

NCOP MEMBERS' TRAINING

**Effective Usage and Interpretation
of Laws and Policies for Effective
and Robust Oversight**

**Presented by:
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OCSLA: WHO WE ARE

OCSLA is constituted as a branch within the Department of Justice and Constitutional Development.

The Office services the whole of the executive branch of Government (all Departments).



FUNCTIONS

- Scrutiny, drafting and certification of legislation;
- Provision of legal opinions;
- Scrutiny and certification of all international agreements, including extradition;
- Scrutiny and vetting of subordinate legislation (regulations);
- Translation of legislation;
- Vetting of municipal by-laws (on request);
- Acting as consultants to organs of state; and
- Perform any other function referred to it by the Executive.



MANDATE

- (a) Office mandate derives from Cabinet resolutions with regard to the scrutiny and providing preliminary opinions on constitutionality and drafting style;
- (b) Years of Government customary usage and practice in relation to:
- provision of legal opinions; and
 - scrutiny and vetting of subordinate legislation;
- (c) Rule 279(2) of Joint Rules of Parliament requires that a Bill introduced by a Cabinet member or deputy minister must be certified by the Chief State Law Adviser or a state law adviser designated by him or her for—
- consistency with Constitution; and
 - being properly drafted in form and style that conforms to legislative practice.

MANDATE...

- (d) Rule 221 of Joint Rules of Parliament requires that official texts of Bills must be accompanied by a translation when sent for the President's assent.
- (e) Section 6(4) of Constitution requires the national government and provincial governments to take legislative and other measures to regulate and monitor their use of official languages. All official languages have to enjoy parity of esteem and be treated equitably.
- (f) Manual on Executive Acts of President requires all international agreements submitted to the President for approval to be vetted by OCSLA for consistence with our Constitution and domestic laws.

SCOPE OF MANDATE

- As will be noted OCSLA is part of the executive arm of the State.
- (Separation of power doctrine)
- Parliament has its own legal services component which only services Parliament as the legislative arm of the State



Introduction

Parliament's website defines the role of Parliament with regard to oversight as follows:

“Oversight is a function granted by the Constitution to Parliament to monitor and oversee government actions.

When exercising oversight, Parliament focuses on the following areas:

- implementation of laws
- application of budgets
- strict observance of laws of Parliament and the Constitution
- effective management of government departments.”

The website states that the specific role of the National Council of Provinces (“NCOP”) is to exercise oversight over national aspects of provincial and local government.

Parliament through 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 developed a document titled “*An Oversight and Accountability Model*”, para 2.1 of which contains 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.”

The oversight model notes that from the above 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.

NCOP together with NA forms part of Parliament, the legislative arm of the State.

NCOP role is not meant to duplicate the oversight functions of NA, but instead serves to complement them.

The focus of 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).

What can NCOP members do if Cabinet member refuses to cooperate, for instance by failure to appear before NCOP committee?

Constitution is clear that the executive is accountable to the NCOP. Section 92(2) expressly provides that members of the Cabinet are responsible (individually and collectively) to *Parliament* as whole, both the NCOP and NA, for exercise of their powers and performance of their functions.

Section 92(3) of Constitution provides that members of Cabinet must provide Parliament with full and regular reports concerning matters under their control.

Section 66(2) empowers NCOP to require a Cabinet member, a Deputy Minister or an official in the national executive or a provincial executive to attend a meeting of NCOP or its committee.

Where a Cabinet member refuses to cooperate, that member may ultimately be summoned to appear before the NCOP.

Section 69 of Constitution empowers NCOP or any of its committees—

- to summon any person to appear before it to give evidence on oath or affirmation or to produce documents;
- to require any institution or person to report to it;
- to compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement issued in terms of section 69(1)(a) or (b).

NCOP Rule 103 deals with the general powers of committees, which include the power—

- to summon any person to appear before it to give evidence and produce documents;
- to receive petitions, representations or submissions from interested persons;
- to conduct public hearings;
- to permit oral evidence, representations and submissions;
- to determine its own procedure; or
- to exercise any other powers assigned to it by the Constitution or, legislation, other provisions of the NCOP Rules or resolutions of the Council.

Can NCOP summon any official of a department or an employee or owner of a private company irrespective of rank, or a members of public to appear before it?

Yes. As noted above section 69 provides that NCOP may summon any person to appear before it to give evidence or to produce documents. It may require any institution or person to report to it.

Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 (Act No. 4 of 2004)

- Deals with how witnesses are compelled to comply with a summons to attend the NCOP.

Do members (collectively & individually) have power to conduct planned or unplanned oversight visits to service points of departments?

Section 70 (1) of the Constitution provides for NCOP—

- to determine and control its internal arrangements, proceedings and procedures; and
- make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

Section 70 (2) of the Constitution states that rules of the NCOP must provide for the establishment, composition, powers, functions, procedures and duration of its committees.

NCOP Rule 151(1) provides that the Rules Committee must establish select committees to deal with legislation, oversight and other matters concerning the affairs of government.

NCOP Rule 151(2) states that any number of divisions of affairs of government may be clustered under any single select committee as the Rules Committee may determine.

Parliament's website notes that the programme of Parliament has two main components - parliamentary sessions (when work is done in plenary groups and committees and constituency periods.

The website, under the heading "Oversight" notes that constituency work affords members of Parliament the greatest opportunity to conduct individual oversight. It states that members have a duty to alert parliament to any issues identified during such oversight interventions.

Parliament's Rules may need to be augmented to clarify the role and processes to be followed by individual members in conducting oversight.

Can NCOP consider and reject section 231(3) international agreement tabled before it by national executive after signature?

Section 231 of Constitution provides that the negotiating and signing of international agreements is the responsibility of the national executive and states as follows:

“International agreements

231 (1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(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.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.”



Role of NCOP with regards to international agreements.

An international agreement binds the Republic only after it has been approved by resolution of both NCOP and NA, unless it is an agreement referred to in s 231(3).

With regards to s 231(3) there is no requirement of approval by the NA or NCOP, but merely that the international agreements must be tabled within a reasonable time. Therefore, NCOP may where it views the time that has elapsed before tabling as having been unduly long, raise the issue of delay with the national executive as part of its oversight function.

Interpretation of statutes

- Important for members of NCOP to have a basic understanding of interpretation of statutes.
- Principle of legality, rationality, reasonableness and *ultra vires*.
- Formulation of empowering provisions (which are discretionary in nature, often use “may”), mandatory provisions (which impose an obligation on usually members of the executive and officials, often use “must”).



Interpretation of statutes...

- Distinction between “in consultation with” and “after consultation with”.
- Awareness of provisions that require the “approval” of the NCOP and those that merely require that matters be tabled for possible consideration or noting.
- Reporting requirements imposed on the executive and officials should be kept in mind.



It is important for NCOP members to be familiar with—

- provisions of legislation that relate to the portfolio that the respective committee oversees;
- duties imposed on executive in the legislation;
- reporting requirements in legislation;
- the content or subject of a matter before NCOP or its committee,
- in order to ask pertinent, pointed questions that demand transparent answers.

This will allow NCOP to follow up in areas where the executive is falling short in for instance the implementation of legislation. It would be difficult to follow up though, where answers are not transparent because the wrong questions were asked.

It would accordingly be effective if draft legislation before NCOP caters for reporting by the executive to Parliament or in certain instances tabling reports on important matters or activities and decisions of the executive and its entities to enable appropriate oversight. Such reports will allow NCOP to become more familiar with the subject-matter of its business which could inform pertinent questions and appropriate oversight at relevant stages of its business.

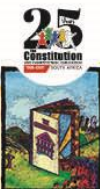
Examples of legislation conferring oversight powers on NCOP

Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000). See sections 47(3) and 106. See also the following remarks of the Court in **City of Cape Town v Premier, Western Cape, and Others** 2008 (6) SA 345 (C) at p 367:

“The obligation imposed on the MEC by s 106(3) to submit a written statement to the National Council of Provinces , motivating his action, is an indication of the serious light in which the legislature viewed such intervention by the MEC and its desire to subject his actions to a measure of hierarchical scrutiny and oversight.”

Executive Members' Ethics Act, 1998 (Act No. 82 of 1998). See section 3(5)(b). See also the following remarks of the Court in **Public Protector and Others v President of the Republic of South Africa and Others** 2021 (6) SA 37 (CC) at p 45:

“However, once a decision on a penalty is taken, the National Assembly or a Provincial Legislature must be informed about the penalty. If the investigation was against a Premier, the Public Protector must submit her report to the President who must forward it with his own comments to the National Council of Provinces (NCOP).”



Interventions in provinces and municipalities

NCOP has an oversight role provided for in section 100(2) and 139(2) of the Constitution in relation to interventions.

- The NCOP must receive a written notice of the intervention within 14 days after the intervention began;
- the intervention must end if the NCOP disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
- the NCOP must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.

NCOP Rule 254 deals with section 100 interventions by national executive in provinces and provides for oversight role of NCOP. See NCOP Rule 254(4).

Interventions in provinces and municipalities

In terms of section 139(1) of the Constitution a provincial executive may intervene if a municipality does not fulfil an executive obligation in terms of the Constitution or legislation.

- The NCOP must receive a written notice of the intervention within 14 days after the intervention began;
- the intervention must end if the NCOP disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
- the NCOP must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.

Interventions in provinces and municipalities

If the provincial executive decides to intervene by dissolving the Municipal Council, the NCOP has the following important oversight functions in terms of section 139(3) of the Constitution:

- The NCOP must immediately receive a written notice of the dissolution;
- the NCOP may set aside the dissolution of the Municipal Council.

NCOP Rule 255 deals with section 139 interventions by a provincial executive in a municipality and provides for the role of NCOP. See NCOP Rule 255(4).

NCOP commissioned Prof Christina Murray and others to compile a report on the oversight role of the NCOP. This report, entitled **Speeding Transformation: NCOP's Role in the Oversight Process** (obtained from the Internet at https://www.ndi.org/sites/default/files/1215_sa_ncoprole22001_5.pdf) discuss the oversight role of the NCOP in great detail. Chapter 3 of this report gives particular attention to the NCOP's oversight role provided for in section 100(2) and 139(2).

Thank you!

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