

# **REPORT ON PARLIAMENTARY OVERSIGHT AND ACCOUNTABILITY**

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## 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, 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.

**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* (3<sup>rd</sup> 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* 8<sup>th</sup> 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 functional 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 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
<b>Budget</b>	20	18	17	5	3	3
<b>Policy</b>	22	19	16	7	5	2
<b>Structural</b>	13	9	5	3	1	1
<b>Current</b>	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

<b>Current Issue Briefings</b>	<b>Current issue briefings, no policy briefings</b>	<b>Policy and current issue briefings</b>
	<b>No policy or current issue briefings</b>	<b>Policy briefings, no current issue briefings</b>
	<b>Policy Briefings</b>	

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

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

Chart 4: Committee Performance in 1998

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

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 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

<b>Statutory Bodies</b>	<b>8</b>	<b>4</b>	<b>3</b>
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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 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 of 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 it 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'. At 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 Office 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 through 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 its 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 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 systemic 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 SCOCl 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.

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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