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MEMORANDUM

TO: Chairperson Subcommittee on the Review of the Rules
[Mr M R Mdakane, MP]

COPY: Secretary to Parliament
[Mr G Mgidlana]

FROM: Constitutional and Legal Services Office
[Adv F S Jenkins – Senior Parliamentary Legal Adviser]

DATE: 27 May 2015

REFERENCE: 47/15

SUBJECT: Proposal for review of NA Rules applicable to Committee on Public Accounts

MESSAGE: Please find attached a legal opinion for your attention.



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Introduction

1. At the meeting of the Subcommittee on the Review of Rules (the Committee) on 15 May 2015, Mr T Godi, Chairperson of the Committee on Public Accounts (SCOPA), made a submission on the functioning of SCOPA. His submission included a number of new proposals. The Committee subsequently requested a legal opinion on the proposal to amend rule 206(1)(vi).
2. This brief requires legal comment on areas of particular importance to members; namely,
 - (i) the effect such a proposal would have on the separation of powers; and
 - (ii) the principle of co-operative government.



3. There was also a suggestion that, to ensure clarity and legal precision, the rules should exclude reference to the Division of Revenue Act and simply refer to transfer payments.

Proposed amendment

4. The proposed amendment to rule 206(1) is to insert a new provision as subrule (vi) as follows:

(1) The Standing Committee on Public Accounts —

(a) must — ...

(vi) hold accountable organs of state and constitutional institutions or other public bodies that receive transfer payments from national departments through the Division of Revenue Act (DORA) for the expenditure of those transfers.

5. The meaning of the proposal must be established by reading "the words used in the context of the document as a whole and in the light of all relevant circumstances" (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 (15 March 2012)). For this purpose the submission by Mr Godi is attached.
6. Subrule (a)(vi) should be read in light of subrules (a)(i) – (v). The latter rules deal with the functions of considering financial statements, audit reports and expenditure reports. Subrule (a)(vi) deals with accountability. The bodies to be held accountable are "organs of state and constitutional institutions or other public bodies", the same phrase used in subrules (a)(i) and (iv). These bodies are qualified by the last phrase: "that receive transfer payments from national departments through the Division of Revenue Act (DORA) for the expenditure of those transfers." Each of these three parts of the proposal should be considered in light of the applicable law.

Regulatory framework

7. Section 55(2) of the Constitution of the RSA, 1996 (the Constitution) 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.*

8. The provision requires that executive organs of state in the national sphere of government are accountable to the Assembly through various mechanisms. Oversight must also be exercised through a mechanism. The Oversight and Accountability Model (the Model) refers to committees as the mechanism for oversight (see Oversight and Accountability Model, p. 70, Announcements, Tablings, Committee Reports, Tuesday, 27 January 2009, p.64). In my view committees are also the mechanisms for ensuring accountability. In other words, the concept "mechanism" is generally understood as committees, including SCOPA. Section 57(2) of the Constitution permits the Assembly to establish committees through its rules and orders.

9. The Model defines accountability as "a social relationship where an actor (an individual or an agency) feels an obligation to explain and justify his or her conduct to some significant other (the accountability forum, accountee, specific person or agency)" (at p. 71). The "obligation" referred to in the definition should be understood as referring to constitutional and statutory obligations when the definition is used in the realm of constitutional law. The reason for this is the operation of the principle of legality which requires that public power must be exercised in accordance with constitutional or statutory authority.

10. It follows that the bodies to be held accountable; namely, "organs of state and constitutional institutions or other public bodies", must be read to mean "all executive organs of state in the national sphere of government" as this is the scope of section 55(2). A wider reading of the subrule would result in a conflict with the Constitution. This interpretation is used to give effect to subrule (a)(i), amongst others, by qualifying the so-called "actors" with "when those statements are submitted to Parliament". Statements are submitted to Parliament when required in terms of the Constitution or legislation.

11. Furthermore, section 114 of the Constitution requires that provincial legislatures provide



for mechanisms to ensure accountability of provincial executive organs of state. Chapter 3 of the Constitution deals with co-operative government and provides in section 41 that organs of state must not assume any power or function except those conferred on them in terms of the Constitution. Section 41 also provides that all spheres of government and all organs of state within each sphere are also required to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

12. In light of these provisions, the constitutionally compliant reading of the scope of the proposed subrule (a)(vi) – where it refers to “organs of state and constitutional institutions or other public bodies” – must mean “all executive organs of state in the national sphere of government”. Furthermore, the qualification that the subrule applies only to such bodies “that receive transfer payments from national departments through the Division of Revenue Act (DORA) for the expenditure of those transfers” is therefore only applicable to “executive organs of state in the national sphere of government”.
13. The Division of Revenue Act authorises two types of allocations: one, the equitable share allocations amongst spheres of government; and, two, conditional allocations to provinces and municipalities. The Act sets out the obligations of both the transferring and receiving officers. The transferring officer is defined as the accounting officer of a national department that transfers funds to a province or a municipality or spends the allocation on behalf of the province or municipality. A receiving officer refers to an accounting officer in the provincial or local sphere of government receiving funds in terms of the Act. It follows that the qualification “that receive transfer payments from national departments through the Division of Revenue Act (DORA) for the expenditure of those transfers” implies organs of state in the provincial and local sphere of government. This implication contradicts the constitutional compliant reading of the proposed subrule.

Conclusion

14. According to the Constitution, the Assembly must establish committees and use these mechanisms to ensure that the executive organs of state in the national sphere of government are accountable to it. The Assembly does this by, amongst others, considering the reports of committees and adopting recommendations in those reports.



15. The Assembly may only hold to account those executive organs of state in the national sphere of government in accordance with the Constitution. It must exercise this constitutional mandate in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.
16. It follows that the formulation of the proposed subrule (vi), implying that SCOPA can hold organs of state in provincial and local government spheres to account, is inconsistent with the Constitution. For reasons set out below I am of the view the proposed subrule is unnecessary.

Advice

17. The intention of the proposed subrule appears to me aimed at exercising full accountability and oversight across the three spheres of government for public funds distributed amongst the three spheres of government. The Model also considers this issue (at p. 72, emphasis added):

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

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

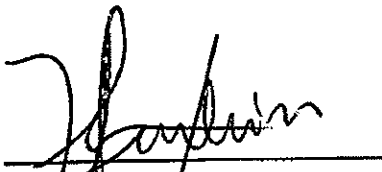
If further accountability is required, committees could use the power provided in the Constitution to access information even from public bodies that are at provincial or local government level in order that the committee has complete information and details on the public function reported on. Where a parliamentary committee is reviewing the performance of a national organ of state, the committee must ensure that the performance of its other entities, ie subsidiaries of the main organ of state, is



included in the report to Parliament. If this is not included in the report, Parliament should in terms of sections 56(b) and 69(b) of the Constitution require of the entity to report to it so that Parliament has the complete picture.

In conducting oversight and accountability, the principles of co-operative government and intergovernmental relations must be taken into consideration, including the separation of powers and the need for all spheres of government and all organs of state to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. (p. 72)

18. Section 56(b) of the Constitution authorises the Assembly and its committees to require any person or institution to report to it. This provision, read with section 55(2) referred to above, empowers the Assembly or SCOPA to require accounting officers in provincial and local government who are responsible for receiving allocations in terms of the DORA or any other transfer to report to it for the purpose of holding an organ of state in the national sphere of government to account or maintaining oversight of the exercise of national executive authority.
19. Section 14 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 (Act No. 4 of 2004) provides for summoning of a witness. This provision allows the Assembly or a committee, including SCOPA, to compel the accounting officer of an organ of state in the provincial or local sphere of government to report to it should the request to report remain unfulfilled.
20. It may be mentioned that the implementation of the DORA is a matter over which the Assembly must maintain oversight, including the obligations provided for in the DORA pertaining to National and provincial treasuries; and, transferring and receiving officers.



Adv F S Jenkins
Senior Parliamentary Legal Adviser



**SUBMISSION BY SCOPA CHAIRPERSON CDE THEMBA GODI TO
THE SUB-COMMITTEE ON NATIONAL ASSEMBLY RULES**

Part 10: **Standing** Committee on Public Accounts

204. Establishment

There is a **Standing** Committee on Public Accounts (**SCOPA**)

205. Composition

The **Standing** Committee on Public Accounts consists of the number of Assembly members that the Speaker may determine with the concurrence of the Rules Committee.

206. Functions and powers

(1) The **Standing** Committee on Public Accounts —

(a) must [consider] —

- (i) **consider** the financial statements of all executive organs of State and constitutional institutions or **other public bodies** when those statements are submitted to Parliament;
- (ii) **consider** any audit reports issued on those statements;
- (iii) **consider** any reports issued by the Auditor-General on the affairs of any executive organ of state, constitutional institution or other public body; [and]
- (iv) **consider any reports reviewing expenditure of public funds by any executive organ of state and constitutional institution or other public body;**
- (v) **consider** any other financial statements or reports referred to the Committee in terms of these Rules; **and**
- (vi) **hold accountable organs of state and constitutional institutions or other public bodies that receive transfer payments from national departments through the Division of Revenue Act (DORA) for the expenditure of those transfers.**

(b) may report on any of those financial statements or reports to the Assembly;

(c) may initiate any investigation in its area of competence; and

(d) must perform any other functions, tasks or duties assigned to it in terms of the Constitution, legislation, these Rules, the Joint Rules or resolutions of the Assembly, including functions, tasks and duties concerning parliamentary financial oversight or supervision of executive organs of state, constitutional institutions or other public bodies.

(2) The Speaker must refer the financial statements and reports mentioned in paragraph (a)(i) – (iv) to the Committee when they are submitted to Parliament irrespective of whether they are also referred to another committee, ***except for the financial statements and reports of the Intelligence agencies.***

207. Subcommittees

The ***Standing*** Committee on Public Accounts may appoint a subcommittee from amongst its members to assist the Committee.

208. [Notice to portfolio committee] ***Collaborations***

[When a matter falling within a portfolio committee's competence is to be considered by the Committee on Public Accounts, the chairperson of the Committee, after consultation with the chairperson of the portfolio committee, must give notice to the portfolio committee when that matter will be considered by the Committee.]

In order to enhance oversight and foster collaboration amongst committees of the Assembly and beyond, SCOPA must:

- (i) engage and involve other committees of the Assembly in its work, through invitations during considerations of reports referred to in Rule 206 (1)(a);***
- (ii) find ways to share information and insights with other Assembly committees, with the concurrence and assistance of the House Chairperson (Committees, Oversight & ICT);***
- (iii) collaborate with public accounts committees in the provincial and local government spheres.***