

CHAPTER 4

THE NCOP: A FORUM FOR LEGISLATIVE INTER- GOVERNMENTAL RELATIONS

The NCOP acts at the national level of government in South Africa. It represents provincial and local government. It functions as a bridge between these three spheres of government. The NCOP is a linking mechanism that acts simultaneously to involve the provinces in national purposes and to ensure the responsiveness of national government to provincial interests. Through the NCOP, national government is sensitised to provincial interests and its processes are enriched accordingly. Equally, by engaging the provinces and provincial legislatures in the formulation of national policy, it avoids their becoming parochial.

- Naledi Pandor, Chairperson of the NCOP¹

The National Council of Provinces is the ‘second chamber’ of South Africa’s national Parliament and a concrete expression of the principles of co-operative government that are central to our Constitution. The role of the NCOP is to represent the provincial perspective within the national Parliament. By giving the nine provinces a collective say in national legislation, it provides the entrée for provinces into national policy-making; it is a bridge between the provincial and national governments. In an important way it also compensates for the limited power provinces have individually.

The NCOP is now in its sixth year. Established shortly after the ‘final’ South African Constitution came into effect on 4 February 1997, it is the youngest of South Africa’s legislatures. A variety of problems have plagued it since its inception. Outside observers tend to ascribe its problems to the complexity of its design. South Africa’s second chamber is modelled on the German Bundesrat with certain adjustments in response to South African concerns. These adjustments, it is often suggested, introduce a level of complexity that is particularly problematic in a country with a weak democratic tradition. In addition, the NCOP suffers from problems of both internal credibility, where South African politicians pay little attention to it, and external legitimacy, where the public does not see it performing a useful role.

These difficulties and misunderstandings are not surprising. The NCOP is new

and its processes are complicated. But, as this chapter shows, the NCOP is nevertheless beginning to demonstrate that it can realise the vision of the constitution-makers and contribute in a meaningful way to the process of deepening representative democracy in South Africa.

As we have already mentioned, the role of the NCOP must be seen in the context of the constitutional commitment to co-operative government. Co-operative government means that national policy must be sensitive to local and provincial needs and concerns and must not ignore or ride roughshod over them. It also means that municipalities and, particularly, provinces should not act alone or in isolation; they must be deeply integrated into the national political process. The NCOP is designed to ensure that this happens.

WHY THE NCOP MATTERS

The Constitution sets out the main function of the NCOP clearly – it is to participate in the national law-making process and provide a national forum for public debate of provincial issues. This gives the NCOP a special representative role in the context of a system of intergovernmental relations. The significance of that role lies in the distribution of responsibilities amongst the three spheres of government that is set out in the Constitution.

The Constitution explains that legislative power is divided amongst the three spheres of government (section 43). The exact powers of each of the spheres – national, provincial and local – are set out in separate constitutional provisions (sections 44, 104 and 156) but there is a great deal of overlap. The national government and provinces share legislative power over a long list of matters. The list includes matters central to the socio-economic development of South Africa such as health, welfare, housing and education. Local government also shares its legislative power because both the national and the provincial governments may ‘oversee’ the way that municipalities exercise their powers (section 155(7)).

Finally, the Constitution anticipates that provinces will usually implement national legislation that deals with matters over which the provinces have concurrent legislative authority (section 125(2)). This means that the Constitution expects provinces to implement national legislation concerning, among other things, agriculture, industrial promotion, nature conservation and tourism, as well as laws that fall into the major transformation portfolios – education, health, housing and welfare. These matters are listed in Schedule 4.

It is section 125(2) that explains most clearly the interest that provinces have in the national legislative process. If they are to implement national legislation it is important that they should have a say in its development and form. Members of provincial governments do participate in the early stages of the process through intergovernmental forums but these do not take place in the public eye. Although the views of provinces may be influential in forums such as MinMECs (meetings of the national Minister and his or her provincial counterparts), decisions taken by MinMECs are not formally binding or democratically legitimate. It is the NCOP that provides the opportunity for a public discussion of national policy with the provincial politicians who will be responsible to provincial electorates for its implementation. Provinces need to use the NCOP to ensure that the legislation they will be expected to implement is realistic and

Constitution section 42(4):

The National Council of Provinces represents provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.

fulfils provincial needs. Conversely, the response to national legislative proposals by provinces in the NCOP allows the national government to ensure that its goals will be achieved and that its policies are practical.

Provinces are not equally interested in all the bills that are passed by the national Parliament. Many concern matters that fall outside the jurisdiction of provinces. These include money bills, some constitutional amendments and those bills that are dubbed 'section 75 bills' because they are passed by the procedure set out in section 75 of the Constitution. The NCOP must consider these bills but, when voting on them, the 10 delegates of each province vote as individual MPs. Appropriately, the NCOP does not have much influence over such bills. Should the NCOP fail to pass one, it can still become law if the National Assembly passes it again. But a number of national bills do concern provinces. They are passed according to section 76 of the Constitution and are referred to as 'section 76 bills'. They require the approval of at least five of the nine provincial delegations to the NCOP to become law.²

The table below indicates the total number of bills that were passed by Parliament in 1999 and 2000 as well as the numbers for different types of bills. In 2001, eleven of the 69 national bills passed were section 76 bills. These figures suggest that the number of national bills that concern provinces is dropping. This was anticipated – the first Parliament had a huge legislative agenda, much of which concerned key areas of socio-economic transformation and thus fell within the concurrent jurisdiction of provincial legislatures. As new policy was established, the legislative load in these areas is lessened. Nevertheless, the obligation to engage with national bills still places a substantial burden on the relatively small NCOP and provincial legislatures.

BILLS PASSED IN 1999 AND 2000

TYPE OF BILL	1999	2000
Section 76(1) (bills affecting the provinces, introduced in the National Assembly)	5	8
Section 76(2) (bills affecting the provinces, introduced in the NCOP)	14	12
Section 77 (money bills)	6	6
Section 75 (bills not affecting provinces)	33	44
Section 74(3) (bills amending the Constitution)	2	
Total	60	70

*Annual Report of Parliament 1999 and Annual Report 2000

In addition to national legislation, the NCOP plays an important role with regard to provincial budgets. As the Constitution gives provinces little power to raise their own revenue, they depend on the national government for their budgets. To protect the financial security of provinces, the Constitution stipulates that each province is entitled to an 'equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it' (section 227(1)(a)). But the Constitution does not set out what the share is or how it is to be calculated. This takes place in the annual Division of Revenue Bill, which divides the national revenue pool amongst the three spheres of government and then divides the provincial share amongst the nine provinces.

The Bill is critically important to provinces. As we have just noted, many provincial obligations are imposed on them by national legislation and it is usually not within the power of provinces to amend (or reduce) them. They need to ensure that the Division of Revenue Bill gives them sufficient resources to fulfil their obligations. Thus, the role of the NCOP in the budget process is central to the effective functioning of provinces. It is for this reason that the Division of Revenue Bill is classified as a section 76 bill and must be approved by at least five of the nine provincial delegations in the NCOP.

Over the past year or two, the NCOP has paid more attention to this responsibility. Now, it is in the NCOP and not the National Assembly that the Division of Revenue Bill is discussed. However, NCOP select committees still spend considerable time on the national Appropriation Bill that allocates the national share of the revenue to different national programmes. Instead they should consider the conditional grants that the Division of Revenue Bill allocates to provinces.

The NCOP does not only provide provinces with an essential forum in which to engage with the national government on matters concerning their provincial responsibilities and budgets. It also provides opportunities for provinces to oversee the activities and programmes of national government relating to provincial and local matters. This oversight role of the NCOP is discussed more fully in chapter 7.

Finally, in providing a forum to debate matters affecting provinces in public, the NCOP can ensure that provincial issues are aired and that provincial concerns are not marginalised or misrepresented in the national debate. It also provides a forum to deal with the difficult question of identifying who is responsible for the failures (and successes) of government. This problem, which undermines representative government, is particularly acute in a system such as ours in which the responsibilities of national, provincial and local governments are shared and not clearly demarcated. Discussion in the NCOP could help to reduce the political buck-passing that occurs, for instance, when provinces blame the national government for inadequate funding and the national government retaliates with accusations of poor management and over-staffing. This would enhance co-operative government by providing an opportunity for provinces and national government to deal with disputes through deliberation rather than in adversarial court proceedings or in the press. Similarly, ongoing problems with the implementation of policy in key areas of transformation which are the responsibility of both provinces and the national government, such as housing, health and welfare, should be discussed in the NCOP. In this way national and provincial politicians could take joint responsibility for devising solutions to problems, such as the failure to pay pensions or inadequate hospital supplies, before parties seek recourse through the courts.

DO WE REALLY NEED THE NCOP IN ADDITION TO EXECUTIVE INTERGOVERNMENTAL RELATIONS?

Many members of the national and provincial executives think that the NCOP is redundant. Some provincial MPLs and national MPs share this view. It is based on the premise that co-operation between provinces and the national government can take place through intergovernmental forums established by the executive.

At the moment it is in MinMECs that the most productive discussion of new legislation and policy affecting the provinces takes place. Here, and in forums in which departmental officials discuss more technical matters, the details of new policies are tabled and provincial executives are given a chance to respond. The effectiveness of MinMECs varies and much depends on the relationship between the national Minister and the MECs. What is clear, however, is that in all but rare cases, it is in MinMECs (and in party caucuses) and not the NCOP that most disagreements are resolved.

But, this does not mean that the NCOP is redundant. First, this view seems to misunderstand the respective roles of intergovernmental forums like MinMECs and the NCOP. Secondly, it assumes an unnecessarily narrow role for the NCOP. The proper role of the NCOP, as a forum for legislative intergovernmental relations, is to oversee the relationships amongst the spheres of government in a public forum.

Certainly, the NCOP is underused at the moment. But, even if it were fully understood and fully used, most discussion and negotiation on policy and legislation would probably still take place in MinMECs. The critical point is that agreements reached in MinMECs are subject to scrutiny in the NCOP. This means that members of the executive engaged in intergovernmental negotiations need to be constantly aware of the needs of their constituents.

The view that public scrutiny of intergovernmental relations is important was highly influential in the design of the NCOP. South Africans departed from the German model of the Bundesrat to the 'more complicated' model of the NCOP to avoid the bureaucratisation of executive-driven intergovernmental decision-making and to enhance transparency and openness. By involving provincial legislatures in NCOP decision-making through the mandating process, which we discuss below, and by designing delegations that combine members of the executive and the legislature, the Constitution seeks to deepen democracy and enhance representative government.

The role of the NCOP as an intergovernmental forum is also not restricted to discussion of particular policies and legislation. It has a broader role in overseeing the relationships between the three spheres of government. And, in fulfilling this role, unlike the executive intergovernmental forums, the NCOP can engage all role-players – ten legislatures, ten executives and the public. At the moment, the greatest challenge to the NCOP is to clarify the relationship between local government, on the one hand, and the provincial and national spheres on the other. In particular, provincial legislatures have very little clarity about the responsibility that provinces have in relation to local government and how they should ensure that their executives fulfil this responsibility. What is needed is a common understanding of the relationships and a framework in which they can operate. The NCOP is the appropriate forum for this.

WHAT HAPPENS WHEN THE NCOP AND NATIONAL ASSEMBLY DISAGREE?

When the NCOP and National Assembly disagree on a section 76 bill, the bill is sent to the Mediation Committee set up under section 78 of the Constitution. Nine members of each House come together to discuss ways of resolving the issue and may agree on either the National Assembly's version of the bill or that

of the NCOP or propose a different version altogether. By the end of 2001, the Mediation Committee had been struck three times – and each time its deliberations had been successful. Politicians on both sides felt that reasonable positions had been reached and misunderstandings cleared up.

REPRESENTING PROVINCES: DELEGATIONS AND MANDATES

(A) DELEGATIONS IN THE NCOP: ROLES AND RESPONSIBILITIES

The NCOP is made up of nine ten-member provincial delegations. A further ten-member delegation representing local government does not have voting rights but may address the NCOP and its committees on matters of importance to local government.

Each provincial delegation is headed by the Premier of the province and comprises six ‘permanent’ delegates and four ‘special’ delegates (one of whom is the premier or his or her nominee). The permanent delegates in a provincial delegation must be appointed by the provincial legislature within 30 days of the announcement of the result of a provincial election. They serve until the next provincial election and are based in Cape Town. The four special delegates are appointed from time to time to represent the province on specific matters. They consist of the Premier or her or his nominee (thus, at least in principle, formally involving the provincial executive in the national legislative process) and three other members of the provincial legislature. Thus, when legislation relating to housing is considered in the NCOP, provinces may choose to send the chairperson of their committee on housing and the MEC for housing as special delegates. The special delegates ensure that provincial delegations include the expertise necessary to decide specific matters.

The process of determining party representation in each provincial delegation is complex. Section 61 of the Constitution provides that parties represented in a provincial legislature are entitled to delegates in the province’s delegation to the NCOP in accordance with a formula set out in Schedule 3 of the Constitution. The next step involves the calculation of the number of permanent delegates to which each party is entitled in each provincial delegation. The Determination of Delegates (NCOP) Act 69 of 1998 guides this process. Each party entitled to delegates in the provincial delegation must have at least one permanent delegate.³

Each provincial delegation thus combines politicians from the governing party in the province and from the provincial opposition as well as members of the provincial executive and the provincial legislature. The latter combination is particularly important. When representing the province in the NCOP, the members of the executive and legislature on the delegation should not be seen as coming from separate branches of government but as partners mandated to ensure that the province’s interests are properly understood in the national sphere.

While the election in 1999 brought some changes to the NCOP, these were not as dramatic as those in the National Assembly. In contrast to the National Assembly, where 13 parties are represented, seven parties are represented in the NCOP.

PROVINCIAL DELEGATIONS IN THE NCOP*

	PARTIES	PERMANENT DELEGATES	SPECIAL DELEGATES
EASTERN CAPE	ANC	4	3
	UDM	1	1
	DP	1	
FREE STATE	ANC	4	4
	UDM	1	
	DP	1	
GAUTENG	ANC	4	3
	UDM	1	1
	DP	1	
KWAZULU-NATAL	IFP	2	2
	ANC	2	2
	DP	1	
	NNP	1	
LIMPOPO	ANC	5	4
	UDM	1	
MPUMALANGA	ANC	5	4
	DP	1	
NORTHERN CAPE	ANC	4	3
	NNP	2	1
NORTH WEST	ANC	4	4
	DP	1	
	UCDP	1	
WESTERN CAPE	NNP	2	2
	ANC	2	2
	DP	1	
	ACDP	1	

*Taken from Annual Report of Parliament 1999

The NCOP requires politicians to function in a manner that is, in many ways, very different from the traditional model. If they fail to adapt and develop the new roles required of them, the NCOP will fail. The following sections deal with all the politicians directly involved in the NCOP – MPLs, MECs and permanent and special members of delegations to the NCOP.⁴

Members of provincial legislatures and executives

The decisions taken by delegations to the NCOP are determined by their provincial legislatures. This means that it is the provincial politicians who determine the way in which votes will be cast in the NCOP and that the key decision-makers are the provincial legislatures and their MPLs.

But a number of difficulties stand in the way of MPLs fulfilling this role. As already mentioned, many do not understand the NCOP, the benefits it may hold for provinces and the development of national policy, or its role in co-operative (as opposed to competitive and divisive) government. Most MPLs see themselves as provincial politicians, focused on provincial legislation and oversight of the provincial executive. In interviews with provincial politicians few raised issues relating to the NCOP despite the fact that NCOP work often dominates provincial programmes.

To make decisions on national legislation, MPLs need to follow national political debates, understand the legislative proposals introduced in Parliament, and assess the implications that they have for the province. The 1996 Provincial Legislatures Needs Assessment Report indicated that many MPLs lack the skills, knowledge and support necessary to deal with provincial legislative matters, let alone national ones. They rely on information from summaries of bills, sketchy briefings in their committees and, to a very limited extent, research support. The research conducted for the Legislative Landscape Study suggests that although procedures in provincial legislatures are improving, the problems identified in 1996 remain.

The attitude to the NCOP of many MECs compounds the problem. Assuming that their work is done when they have participated in MinMECs, they pay little attention to the passage of national legislation through the NCOP and seldom attempt to discuss the appropriate mandate with their colleagues in the provincial legislature. This is shortsighted. As it is the provincial executive that will bear responsibility for the implementation of much section 76 legislation, it is critical that the views of the MECs are considered by the provincial legislature when it confers mandates. Often, political study groups and caucuses play the same role but, when discussion is limited to these forums, democratic processes are weakened – decisions must also be discussed in public if legislatures are to fulfil their role as representative institutions.

Another misunderstanding about the role of the provincial delegation to the NCOP sometimes increases the reluctance of MECs to participate fully in NCOP decision-making. MECs and MPLs may be concerned that their partnership in the delegation undermines the separation of powers that should exist between the executive and the legislature. But, as we have already noted, in the delegations, the provincial executive and legislature must act as a team, jointly representing provincial interests. In this context, separation of powers is not relevant.

Permanent and special delegates

The division of delegations into permanent and special components ensures that provincial politicians are involved in the national legislative process and do not become parochial. The permanent delegates not only represent the province

on an ongoing basis in the national Parliament but also bring the broader national perspective to provinces. Similarly, the opportunity for MPLs to attend the NCOP as delegates immerses them in national politics.

In the 1998 NCOP Needs Assessment the role of permanent delegates was described as follows:

'The role of permanent delegates is a complex one and not easy to fulfil. On the one hand, a permanent delegate is the appointee of the provincial legislature and responsible to it. On the other, she or he is a member of the national Parliament, resident in Cape Town and involved on a daily basis in the processes of the national legislature. There is a danger that permanent delegates enter a political limbo – too remote from their provinces to have effective contact with them, too tied to the provincial legislature to act effectively and autonomously in the national Parliament. Links between provincial legislature and permanent delegate and between permanent delegate and the NCOP must be strong. Indeed, our analysis suggests that effective permanent delegates are the key to effective functioning of the NCOP. They are the critical link between the provincial and national arenas...

In practice the role of permanent delegates is not always clear or well understood. Provincial portfolio committees complain that permanent delegates seldom come and brief them. Many MPLs are not clear what the role of the permanent delegates is and do not know what needs to be done to hold them accountable. On the other hand, some permanent delegates, particularly those from minority parties, feel isolated and say that provincial committees make no attempt to use them. In addition, permanent delegates lack a political base in the province that they represent and lack status in Parliament.'

These problems remain. But, permanent delegates have provided leadership through the development of initiatives involving provinces in the NCOP and through the way in which they manage the committee work of the NCOP. Perhaps the most exciting initiative – and one that has been welcomed by MPLs – is the system of 'provincial weeks' which was introduced in 2001. The provincial week is a week during which permanent delegates and MPLs engage in a programme of joint activities in the province. It is intended to provide a time during which both the provincial legislatures and their permanent delegates focus on issues of common concern to the NCOP and the province. The NCOP takes the initiative, sends suggestions for activities to the provincial legislatures and actively encourages additional ideas from the provinces. Issues proposed in early 2002 ranged from matters of general national interest (hearings on gender equality to mark international women's day), through bills on the NCOP's legislative agenda for which provincial hearings were being encouraged, to more procedural issues (such as proposed changes to NCOP rules).

However, in many cases links with the provinces remain weak. At an administrative level, their ties to the national Parliament are closer than their ties to the provinces as it is the NCOP and not the provincial legislature that determines when they should visit provinces and their timetable of committee work. Thus,

it is not the provincial legislature that manages the role of permanent delegates but the NCOP. Provincial politicians complain that there are inadequate links between permanent delegates and the provincial legislature. On the other hand, permanent delegates speak of the frustrations of trying to fit in with provincial programmes. Many of these problems are linked to the programming problems described below.

The role of special delegates is as difficult as that of permanent delegates. Special delegates provide direct input to the NCOP from the provincial legislature and are thus important contributors to its deliberations. However, as occasional visitors to Parliament, they are not integrated into Parliament or necessarily familiar with its dynamics. On the other hand, participation as a special delegate in the NCOP gives provincial politicians valuable experience and exposure in national politics. In particular, it gives them a potentially valuable opportunity to raise issues with national politicians.

Provinces do not seem to have difficulty in identifying special delegates.⁵ In addition, a more strategic attitude to the use of special delegates is developing. For instance, in some provinces special delegates are sent to Cape Town only when the province has a specific view on a subject that it wishes to discuss. Also, some provinces choose to send special delegates to the stage at which the final mandate is negotiated but not to the plenary session in which voting occurs. A permanent delegate votes for the province. In this way, the province ensures that it has special delegates in the NCOP at the times at which most influence can be exercised.

(B) MANDATING DELEGATIONS

Provincial delegations must cast their votes in the NCOP in accordance with the wishes of their provincial legislatures. This requirement ensures that provinces engage with NCOP matters thus strengthening the democratic process. Section 65(2) of the Constitution seeks to secure this process by requiring it to be regulated by an Act of the national Parliament. However, the Act anticipated in section 65 has not been adopted and different provinces follow different procedures when they mandate their delegations to vote in the NCOP.

It has clearly been wise to allow provinces to develop their own procedures as their experience will ensure that the Act is attuned to the practicalities of the mandating process. But the Act must also take into account the fact that in some cases different procedures have been driven by the particular political circumstances in a province. Thus KwaZulu-Natal has established a process under which a committee can confer a mandate provided that 75 per cent of the members agree. This encourages decisions that are based on provincial and not party interests and reflects sensitivity to the political needs of a province in which the party balance is very close.

The most important matter for the section 65 legislation to resolve is how to ensure that mandates can be secured promptly. The Constitution requires the mandate to be conferred by the 'legislature' and this is generally understood to mean that a committee may not do it – despite the KwaZulu-Natal system. This view is based on the wording of section 65 (which does not refer to committees) and on the policy behind section 65 (that the provincial legislature should

Constitution section 65(2): An Act of Parliament, enacted in accordance with the procedure established by either subsection (1) or subsection (2) of section 76, must provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf.

participate fully in the adoption of national legislation through the NCOP). Those that argue that a provincial legislature could authorise a committee to determine the mandate point to section 116 of the Constitution, which permits legislatures to establish their own internal proceedings. This is not an abstract constitutional debate. The practical concern that underlies it is very real: provincial legislatures do not meet frequently but mandates may be needed at short notice – or at a time when the provincial legislature is not sitting.

Gauteng resolves this problem by tabling proposed mandates in the ATC (Announcements, Tablings and Committee Reports) when the house is not sitting. Members are given a period in which to object to the proposed mandate. If no objections are received, the recommendation becomes a decision of the house.

There are still occasions on which provincial mandates are not provided and delegations may not vote. However, this now happens very rarely. So-called negotiating mandates (ie the mandate that guides the delegation in the early stages of the discussions on a bill) may sometimes be missed. But, as there is no constitutional requirement of a negotiating mandate, provinces may establish their own procedures for deciding when they are necessary and when they can be dispensed with.

LOCAL GOVERNMENT IN THE NCOP

The Organised Local Government Act 52 of 1997 was passed in 1997. It provides for the recognition of ‘organised local government’ nationally and provincially and includes a provision regulating the nomination of representatives to the NCOP. Nevertheless, local government participation in the NCOP has been patchy. There are a number of reasons for this, most of which are linked to the fact that local government is new and the challenges that it faces are enormous. SALGA (the national organisation representing local government) does not yet run smoothly and its strategies for involvement in provincial and national issues are still being developed.

There is some disagreement about whether local government should focus on engagement at provincial or national level. One concern about SALGA’s involvement in the NCOP is that it may be too late. Some people think that participation in provincial procedures would be more useful than participation at the national level, as mandates are determined by provinces and not in the national sphere. Some provincial legislatures are responding to this by considering ways in which their relationship with provincial local government could be formalised. Here, various options have been mooted. Provincial legislatures might use organised local government in the province as their contact point. They might also set up forums in which district councils and metros are represented. In a province such as KwaZulu-Natal where the challenges different municipalities face are very diverse, the latter approach may offer a particularly effective way of engaging with local government.

However, engagement at the provincial level should not be seen as a substitute for engagement in the national sphere. From a practical point of view, while SALGA still has limited capacity, the NCOP offers SALGA a single opportunity to intervene and to present views that reflect those of local government across the country. But, over the longer term as SALGA strengthens, engagement through

Constitution section 67: Not more than ten part-time representatives designated by organised local government in terms of section 163, to represent the different categories of municipalities, may participate when necessary in the proceedings of the National Council of Provinces, but may not vote.

the NCOP will remain valuable. It should give SALGA an opportunity to engage in national debates, at some distance from the parochialism that will inevitably inform provincial discussions, and it will ensure that local government's needs are not conflated with those of provinces.

PROGRAMMING: CYCLES AND CO-ORDINATION

The NCOP gives rise to especially complicated programming issues. In an 'ordinary' legislature, in which all members can be expected to be available for meetings if they are given reasonable warning, programming (including the timetabling of committee meetings) is relatively uncomplicated – although even under such circumstances it can be controversial. The NCOP is totally different. Delegates to the NCOP belong to nine other legislatures, each of which must establish its own programme – in co-ordination with the NCOP.

The core of the problem relating to programming (or timetabling of meetings) is the need to co-ordinate NCOP and provincial programmes. This is perhaps the most persistent concern of provincial politicians – especially politicians from those provincial legislatures which have made progress in establishing annual programmes and which try to factor in time for oversight meetings as well as discussion of legislation. In the words of one provincial politician, 'the province may be caught up in a budget process on the only day that the permanent delegate can brief the committee'. At least one province simply prioritises its own sittings over NCOP matters.

NCOP CYCLE

WEEK 1: BILL TABLED IN NCOP

NCOP Select Committee briefed on bill by the minister or representatives of the national department that initiated the bill. Special delegates are sometimes present at these briefings. In future they may occur with video conferencing facilities so that provinces participate. A trial run was done with the Municipal Structures Bill. Provinces can immediately e-mail or fax questions to the meeting. In the absence of video conferencing facilities, committee clerks take extensive minutes and these minutes should be sent to the provinces the following day.

WEEK 2: THE BILL IS CONSIDERED IN THE PROVINCES

Originally this week was set aside for permanent delegates to return to their province, brief the relevant committee and assist in the preparation of the negotiating mandate. In practice this rarely happened. It was also intended to provide an opportunity for the province to hold public hearings on the bill. Now, permanent delegates remain in Cape Town until Thursday or Friday, fully engaged in NCOP committee work (for instance on section 75 bills) for which it is assumed special delegates or direct provincial input are not necessary.

The NCOP then assumes that provincial policy committees will meet with the permanent delegates on Thursday or Friday to discuss bills that are in the cycle. In practice, this does not work, as Thursday is traditionally caucus day and Friday constituency day. Early in this week provinces prepare negotiating mandates. They may hold public hearings.

WEEK 3: BACK TO NCOP

NCOP Select Committees meet; provinces negotiate in accordance with their mandates. On Thursday or Friday the delegates go back to the provinces if need be. If this is not necessary, final mandates are mailed or faxed.

WEEK 4: BILL VOTED ON IN NCOP PLENARY⁶

As we have seen, the Constitution requires virtually all decision-making in the NCOP to be directed by the provincial legislatures. This means that provincial legislatures must have the opportunity to deliberate on the national bills that their delegation will be asked to approve in the NCOP. In the first year of the NCOP, a decision was taken to deal with legislation in cycles so that NCOP timetables are predictable and to ensure that provincial involvement can be co-ordinated. However, the cycles seem to be applied to section 76 legislation only. Oversight programmes and section 75 legislation are dealt with 'off cycle'. As we describe below, this inhibits the participation of provinces. In short, programming in the NCOP remains controversial.

The NCOP legislative cycle is four weeks, with time allocated for deliberations in provincial legislatures and time allocated to discussion and negotiation in the NCOP in Cape Town.

The idea that NCOP business should follow cycles has strong support. But there are a number of widely shared concerns about the way in which the system is implemented. The main concerns are that –

- > Cycles are too short for most pieces of legislation
- > Cycles are often changed or abandoned
- > The abolition of a clear 'provincial week' in the cycle limits the ability of permanent delegates to liaise properly with their provincial legislatures
- > Cycles are not properly co-ordinated with provincial programmes

Concern about the length of the cycle persists although many permanent delegates are under the impression that the problems are more imagined than real. Permanent delegates also point to inefficiencies in provincial timetabling and suggest that problems with the length of the cycle are often the result of bad provincial planning rather than the four-week cycle itself. Nevertheless, the fact that two of the provinces with the most well-established timetabling and the best record of engagement with the NCOP put the four-week cycle high on their list of concerns suggests that the problem is more serious than these national politicians admit. The problem has been slightly alleviated over the past couple of years. But this may be because the pace of legislation in Parliament has slowed down and provincial legislatures are managing to consider new legislation before it is introduced in the NCOP. Also, much section 76 legislation is now introduced in the NCOP rather than the National Assembly. This means that the NCOP can consider it at its leisure and on a number of occasions the consideration of a bill has extended over two cycles.

Although four-week cycles are indicated on the programme, in practice the four-week cycles have been altered and even disposed of in some cases. If provinces require more time, a bill may roll over two cycles. The chair of the NCOP Select Committee decides this on the basis of the response of the provinces and normally if a bill is to be allocated a longer time, this is known by the second week. In a better-run system, these decisions would be made before the bill reaches the NCOP. Then, provided that deliberations on the bill in the NCOP are scheduled for times at which special delegates are expected to be in Cape Town, this should cause no problems.

Introducing bills mid-cycle is a much more serious problem. Although

committee chairs in the NCOP often successfully resist the considerable pressure that Ministers may put on them to introduce bills mid-cycle, it does still occur. As a result, sometimes briefings take place in the second week. Here the liaison officers are expected to alert provinces so that they can schedule a meeting. However, if the provincial legislature is operating efficiently, such programme changes will be very difficult.

In addition, there is a view that cycles are necessary only for section 76 bills because it is these bills for which a provincial mandate is necessary. This means not only that section 75 legislation is dealt with 'off cycle' but also that oversight programmes in the NCOP, for instance, do not follow cycles. Section 76 bills that are first introduced in the NCOP rather than the National Assembly are also not necessarily tied to the four-week cycle. As a result, NCOP meetings which special delegates might wish to attend may be scheduled for weeks that have not been planned as 'Cape Town' weeks. For the cycle system to work in a way that draws provinces into the NCOP, the system of cycles needs to be adhered to strictly. While the NCOP can (and should) treat section 75 legislation differently from section 76 legislation, moving off-cycle should be very rare. This does not mean that the NCOP should always be limited to dealing with legislation within a four-week framework. Instead it means that, if a longer time is needed, work on the

NCOP AND NATIONAL ASSEMBLY: WHERE ARE BILLS INTRODUCED?

The number of section 76 bills introduced in the NCOP has increased since 1999 though it remains significantly lower than the number of section 76 bills that are introduced in the National Assembly.

Several factors determine whether a section 76 bill will be introduced in the NCOP. First, there are a few section 76 bills that cannot be introduced in the NCOP e.g. the annual Division of Revenue Bill. Secondly, the political preference may be to have the bill discussed in the National Assembly first. Thirdly, practical considerations play a role. One of these is the fact that should a bill that is introduced in the NCOP go to mediation and the mediation fails, the bill will lapse. However, if the bill was introduced first in the National Assembly, it could become law if passed again by the National Assembly with a two-thirds majority.

The NCOP is encouraging the introduction of section 76 bills in the NCOP rather than the National Assembly. This procedure gives it more time and thus assists provinces to engage properly with bills. When the NCOP learns that a bill has been 'tagged' as a section 76 bill, it asks the relevant Minister to introduce it in the NCOP. Sometimes, Ministers are keen to introduce bills in the NCOP if the NCOP assures them that the bill will move more quickly if introduced earlier than it would if it were first introduced in the National Assembly and arrives in the NCOP mid-cycle. Departments may also introduce a bill in the NCOP if hearings are planned in the provinces in order to give the NCOP more time.

bill should be timetabled over two full cycles.

The problem of having bills that are dealt with 'off-cycle' is compounded by the fact that changes are inevitably made to the programme. The NCOP tries not to alter the scheduling of a bill once it has been introduced. However, rescheduling does occur and this results in problems for provinces.

Over the past couple of years, the form of the four-week cycle has also changed. Instead of the entire second week being devoted to the province, the delegates return to the province only on Thursday morning. The same happens in week three. It is difficult to imagine how permanent delegates manage to make any contact with their provincial legislatures in provinces such as the Eastern Cape,

which follows the common pattern of committee sittings during the first part of the week, caucus meetings on Thursdays and constituency work on Fridays. This widens the gap between the NCOP and the provinces.

In the past, 'fast-tracking' was often a problem. Ministers would ask Parliament to depart from its ordinary legislative schedule and process a bill quickly. This cut the amount of time given to committees to deliberate or elicit public opinions on the bill. Now, and contrary to assertions in many provincial legislatures, section 76 bills are not often fast-tracked. It is an objective of the NCOP to avoid this wherever possible. In June 2000, the Joint Programming Committee adopted guidelines for deciding whether a bill should be fast-tracked.

The interests of provinces must be properly considered in the planning of programmes. But provinces must also become more pro-active in this regard. The Joint Programming Committee comprises members from both Houses and two delegates from each province. It sits in terms of the joint rules and sets time-frames for a parliamentary term i.e. leave periods, constituency periods etc. Cycles are entered into this framework with roughly two cycles in a term. The framework is presented on the NCOP website.⁷ Provinces are expected to work out their timetables according to the national framework.

However, several provinces did not send delegates to the Joint Planning Committee in October last year. This is bound to lead to problems. NCOP Whips/Programme Committee meetings are held in the NCOP on Tuesdays when more detailed planning takes place. The provincial whips and provincial liaison officers are always present. The whips should communicate with the provinces

PROVINCES AND PLANNING: THE NCOP WEBSITE

NCOP Online! is an internet-based data management and communication system that is designed to assist the NCOP in carrying out its constitutional mandate. One of the website's primary functions is to provide information about parliamentary programmes so that the NCOP and provinces can co-ordinate their activities.

The website is well presented and the programme section is updated at least three times a week (including after the NCOP Programming Committee meeting on Tuesdays and the National Assembly Programming Committee meeting on Thursdays).

PROGRAMMING PROCESSES

The website is updated with information from the NCOP and National Assembly programmes of meetings. Notes are made to remind the provinces to set up meetings for a briefing on a particular bill on a particular day. In addition, a status monitor follows the progress of a bill through the two Houses. When a bill is introduced in the NCOP, it is immediately published on the website. This information is also put into an EPAC (electronic mail packages which work through e-mail). These are sent to the provincial liaison officers, and the Secretaries and the Speakers in each province. The website provides NCOP committee meeting times and agendas and also the details of debates in plenary which the provinces attend.

ACCESS

Poorer provinces do not have access to the internet. A liaison officer from a small province reported that she never looks at the website since her computer is too old. She also cannot open EPACs that are sent to her. She manages to do her job by using order papers and performing tasks manually but she says that access to electronic data would be preferable.

It is clear that the provinces do not use the website fully. The website has a page for provincial programmes; however, when checked on 28 February 2001, this page had last been updated on 8 November 1999. Liaison officers are supposed to submit these programmes but a lack of resources may be the reason for this omission. This page could pave the way for a more mutual communication between the NCOP and the provinces.

regarding committee meetings etc. Again, often communication is weak.

There are also ways for a pro-active province to mitigate, to some extent, the effect of changes to schedule. A report from the Office of Government Business containing a list of bills that are likely to come up in the term is presented at the Joint Programming Committee meeting. Minutes of the meeting are sent to the provinces with information indicating the committee which will be dealing with each bill, and provinces are able, at this stage, to begin informal discussion on the bill. This will not alleviate the inconvenience of being unable to plan timetables properly but does allow provinces to prepare themselves better.

HANDS-ON INTERGOVERNMENTAL RELATIONS

The NCOP is through and through a forum for intergovernmental relations. Every decision on section 76 legislation involves a consideration of intergovernmental matters and every committee meeting and assembly of the plenary brings together representatives of all provinces and often local and national politicians as well. But the Constitution also allocates a number of intergovernmental 'watch dog' tasks to the NCOP. In essence these are oversight responsibilities and they are considered in chapter 7.

It is important to draw attention to them here too, because it is in these areas that the NCOP has made some of its most successful contributions to co-operative government – and been guilty of a number of omissions.

Section 100 of the Constitution permits the national government to intervene in provincial affairs if a province is not managing to fulfil its obligations. Similarly, under section 139, a province may intervene in a municipality that is not performing as it should. These are substantial powers to grant to the national and provincial executives and the Constitution builds in a check. When intervention amounts to a 'take-over', in other words when the national or provincial government actually assumes responsibility for a function, the NCOP must review the intervention. If the NCOP is not satisfied that it is warranted under the Constitution, the intervention must end.

The NCOP has reviewed a number of interventions under these provisions and, in doing so, showed its real potential as a body capable of bringing together representatives from different spheres and facilitating productive settlement of disputes. Interventions should become rare as governments put in place proper 'early warning' mechanisms but, when they do occur, the procedures developed by the NCOP to oversee them will be valuable.

If the intervention processes in the NCOP show it off at its best, its consideration of international agreements is perhaps its weakest spot. This is, of course, a hugely technical area of political responsibility for provinces because the most important international agreements, from a provincial point of view, are likely to relate to trade, agriculture and the environment. Under section 231 some of these agreements must be agreed to by the NCOP. Others must merely be tabled in it. Section 65 stipulates that when NCOP approval is required, provincial delegations must vote according to the mandate conferred by their provincial legislatures. At present, however, decision-making appears to be by individual delegates without provincial mandates.

This may seem to be a small omission but it could have serious repercussions

for provinces. International agreements often introduce restrictions and standards that will have a direct impact on commercial operations in provinces or on environmental standards. Provinces need to ensure that the agreements serve their interests in the best possible way.

CONCLUSION

The NCOP has made enormous progress in the six years since it was established. Most importantly, most delegates show a clear grasp of the NCOP's role and goals and are aware of its procedures and the reasons for provincial involvement in the national sphere of government. The NCOP website, which is described below, and better allocation of tasks in the NCOP in Cape Town, have improved communication between the provinces and the NCOP. National Ministers are showing a greater understanding of the role of the NCOP and more legislation that affects provinces is introduced in the NCOP and thus considered outside the pressured 'cycles' which constrained decision-making in the NCOP in the past.

Nevertheless, as must be anticipated in a young institution without precedent, the NCOP still faces many challenges in fulfilling its constitutional mandate and providing the forum of intergovernmental relations and the development of a co-operative system of government that it was intended to be. In some ways the NCOP may be its own worst enemy since it often seems to lack confidence in the value of its own role. The information page on the NCOP website presents a good example when it says:

'As you can see, except in the case of some Bills that amend the Constitution, the NCOP does not have as much power to pass Bills as the National Assembly. There is a good reason for this. The National Assembly consists of direct representatives of the political party you have supported in the election. Delegates on the NCOP represent the legislature in each province and were elected to the province and not to the NCOP. This means they represent their provinces and do not represent the individual voters directly.'⁸

There is indeed good reason for the limited and focused powers of the NCOP. It has a very specific role, which is to represent provinces and to ensure that the system of co-operative government works. Its powers are not limited because representation in the NCOP is somehow inferior to that in the National Assembly, as this information page suggests. Its powers are tailored to match its role.

The NCOP could allow provinces to enrich the national legislative process and prevent provinces from becoming excessively parochial as its chairperson, Ms Naledi Pandor, is quoted as saying at the beginning of this chapter. And it could sustain provincial governments as they carry out the major national responsibility of transformation in key areas. Moreover, the participation of a (non-voting) delegation representing local government is a tentative first move to bind local government into national politics in a similar way. But, the implementation of a system of co-operative government with three spheres of government requires a fundamental shift away from thinking in terms of a unitary form of government. This change is taking place very slowly. Although some provincial politicians are increasingly aware of their role in the new integrated system, many remain

focused on provincial issues only.

Some national politicians also fail to understand the implications of the system for provinces. They express irritation at what they perceive as time-wasting processes in the NCOP and at difficulties provinces have in implementing national policies. The NCOP itself seems to vacillate between seeing itself as a national and a provincial institution and struggles to balance and integrate what are in fact two inter-related roles.

For the NCOP to succeed in its constitutional role, all participants in our political system need to be committed to the constitutional system of which it is a part – and the NCOP needs to lead the way.

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FOOTNOTES

- ¹ Extract from a presentation at the Meeting of the World's Senates 14 March 2000 Paris.
- ² As we note in chapter 1, strictly speaking the bill may become law without the approval of the NCOP if it is passed by a two-thirds majority in the National Assembly. However, rejection by the NCOP would mean that fewer than five provinces supported the bill. Under these circumstances it is very unlikely that the National Assembly would support it.
- ³ Vacancies amongst permanent delegates are filled in accordance with the National Council of Provinces (Permanent Delegates Vacancies) Act 17 of 1997.
- ⁴ These sections draw on the European Union Programme for Development and Construction in South Africa Parliamentary Support Programme *NCOP Study Draft Report* (1998) as well as recent information from interviews in the NCOP and provincial legislatures.
- ⁵ Provision is usually made in the legislature's rules for the appointment of special delegates by the House or, if it is not sitting, by the Speaker (see e.g. Free State Rules: NCOP 3 and KwaZulu-Natal Rules Annexe A 3).
- ⁶ Note that recently a concern has been raised by provincial speakers about special delegates going to the NCOP without informing them. Invitations will now be directed to the Speakers rather than to individual committee chairs.
- ⁷ This did not happen in 1999 and 2000 because of national and local elections.
- ⁸ See <http://www.parliament.gov.za/ncop/general/about.asp> (accessed 23 February 2002).