

REVIEWING THE LEGISLATIVE PROCESS IN PARLIAMENT

[Report prepared by the Joint Task Team on the Legislative Process in Parliament]

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CHAPTER I: LEGISLATIVE PROCESS

Stages in legislative process of ordinary Bills

1. The Constitution provides that Bills may be introduced in Parliament by a member of the Executive [only in the NA] or any member or committee of the House concerned.¹ In practice, with a few exceptions, all Bills coming before Parliament emanate from the Executive. Ordinary Bills [ie excluding Constitution amendment Bills and money Bills] normally go through the following stages:

(1) Initiating, development and Cabinet approval

The first stage involves initiating, developing and formal executive approval of the draft legislation. Usually a first draft is prepared by departmental specialists, sometimes assisted by consultants, after consultation with interested persons and institutions. The draft is then submitted to Cabinet for approval in principle.

(2) Submission of draft Bill to Parliament

Joint Rule 159 requires that once Cabinet has approved the legislative proposals, the draft of the proposed Bill must be sent to Parliament, together with a memorandum explaining the objects of the proposed legislation. The Speaker and the NCOP Chairperson must refer the draft to the responsible committees of the respective Houses. The purpose of this procedure is to assist the committees in planning their work and to enable committee members to acquaint themselves with and to develop their positions with regard to the proposed legislation.

¹ Section 73 of the Constitution

NOTE (i): *In practice this rule is not working as it should, with the result that its purpose is lost. Parliament often does not receive the Rule 159 draft before the final Bill is submitted to Parliament for introduction.*

NOTE (ii): *The purpose of Joint rule 159 is to make Parliament aware that proposed legislation is coming; hence it is not necessary for the whole draft Bill to be sent to Parliament at that stage – the long title or a summary of the objectives of the legislation should be sufficient. See the recommendation in paragraph 2 (b) below.*

(3) Processing and certification by Office of Chief State Law Adviser

The draft as approved by the Cabinet is also submitted to the Office of the Chief State Law Adviser for processing into a proper draft Bill and for certification.

NOTE: *In terms of NA rule 243(1A), a Bill introduced by a Cabinet Member or Deputy Minister must be certified by a state law adviser as (a) being consistent with the Constitution and (b) properly drafted in the form and style which conforms to legislative practice. If a Bill is not so certified, it must be accompanied by a report or legal opinion by a state law adviser on why it has not been certified (NA rule 243(1B)).] The NCOP does not have such a rule.*

(4) Submission of certified Bill to Parliament

The draft Bill, whether or not certified by a State Law Adviser, is then submitted to the Parliament's Bills Office [previously the Legislation and Proceedings Section] for (language/grammar) editing, publishing and proofreading. See paragraphs 3 – 6 below regarding the language requirements for Bills.

(5) Prior notice and publication of draft (by introducer of Bill)

Before the introduction of a Bill in Parliament, notice must be given in the *Government Gazette* and an explanatory summary of the Bill, or

the draft Bill as it is to be introduced, must be published in the *Gazette* [NA rule 241(1) and NCOP rule 186(1)].

NOTE (i): *In terms of NCOP rule 186(2), the notice must contain an invitation to interested persons and institutions to submit written representations on the draft legislation to the Secretary. The NA rule requires this invitation only when the Bill as it is to be introduced is published in the Government Gazette by its introducer. Since the Rules do not specify a time frame between the publication in the Gazette and the introduction of the Bill, it is possible that the comments might not have been captured in the Bill as Tabled.*

NOTE (ii): *In practice, these rules are not working as they should. Often there is nothing but formal compliance, without any meaningful role in the legislative process.*

NOTE (iii): *The purpose of NA rule 241 and NCOP rule 186 is to inform the public of the intention to introduce proposed legislation in Parliament; hence there is no need to publish the Bill as a whole at that stage – publication of the long title of the Bill or a summary of the objectives of the legislation should be sufficient. See the recommendation in paragraph 2 (c) below.*

(6) Introduction

The next stage is the formal introduction of the Bill in terms of the relevant procedures prescribed by the Rules of the House concerned. These procedures differ according to the nature of the Bill in question.² After introduction, the Bill is referred to the Joint Tagging Mechanism [JTM] for classification [see paragraphs 13 - 32 below] and to the relevant committee for consideration and report. In the NA, a Bill as introduced is regarded as having been read a first time, but in some cases there is a formal First Reading procedure.

² See NA rules 243, 260 and 286 - 288 and NCOP rule 188.

(7) Committee stage

The committee stage involves, amongst others, briefing on and inquiry into the subject of the Bill, consultation, public participation and deliberation. See further paragraphs 7 – 12 below.

(8) Plenary stage (first House)

The Bill is then placed on the Order Paper for consideration and decision by the House. If the House passes the Bill it is referred to the other House for processing in terms of the Rules of that House.

(9) Process in other House

The Bill again goes through a committee stage (as above) and then a plenary stage.

NOTE: *Depending on the type of Bill and the decision of the second House on the Bill, there are various possibilities at this stage, including, in the case of a Bill contemplated in section 76 of the Constitution, referral of the Bill to the Mediation Committee.*

(10) Submission of Bill to the President for assent

If the Bill is passed in accordance with the Constitution, it is submitted to the President for assent.

(11) Bill becomes Act

A Bill assented to and signed by the President becomes an Act of Parliament and must be published. A signed version of the Act is entrusted to the Constitutional Court for safekeeping.

2. RECOMMENDATIONS REGARDING PRE-INTRODUCTION PROCESSES

a) *There needs to be substantial engagement between Parliament and the Executive on all pre-introduction processes for Bills, and specifically the application of Joint rule 159, NA rule 241 and NCOP rule 186.*

b) *Since the purpose of Joint rule 159 is to alert Parliament about an imminent Bill [see paragraph 1(2) above], it is recommended that*

the rule should require only the long title of the draft Bill or a summary of its objectives to be sent to Parliament.

- c) Since the purpose of the notices in terms of NA rule 241 and NCOP rule 186 is to inform the public of the imminent introduction of a Bill in Parliament [see paragraph 1(5) above], consideration should be given to publishing only the long title or a summary of the objectives of the Bill concerned. Publication of the Bill itself in the Government Gazette could follow at a later stage. [See also the recommendation in paragraph 6 (b) below regarding translations.]*

Language requirements for Bills

3. In terms of Joint Rule 220(1), a Bill introduced in either House has to be in one of the official languages. The Bill in that language will be the **official text** for purposes of parliamentary proceedings. In parliamentary proceedings only the official text of a Bill is considered [Joint Rule 220(4)]. A translation of the Bill into at least one of the other official languages has to be in Parliament's possession at least three days before the formal consideration of the Bill by the House in which it was introduced [Joint Rule 220(2)]. Such a translated version of a Bill is referred to as the "**official translation**". The cover page of a Bill specifies which language version of the Bill is the official text and which is an official translation [Joint Rule 220(3)]. Since the adoption of Joint Rule 220 in 1999, the official text of all Bills has been in English. The language of the official translations of Bills has varied according to the preferences of the introducers of the Bills.

4. In terms of Joint Rule 221, the official text of a Bill must be accompanied by the official translation [of the final Bill] when it is sent to the President. The practice is that the official translation accompanies the signed copy of an Act of Parliament when it is sent to the Constitutional Court for safekeeping in terms of section 82 of the Constitution.

5. In practice the requirements of Joint Rule 220 with regard to the translation of Bills have created certain problems.

a) Firstly, as regards the requirement that the official translation of a Bill need not be submitted to Parliament earlier than three days before the formal consideration of the Bill by the [first] House: Where Parliament receives a translation of the Bill as it was introduced three days before the consideration of the Bill, there would have been formal compliance with the rule even though the Bill might have been amended extensively during the committee stage. However, there is no point in receiving a translation of the Bill as introduced at that stage. What is more, Parliament then has to effect the necessary amendments to the translation [Joint Rule 220(4)]. In practice, this sometimes causes considerable delays [of weeks or even months] before a Bill passed by Parliament can be sent to the President for assent.

b) In terms of Joint Rule 222, the official text of an amendment Bill may be in any of the official languages, ie irrespective of the language(s) of the Act that is being amended. Where the official text of an amendment Bill is not in the same language as the signed text of that Act, Joint Rule 222(1) requires that an official translation of the amendment Bill must be in the language of the signed text. However, since translations of a Bill are not considered in parliamentary proceedings [Joint Rule 220(4)], it means that the official, signed text of an Act could be amended [by means of a translation of a Bill amending that Act] without Parliament satisfying itself that the wording and formulation of the translation are in order.

c) There is no requirement in the Rules to the effect that when an Act is amended, the official translation must also be amended. This creates the possibility, either that the official text of an Act on the statute book might differ from the official translation [because the official translation is not updated when the official text is amended] or that the official translation might be amended by insertions etc in another language,

creating the nonsensical position of using two different languages in the same text.

6. RECOMMENDATIONS REGARDING LANGUAGES OF LEGISLATION:

- a) *Joint Rule 220(1) should be brought in line with the established practice, namely that the official text of every Bill must be in the English language.*
- b) *Joint Rule 220(2) should be changed to provide that a translation of a Bill into at least one of the other official languages must accompany the Bill when it is introduced [with an escape clause to allow the introduction of a Bill in one language in urgent cases or where there are other suitable reasons].*
 - *An option to this recommendation is to require that, instead of a translation of the whole Bill into at least one other language, a translation of either a summary of the objectives of the Bill or, where appropriate, the long title should be provided in all other official languages. This would enable the dissemination of the objectives of legislation to a wider spectrum of the population.*
- c) *Joint Rule 222(1) should be changed to provide that when an Act is amended that was passed after the adoption of rule 220 [March 1999], the official text of the amendment Bill must be in the same language as the signed text of the Act.*
- d) *Joint Rule 222 should provide that when an Act is amended all official translations of that Act must also be amended in the respective languages of those translations.*

- e) *Parliament should take steps to make legislation passed by it accessible to the public in all official languages. Capacity to do this will have to be developed.*
- f) *The Joint Rules should provide that when an Act is sent to the Constitutional Court for safekeeping in terms of section 82 of the Constitution, it must be accompanied by the official translation(s).*
- g) *A copy of the printed official text as well as the official translation(s) of all Acts must be retained in Parliament's archive and published on its web site. Parliament should be the central point of access to legislation passed by it.*

Committee procedure³

7. The usual chain of events in a committee to which a Bill has been referred for consideration is as follows:
 - a) An informal discussion of the subject or principle of the Bill
 - b) Briefing by officials of the Department concerned
 - c) Invitation for public comment and submissions, followed by the hearing of oral evidence [if the committee considers it necessary]
 - d) Deliberation by Members, taking into consideration proposed amendments and comments and proposals from representations received and evidence presented

NOTE: *There should be a formal closure of the public participation process outline in (c) above. However, nothing prevents a committee from receiving and distributing further written representations until the voting stage in the committee.*

³ See Joint rule 167, NA rule 249 and NCOP rule 193

- e) Adoption of motion of desirability [motion to accept the principle of and the need for the legislation]

NOTE: *The general feeling of the Task Team is that no real purpose is served by this stage.*

- f) Formal consideration of the Bill. Each clause is formally put, as well as every amendment formally proposed, and decided

NOTE: *The Task Team feels that, where applicable, this stage should be followed by a motion for the Committee to agree to the Bill, as amended.*

- g) Consideration and adoption of committee's report, recommending passing or rejection of the Bill.

8. In the case of a Bill before the NCOP [excluding a section 75 Bill], the committee stage also involves the submission of the Bill to each provincial legislature for purposes of enabling the legislature to confer authority on its delegation to convey the Province's view on the Bill and also to vote on it [negotiating and final or voting mandates].
9. The committee may recommend approval of the Bill, with or without amendments, or the rejection of the Bill or [depending on the nature of the Bill] a redraft of the Bill. Committee amendments agreed to, and those formally rejected, are listed in the so-called "A list" [in the case of the first committee considering a Bill after its introduction], while the Bill incorporating the amendments, or the redraft of the Bill, is the "B Bill" [numbered, eg, B 14B – 2008].
10. It is the committee's responsibility to ensure that the Bill it has agreed on and which is tabled in the House is in all respects complete and flawless and ready for adoption by the House. For this purpose, it is essential that all amendments should be fully drafted and before the committee when it agrees to a Bill. Furthermore, the final version of the Bill [the B Bill in the first House] should be before the committee and the committee should ensure that all amendments agreed to are correctly reflected in it.⁴ Only then should the committee formally agree to the Bill and report to the House.

⁴ Failure to do this would seem to have been the source of the problems encountered with the finalisation and scheduling of the Children's Amendment Bill, 2006. The committee concerned approved the Bill and reported to the House without having the final version of the Bill before it, and left it for officials to incorporate the necessary amendments.

11. It is essential that the programming of parliamentary business on a Bill allow sufficient time for the committees concerned to deal properly with the Bill without undue haste. Tight deadlines pose a risk to the quality and constitutionality of Bills.⁵

12. RECOMMENDATIONS REGARDING COMMITTEE PROCEDURE

(a) *The stages of legislative procedure to be followed by a committee in considering a Bill should be spelt out in the Rules and elaborated on in the handbook proposed in paragraphs 56 - 57 below.*

(b) *The adoption of a motion of desirability does not serve any purpose, and should be scrapped.*

(c) *In view of various practices concerning public involvement in the legislative process and recent judgments by the courts in respect thereof [see Chapter V below], it has become imperative for the public participation process to be separate from the deliberative stage..*

(d) *The Rules should provide that the final version of a Bill [ie the version going to the House for passing] must be before the committee when it decides on [votes for or against] the Bill.*

CHAPTER II: TAGGING OF BILLS

13. Tagging refers to the process of classifying or categorising Bills for the purposes of the parliamentary process.

14. There are five types of Bills that could come before Parliament. The Constitution makes provision for four types:

- Bills amending the Constitution [section 74 Bills]
- Ordinary Bills that do not affect the provinces, ie Bills to which the procedure prescribed by section 75 apply [section 75 Bills]
- Ordinary Bills that affect the provinces, ie Bills to which the procedure prescribed by section 76 apply [section 76 Bills]

⁵ See, eg, the decision of the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and Chairperson of the National Council of Provinces* 2006 12 BCLR 1399 (CC).

- Money Bills, ie Bills to which section 77 apply [section 77 Bills]

In addition, the Joint Rules of Parliament make provision for:

- Mixed section 75/76 Bills [mixed Bills].⁶

15. The Constitution creates different legislative processes for the different types of Bills. This raises potential questions about the constitutional validity of legislation in respect of the procedure followed in Parliament. For example, if Parliament were to deal by way of the section 75 procedure with a Bill which, in terms of the Constitution, should have followed the section 76 procedure, the Bill is not properly enacted and, consequently, cannot become law. This is so because Parliament has no powers to enact legislation otherwise than in accordance with the “manner and form” requirements set out in the Constitution, and law or conduct inconsistent with the Constitution is invalid.⁷ The problem cannot be remedied by political agreements, for example to pass a Bill in accordance with a particular section of the Constitution. If the Bill, objectively, is one that ought to have been processed under another section, it will remain open for any person to challenge the validity of the law which purports to have been created by the passing of the Bill.⁸

16. It follows that the correct classification of Bills is a challenge for Parliament. For that purpose Joint Rule 151 established the Joint Tagging Mechanism [JTM], consisting of the Speaker and Deputy Speaker of the NA and the Chairperson and permanent Deputy Chairperson of the NCOP. Every Bill introduced in Parliament is referred to the JTM for classification. For the purposes of all parliamentary proceedings, the JTM's classification of and findings on a Bill is final and binding on both Houses. If the JTM classifies a

⁶ See Part 7 of Chapter 4 of the Joint Rules. The Joint Rules Committee approved Part 7 but its implementation has been held in abeyance pending legal clarity on its validity. See further paragraphs 33-37 below.

⁷ See sections 44(4) and 2 of the Constitution and compare *Doctors for Life International v Speaker of the National Assembly and Chairperson of the National Council of Provinces* 2006 12 BCLR 1399 (CC) at 1464F – 1465C.

⁸ See S Budlender *National Legislative Authority* in M Chaskalson and others (Eds) *Constitutional Law of South Africa* 2nd Ed Chapter 16.

Bill as constitutionally or procedurally out of order, the Bill may not be proceeded with.⁹

17. In practice, the most problematic aspect of tagging Bills has proved to be the distinction between section 75 and section 76 Bills.

- A section 76 Bill is an ordinary Bill [ie not a money Bill or a constitutional amendment Bill] that affects the provinces within the meaning of section 76 and to which the procedure prescribed by section 76 applies. A Bill must be dealt with in accordance with the section 76 procedure if it provides for legislation with regard to a functional area listed in Schedule 4¹⁰ or envisaged in various sections of the Constitution¹¹. A section 76 Bill can be introduced in either of the Houses. On such a Bill, the provincial delegations in the NCOP vote en bloc, each province having one vote, which is cast on the instructions of the provincial legislature concerned. For this purpose, each provincial legislature has to confer the necessary mandates on its delegation. If the Houses do not agree on a single version of a section 76 Bill, the matter is referred to the Mediation Committee. Ultimately, in the case of a Bill introduced in the NA, the NA may override the NCOP's choice with a two-thirds majority. There is no ultimate override in respect of a section 76 Bill introduced in the NCOP. It lapses if the Houses cannot agree on a single version and mediation fails.
- A section 75 Bill is a Bill to which the procedure set out in section 74¹² or section 76 does not apply. With regard to this type of Bill, the NCOP has a subordinate role. It cannot amend the Bill, but may propose amendments to it. There is no provincial vote; instead the members of the NCOP exercise their votes individually. The NA has an override to pass the version of the Bill that it chooses with an ordinary majority.

⁹ See in general Joint Rules 151-158 and 160-164.

¹⁰ See 15 below.

¹¹ For example, a Bill on the functions of the Public Protector or the Public Service

¹² Bills amending the Constitution

18. In terms of section 76(3) of the Constitution, a Bill must be dealt with by the procedure established by either section 76(1) or section 76(2) “if it falls within a functional area listed in Schedule 4”.¹³ The classification of such a Bill involves the characterisation of the subject matter of the Bill relative to the categories of functional areas listed in Schedule 4. The problem is that the Schedule 4 functional areas are not watertight. There are linguistic overlaps between those areas and areas in respect of which the Constitution envisages the section 75 procedure [and also with functional areas of exclusive provincial legislative competence as listed in Schedule 5].

19. The Constitution recognises that the topics listed in Schedule 4 have a potentially wider reach. Accordingly, section 44(3) provides as follows:

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

20. The application of section 44(3) to a particular Bill depends upon the relationship between the contents of the Bill and the functional areas listed in Schedule 4. It entails that even if the Bill may not fall directly within a Schedule 4 functional area, it should nevertheless be treated as if it does. Therefore, the section 76 legislative procedure will apply not only where the Bill as a whole amounts to legislation regarding such a functional area, but also where the subject matter of the Bill has a connection to a Schedule 4 matter of the kind set out in section 44(3).

21. The Courts have not had much opportunity to give guidance on the classification of parliamentary Bills. In the context of national and provincial legislative competence, the Constitutional Court has indicated that the

¹³ The functional areas listed in Schedule 4 cover fields of concurrent national and provincial legislative competence. See also section 44(1)(b)(ii) of the Constitution.

functional areas should be purposively interpreted. Allocating legislation to functional areas “involves the determination of the subject matter or the substance of the legislation, its essence or true purpose and effect, that is, what the [legislation] is about.”¹⁴ The Court noted that in some other jurisdictions the subject matter of a statute is referred to as its “pith and substance”, which is said to be one of the “interpretive tools” which is invoked when a law dealing with a subject in one list is also touching on a subject in another list. Ngcobo J, delivering the majority judgment in the DVB Behuising case, said the following:

*The doctrine of 'pith and substance' as used in other jurisdictions is intended to refer to the content or subject matter of legislation, that is, its true nature and character or its substance. It is usefully invoked to characterize legislation which, though purporting to deal with a matter falling within the competence of the legislature enacting the legislation, also deals with a matter which falls outside such competence, for the purposes of determining whether it falls within the competence of the legislature which has enacted the legislation in question.*¹⁵

22. The practice of the JTM is to classify a Bill according to its dominant or most important feature, in other words, its “pith and substance”. If it concludes that the dominant feature of a Bill falls within a Schedule 4 functional area, the Bill is tagged as a section 76 Bill even though the Bill might include incidental matters falling outside that Schedule. Conversely, if the substance of a Bill is a matter that falls outside Schedule 4, the Bill is classified as a section 75 Bill even though it might contain incidental matters touching on a functional area listed in Schedule 4. If a Bill cannot be said to have a single substantial character and contains both section 75 and section 76 provisions, the Bill is classified as a mixed Bill and declared out of order [since there is no

¹⁴ *DVB Behuising (Pty) Limited v North West Provincial Government and another* 2001 (1) SA 500 (CC) pars 17 and 36

¹⁵ *Id* footnote 53

procedure for dealing with mixed Bills at this stage¹⁶]. To overcome this impasse, the Bill is then often split into two – one part to follow the section 75 process and the other the section 76 process.

23. Splitting Bills creates numerous problems. For instance, in some cases a section 75 Bill might be passed with blank provisions where section 76 provisions are to be inserted. The Act concerned is then completed by a subsequent Bill according to the section 76 process. Parliamentarians and the public are confronted with fragmented proposals and provinces are expected to provide mandates on Bills that are patently incomplete. Furthermore, it could confuse the allocation of political responsibility for the respective Bills.¹⁷

24. In practice, a Bill is not split where, viewed as a whole, its dominant feature falls either in or outside a Schedule 4 functional area. It is classified as a section 75 Bill or section 76 Bill, as the case may be, according to its dominant feature despite the fact that some of its clauses, viewed individually, do not fall under that feature. This was the position in the case of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill [B50B – 2003]. In a comprehensive report, the Portfolio Committee on Justice and Constitutional Development took issue with the view that the Bill [dealt with as a section 75 Bill] had to be split because some of its clauses fell within a Schedule 4 functional area and could not be regarded as merely incidental to the dominant purpose of the Bill.¹⁸

25. In a recent article in the South African Law Journal, it was argued strongly that the “pith and substance” test is not appropriate for classifying parliamentary Bills.¹⁹ According to the writers of the article, that test is applicable to

¹⁶ See paragraphs 33-37 below.

¹⁷ See Christina Murray and Richard Simeon, *‘Tagging’ Bills in Parliament; Section 75 or section 76?* South African Law Journal 2006 p 244

¹⁸ Report of the Portfolio Committee on Justice and Constitutional Development on the matter of the tagging of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill [B50B – 3003] and matters relating thereto

¹⁹ Christina Murray and Richard Simeon *‘Tagging’ Bills in Parliament; Section 75 or section 76?* South African Law Journal 2006 233

determine whether or not a particular law falls within the legislative competence of the level of government that has enacted it; however, that is not the issue in tagging Bills for the purposes of parliamentary procedure. It is not the power to make laws that is at stake here, but the process by which laws are made.

26. The writers refer to the following obiter dictum (remark in passing) in the judgment of the Constitutional Court in the Liquor Bill case:

This subsection [section 76(3)] requires that a Bill must be dealt with under the procedure established by either section 76(1) or section 76(2) ... 'if it falls within a functional area listed in Schedule 4'. It must be borne in mind, moreover, that section 76 is headed 'Ordinary Bills affecting provinces'. This is, in my view, a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under section 76.²⁰

On the basis of this dictum they contend that several Bills have been wrongly classified as section 75 Bills instead of section 76 Bills [since those Bills fell within a Schedule 4 functional area in substantial measure], amongst others the National Water Bill, the Recognition of Customary Marriages Bill and the Communal Land Rights Bill.

27. The writers of the article go further. In view of the multi-level government established by the Constitution, the constitutional commitment to co-operative government and the role of the NCOP, they argue that all laws that have an impact on matters with which provinces are concerned should be classified as section 76 Bills –whether or not the impact is substantial [but excluding those having only trivial provincial impact]. Accordingly, their contention is that a Bill should go the section 76 route if it contains any provision concerning a Schedule 4 matter which—

²⁰ *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill 2001* (1) SA 732 (CC) par 26

- affects or might affect the administration of a province;
- provinces are required or would normally be expected to implement;
- could, in the future, conflict with a provincial law; or
- has implications for any policy or law that the provinces are already implementing or may implement.

28. The problem with the argument referred to in the previous paragraph is that section 76(3) of the Constitution says that a Bill is a section 76 Bill if it [ie the Bill] falls within a Schedule 4 functional area. It does not say that a Bill must go the section 76 route if any of its provisions fall in such an area. Compare in this regard the amendment effected to section 76(4)(a) of the Constitution by the Constitution Eleventh Amendment Act of 2003. Section 76(4)(a) originally provided that a Bill must go the section 76(1) route if it provides for legislation “envisaged in Chapter 13 and which affects the financial interests of the provincial sphere of government”. Pursuant to this provision the Treasury Control Bill of 1998 [enacted as the Public Finance Management Act, 1999] had to be divided into a section 75 part and a section 76 part. To avoid the splitting of such Bills in future the word “affects” was replaced with “includes any provision affecting”. Consequently, a Bill envisaged in Chapter 13 now has to go the section 76 route even if it includes a single provision affecting provincial financial interests.

RECOMMENDATION

29. It is recommended that the approach in paragraph 22 above should be accepted as the correct one. For tagging purposes a Bill should be looked at objectively and classified according to its dominant feature [its “pith and substance”]. Only when a Bill does not have a single substantial character and contains both section 75 and section 76 provisions should it be classified as a mixed Bill.

- **Parliament should be proactive with regard to this issue and should give credence to these proposals in the Joint Rules**

[NOTE: The classification of the Communal Land Rights Bill, 2003, is at issue in a case currently before the Constitutional Court (Tongoane and others v The National Minister for Agriculture and Land Affairs and others). It is hoped that the judgment will give guidance with regard to the tagging of Bills.]

30. To assist the JTM in its classification of Bills, an amendment to Joint Rule 160 could be considered. When a Bill is introduced as a section 75 Bill, Joint Rule 160(3) requires the JTM to make a finding, not only whether the Bill is in fact a section 75 Bill but also whether it includes any provision to which the procedure prescribed in section 76 applies. Joint Rule 160(4) contains a similar provision with respect to a Bill introduced as a section 76 Bill; in other words, the JTM must make a finding whether it includes any provision to which the section 75 procedure is applicable. These rules might create the impression that a Bill cannot be classified as a section 75 Bill if it contains any “section 76 provision” and cannot be classified as a section 76 Bill if it contains any “section 75 provision”. Such an inference would be clearly incorrect.
31. Firstly, as regards a section 76 Bill, the Constitution clearly implies that such a Bill could contain “section 75 provisions”, provided those provisions are “necessary” or “incidental” within the meaning of section 44(3)²¹. Although the Constitution does not have a similar provision in respect of section 75 Bills, it seems logical that the same principle should apply, ie that “section 76 provisions” are permissible in a Bill which is in substance a section 75 Bill if those provisions are incidental to and reasonably required to deal fully and effectively with the subject concerned.²² Similarly, there are no specific constitutional provisions regulating powers that are ancillary to the Schedule 5 [exclusive provincial] competencies. However, in the First Certification

²¹ See paragraphs 19 and 20 above.

²² See paragraphs 22 and 24 above and the Report of the Portfolio Committee on Justice and Constitutional Development on the matter of the tagging of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill [B50B – 2003], and matters related thereto. The principle involved is also part of our common law as it has been applied by the Courts for many years in different contexts concerning expressed and implied powers.

Judgment [par 244] the Constitutional Court indicated that the Schedule 5 powers would necessarily include incidental powers.

RECOMMENDATION

32. ***It is recommended that Joint Rule 160 be amended to remove the requirement that the JTM must make a [separate] finding on whether a section 75 Bill includes any section 76 provisions and whether a section 76 Bill includes any section 75 provisions.***

[NOTE: What is required for tagging purposes is to determine whether the Bill concerned “is in fact a section 75 Bill” or “is in fact a section 76 Bill” and that is already covered by subrules (3)(b) and (4)(b) of Joint Rule 160.]

CHAPTER III: MIXED BILLS

33. In an effort to alleviate some of the difficulties involved in classifying and separating section 75 and section 76 Bills, Part 7 of Chapter 4 of the Joint Rules provide a procedure for mixed section 75/76 Bills²³. A mixed Bill contains provisions to which section 75 of the Constitution applies as well as provisions to which section 76 applies²⁴, but which cannot be classified as either a section 75 or section 76 Bill using the pith and substance test. In terms of Joint Rule 191 a mixed Bill can be proceeded with if it is of a nature that a dispute between the Houses is unlikely to arise, if it would be possible to split the Bill if necessary into a section 75 and a section 76 Bill, and if the Bill would not lead to other unmanageable procedural complications. The procedure for mixed Bills attempts to ensure that the requirements of both section 75 and section 76 are met. Hence, the NCOP must pass a mixed Bill by both voting procedures; first voting by province and then by individual member.²⁵

²³ Joint Rules 191 – 201

²⁴ See the definition of “mixed section 75/76 Bill” in Joint Rule 1.

²⁵ See Annexure “A”, which is a copy of the note appearing before Joint Rule 191.

34. Since there was uncertainty about the constitutionality of the mixed Bills procedure, the implementation of the relevant rules has been held in abeyance until legal clarity is obtained. Parliament approached the Constitutional Court for advice in this regard but the [then] President of the Court responded that such advice could not be given. Consequently, the legal uncertainty remains.

35. There is difference of opinion among lawyers and academics as to the constitutionality of passing mixed Bills. Some are of the view that the mixed Bill procedure is constitutionally unobjectionable because it is more onerous than the procedure required by the Constitution.²⁶ Others argue that although the mixed Bill procedure could be seen as a pragmatic solution, it is constitutionally flawed. The procedure is not merely more onerous than the section 75 and section 76 procedures; it is different to these procedures, is unknown to the Constitution and could in fact undermine the constitutional legislative process.²⁷ In a legal opinion on the classification of the National Forests Bill, 1998, David Unterhalter SC also expressed doubt about the constitutional validity of the mixed Bill procedure.

36. In view of Parliament's constitutional obligation to comply with the "manner and form" requirements for the passing of legislation and the possible consequences of failure to do that,²⁸ it would not seem advisable to implement the mixed Bill procedure at this stage.

RECOMMENDATION

37. It is recommended that the following options be considered:

() That an amendment of the Constitution be considered to make specific provision for mixed Bills; or

²⁶ I Currie and J de Waal *The New Constitutional and Administrative Law* (2001) 188

²⁷ S Budlender *National Legislative Authority* in M Chaskalson and others (eds) *Constitutional Law of South Africa* 2nd 17-33

²⁸ See paragraph 15 above.

- () to delete the mixed Bill procedure from the Joint Rules and continue with the current practice whereby a Bill that contains both section 75 and section 76 provisions and does not qualify to be tagged as either of the two is regarded as unconstitutional and out of order; or*
- () to retain the mixed Bill procedure in the Joint Rules but without implementing it until the Courts have had occasion to give guidance on the constitutionality of the procedure and, in the meantime, continue with the current practice referred to in subparagraph (b) above, read with paragraph 22.*

CHAPTER IV: LEGAL ADVISORY AND DRAFTING SERVICES FOR PARLIAMENTARY COMMITTEES

38. It is necessary for legal advisory and drafting services to be readily available to parliamentary committees considering Bills and international agreements. The question who should be responsible for providing such services presents a challenge for Parliament.

39. Bills introduced by members of the Executive are usually certified by the State Law Advisers²⁹, who are administratively located in the Department of Justice and Constitutional Development. The certification process involves ensuring that the Bill—

- complies with the Constitution;
- is in line with accepted legal principles;
- harmonises with the existing legal framework;
- captures government policy correctly;
- is logical, effective and workable in practice;
- is properly drafted in accordance with legislative drafting practices;

²⁹ See NA Rule 243 (1A) and (1B).

- is correct in every respect.³⁰

40. The State Law Advisers also render legal advice to parliamentary committees considering Bills and draft amendments entrusted to them by committees. The services of the Parliamentary Law Advisers are also available to committees.

41. There is currently not a uniform process for preparing amendments to Bills. In some cases the amendments are drafted by the State Law Adviser who certified the Bill in the first instance, in some cases by a Parliamentary Law Adviser with or without the assistance of the State Law Adviser, and in some cases by [legal] personnel of the state department concerned.

42. Once a Bill is introduced in Parliament it becomes Parliament's "property". The responsibility for the final version of the Bill rests with Parliament. The feeling has been expressed that Parliament relies too heavily on the State Law Advisers and departmental officials in processing and finalising draft legislation. Furthermore, the State Law Advisers are primarily advisers to the Executive; Parliament has no control over them. The question is whether they are not too close to the Executive (too "executive minded") to be expected to give objective legal advice to committees of Parliament.

43. A process is under way to create a legislative drafting capacity for Parliament. On the basis of a study and report by Parliament's Organisational Development Office [OD], it has been decided to add legal drafting functions to those of the Parliamentary Legal Services Office. This will enable the Parliamentary Law Advisers to render both legal advice and a legal drafting service during the parliamentary process on Bills and international agreements. It is felt that this would ensure that Parliament take ownership and control of the processes involved using its own resources. This would

³⁰ *Role of the State Law Advisers in the Legislative Process* – presentation by the Chief State Law Adviser to the Workshop held on 23 January 2008 on the Legislative Process in Parliament

entail that the Parliamentary Legal Services Office take full and final responsibility for committee amendments to Bills.

44. The view that Parliament should have a separate capacity to draft amendments to Bills emanates from a narrow perception of the doctrine of separation of powers. For Parliament to rely on its own resources for such services will present considerable challenges. Legislative drafting is a scarce and demanding skill and requires a great deal of experience before it can be performed with any measure of confidence. Unless Parliament manages to recruit experienced drafters it seems advisable to obtain assistance to train the staff concerned and supervise their drafting, at least for an initial period. The Department of Justice and Constitutional Development could possibly be approached in this regard. Then the question also arises whether it would be cost effective for Parliament to employ legislative drafters while they might not be fully occupied, especially during recesses.
45. Tasking the Parliamentary Legal Services Office with the drafting of committee amendments to Bills to a certain extent entails a duplication or triplication of the drafting and research processes. As it is, draft Bills are usually prepared by departmental lawyers or officials [with or without outside assistance], who then submit the drafts to the Office of the Chief State Law Adviser for redrafting where necessary and certification. After that the draft Bills get “edited” by Parliament’s Bills Office, which in effect is also part of the drafting process. Now a third set of lawyers will be involved. This would not seem to be the best practice for the passing of properly drafted Bills since the more drafters are involved the greater the risk becomes of drafting errors, inconsistencies, etc.
46. Ideally, there should be only one drafter who is intimately involved in the whole process, from the very outset until the Bill is finalised by the committee. This would enable the drafter to oversee the entire process through the various stages, including the drafting of committee amendments and ensuring that those amendments are correctly captured in the final version of the Bill.

47. Several Commonwealth countries have what is known as an Office of Parliamentary Counsel, which is in effect a centralised drafting service within government serving both the executive and the legislature. Based on this “model of international best practice”, the Chief Directorate: State Law Advisory Services of KwaZulu-Natal recently compiled a “preliminary consultation draft” of the KwaZulu-Natal Legislative Services Agency Bill. The draft Bill seeks to establish a legislative services agency as “a professional, transversal and independent shared services agency in the public service”. It is said that the advantages of such an agency are the following:

- Best use of limited resources (human and financial);
- collective experience, skills and know-how are pooled and shared;
- procedures and style and format of legislation are easily standardised; and
- the resulting legislation is more consistent and uniform, simplifying the task of interpreting the law.

48. To a certain extent the Office of the Chief State Law Adviser fulfils the role of such a central drafting service. However, as pointed out above [paragraph 42], Parliament has no control over the State Law Advisers and, in effect, has to rely on their goodwill.

RECOMMENDATION

49. It is recommended that Parliament should initiate discussions with the Executive with a view to establishing such a central legislative drafting office, serving both the Executive and Parliament, to provide an integrated service for the drafting of parliamentary legislation in accordance with best practice in various other countries.

CHAPTER V: PUBLIC PARTICIPATION IN LEGISLATIVE PROCESS

50. One of the founding values of the Republic, as set out in section 1 of the Constitution, is a system of democratic government to ensure accountability, responsiveness and openness. This finds expression in the constitutional requirement that the rules of the Houses must have due regard to, amongst others, representative and participatory democracy and public involvement.³¹ It also finds expression in the duty imposed by the Constitution on both Houses to facilitate public involvement in their legislative and other processes and of their committees.³²

51. The Constitutional Court has expressed itself in three judgments on the matter of public involvement in the legislative process.³³ These judgments confirm that the legislative process of Parliament and the provincial legislatures is subject to judicial review. Some of the most significant general conclusions to be drawn from the judgments are as follows:

- a) The obligation to facilitate public involvement is a material part of the law-making process. Facilitation of public involvement in this context means taking steps to ensure that the public participate in the process.
- b) The crucial elements of public involvement include the dissemination of information about legislation under consideration, invitation to participate in the process and consultation on the legislation.
- c) Failure to facilitate public involvement in the legislative process could render the resulting legislation invalid. The degree of public

³¹ Sections 57(1)(b) and 70(1)(b) of the Constitution, and see the judgment of the Supreme Court of Appeal in *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006(4) BCLR 462 (SCA) [King case].

³² Sections 59(1)(a) and 72(1)(a)

³³ *Matatiele Municipality and Others v President of the RSA and Others (No 2)* 2007 (6) SA 477 (CC) [Matatiele case]; *Doctors for Life International v Speaker of the National Assembly and Chairperson of the National Council of Provinces* 2006 12 BCLR 1399 (CC) [Doctors for Life case]; and *Merafong Demarcation Forum v President of the RSA* 2008 (5) SA 171 (CC) [Merafong case]

involvement required will differ from case to case; depending on the circumstances [see further paragraphs (e) - (j) below].

- d) Parliament's first duty with regard to public involvement is to afford the public and all interested parties a reasonable opportunity to participate effectively in the law making process. What amounts to reasonable opportunity will depend on the circumstances of each case. The second duty is to take measures to ensure that people have the ability to take advantage of the opportunities provided.
- e) The obligation to facilitate public involvement can be fulfilled in different ways. It is open to innovation and Parliament has considerable discretion to determine how best to fulfil the obligation. What matters is that reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say.
- f) In facilitating public involvement, Parliament must do what is reasonable in all the circumstances. Ultimately, what Parliament has to determine in each case is what methods of public participation would be appropriate.
- g) The method and degree of public participation that is reasonable in a given case will depend on a number of factors such as—
- the nature and content of the legislation;
 - the importance and urgency of the legislation;
 - the intensity of the impact of the legislation on the public or on a particular section of the public;
 - the degree of public interest in the legislation
 - practical considerations, such as time constraints and resources.
- h) Parliament's legislative timetable should allow for meaningful public participation. The public must have a meaningful opportunity to be

heard and to make written or oral representations at a time and in the manner that could influence Parliament's decision on the legislation concerned.

- i) A decision by a House on a particular mode of involving the public in its legislative process creates its own reality. It is incumbent upon the House to give effect to that decision, unless there are sufficient reasons for failure to do so. If the decision is to hold public hearings on a Bill and such hearings are not held, the implication would be that the House has acted unreasonably and has not properly fulfilled its obligations in respect of that Bill.
- j) However, Parliament is not obliged to hold a public hearing on every Bill; depending on the facts, opportunity for written representations might be sufficient. The Court will not easily interfere with the judgment of Parliament as to whom it wishes to hear and whom not.
- k) The purpose of public involvement is to enable Parliament to inform itself of the views of the people. Parliament must keep an open mind and must consider all views expressed by members of the public. However, the views expressed by the public are not binding on Parliament and should not be seen as a mandate for Parliament to act.
- l) If a legislature were to change its position on a Bill that was taken after proper involvement of the public, it would not be necessary to engage the public again. However, where a particular community was involved, failure to revert to them could be regarded as disrespectful.

52. The judgments of the Constitutional Court referred to in the previous paragraph dealt with particular pieces of legislation where the Court felt strongly about the principle of public participation. However, these judgments should not be seen as a blueprint for public participation in all Bills.³⁴ At the

³⁴ See Rassie Malherbe: *Openbare betrokkenheid by die wetgewende gesag kry oplaas tande* TSAR 2007:3 594 at 598.

same time it is clear that if the parliamentary processes in this regard are not in line with the constitutional requirements, the Court would not hesitate to declare the resulting legislation invalid. Consequently, it is necessary for Parliament to relook its rules and procedures for public participation.

53. The Constitutional Court did not find fault with the way in which public involvement in the legislative process is generally facilitated by Parliament. In the *Doctors for Life* case, the Court recognised that Parliament has done much to facilitate public involvement in various ways, including through road shows, regional workshops, radio and television programmes, an internet web site and publications aimed at educating and informing the public about ways to influence Parliament. In the Court's view, these measures provide the information, education and opportunities necessary to enable citizens to participate effectively.

54. According to the Constitutional Court, Parliament's rules constitute an important factor relevant to determining reasonableness in the involvement of the public in the legislative process. The Court referred with approval to Joint Rule 6 and NCOP Rule 5, which regulate public participation in the joint business of the Houses and in the NCOP, respectively.³⁵ The NA does not have a similar rule.

RECOMMENDATIONS REGARDING PUBLIC PARTICIPATION

55. Given the approach by the Constitutional Court, there is scope for Parliament to refine its processes for public participation in the legislative process. Refinement should occur in the following areas:

(1) Notification to the public of upcoming Bills

To enable members of the public to participate in the legislative process it is necessary for Parliament to give adequate notice of opportunities for such participation. This may include:

a) Advertisements and notices in printed media and radio slots;

³⁵ *Doctors for Life* case, paragraphs 144 and 146

NOTE: Bills could be advertised collectively by the Secretary [say once every term] or in urgent matters by the chairperson of the committee concerned.

- b) notices on the dedicated parliamentary television channel;***
- c) media statements by the chairpersons of committees;***
- d) specific invitations to interest groups;***
- e) notices on Parliament's web site;***
- f) notices posted and distributed at places such as the parliamentary democracy offices.***

NOTE: The recommendations in (a) - (f) above are to be implemented for the purpose of notifying the public of opportunities to participate in Parliament's legislative process. Whatever policy is adopted in this regard should be applied consistently in regard to all Bills.

(2) Form of public engagement/comment

- There are different forms of public engagement. Opportunity to make written representations should usually be sufficient. Committees should exercise their discretion in relation to whom they wish to invite to oral hearings [see above, paragraph 51(j)].***
- Parliamentary policy should be developed to give guidance on the factors to be taken into account in deciding on the appropriate methods and extent of public participation, including the factors listed in paragraph 51 (g) above.***
- Public comment should ideally be in writing and oral hearings should usually be necessary only:***

- *where the written comments are unclear;*
 - *to accommodate those groupings who for various reasons are unable to submit written comments; or*
 - *where the proposed legislation affects people residing in a specified geographical area within the Republic.*
- *On section 76 Bills, where provincial mandates are required, the NCOP's public participation process in the provinces could be done via the respective provincial legislatures.*

NOTE 1: Care should be taken not to create the practice that an oral hearing is the normal route for engaging the public in the legislative process. Such practice could be seen as establishing parliamentary law by usage to the effect that an oral hearing is a requirement on every Bill.

NOTE 2: It should be stressed that the public engagement process is to ensure that Parliament understands the views of the public and is not a mandating process.

(3) Venue for hearings

- *If there is to be a public hearing, it should as a matter of routine take place at Parliament.*
- *Hearings should be held outside Parliament only as a matter of extreme interest in certain Bills or where specifically located communities are affected.*

NOTE: This is also [as in paragraph (2) above] to ensure that certain parliamentary practices are not concretised into binding legislative procedure by mere excessive use by committees.

(4) Synchronisation of public participation between Houses

- ***The Houses should be able to synchronise their public participation processes on Bills in the event of oral hearings. For example, where one of the Houses has held public hearings in the provinces, it should not be necessary, as a rule, for the other House to do likewise.***
- ***To avoid the duplication of parliamentary processes, joint public hearings of the Houses could be considered, as well as joint hearings of the NCOP and provincial legislatures.³⁶ Rules should be developed to enable the respective committees to sit together to hear oral evidence.³⁷***

CHAPTER VI: LEGISLATION HANDBOOK

56. Some countries have a legislation handbook which sets out the legislative process in fine detail. It stipulates the roles of the various stakeholders as well as the procedures to be followed in the different stages of making and amending laws. The handbook has an official status and serves as a general guide in relation to the legislative process.³⁸

57. It is recommended that such a legislation handbook be developed as a joint initiative between Parliament and the Executive. The handbook should set out the principles, processes and practices involved in making Acts of Parliament, from inception to completion. It should be a guide for everyone involved to better understand the parliamentary legislative process.

³⁶ The Constitutional Court recognised that it would be wasteful of government's limited resources if both the NCOP and the provinces were to hold separate public hearings in the provinces – *Doctors for Life*, par 161...

³⁷ Compare Joint rules 147 and 148 in relation to conferring by House committees.

³⁸ See eg the *Legislation Handbook* of the Commonwealth of Australia [<http://www.dpmc.gov.au/guidelines/docs/legislation> – accessed on 8 November 2008]. The Handbook covers the following subjects, amongst others: An overview of the legislation process, developing the legislation programme, policy approval, types of bills, preparation of drafting instructions, drafting a Bill, the process prior to introduction in Parliament, the passage of a Bill through Parliament, amendments to Bills, and the procedures after passage of a Bill. The appendices contain detailed information on certain procedures, samples of documents, and forms used for certain procedures.

Signed at Cape Town on November 2008.

Convener: Ms F I Chohan, MP

ANNEXURES

REFERENCES TO RELEVANT RULES AND CONSTITUTIONAL PROVISIONS

SCHEDULES TO DOCUMENT TITLED

REVIEWING THE LEGISLATIVE PROCESS IN PARLIAMENT

SCHEDULE 1

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- . Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- . Non-racialism and non-sexism.
- . Supremacy of the constitution and the rule of law.
- . Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Supremacy of Constitution

2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

National legislative authority

44. (1) The national legislative authority as vested in Parliament -

(a) confers on the National Assembly the power -

(i) to amend the Constitution;

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power -

(i) to participate in amending the Constitution in accordance with section 74;

(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary -

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

(4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

Internal arrangements, proceedings and procedures of

National Assembly

57. (1) The National Assembly may -

(a) determine and control its internal arrangements, proceedings and procedures;
and

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

(2) The rules and orders of the National Assembly must provide for -

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;

(c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and

(d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.

Public access to and involvement in National Assembly

59. (1) The National Assembly must -

(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken -

(i) to regulate public access, including access of the media, to the Assembly and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

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

Internal arrangements, proceedings and procedures of National Council

70. (1) The National Council of Provinces may -

(a) determine and control its internal arrangements, proceedings and procedures; and

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

(2) The rules and orders of the National Council of Provinces must provide for -

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation of all the provinces in its proceedings in a manner consistent with democracy; and

(c) the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy, whenever a matter is to be decided in accordance with section 75.

Public access to and involvement in National Council

72. (1) The National Council of Provinces must -

(a) facilitate public involvement in the legislative and other processes of the Council and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken -

(i) to regulate public access, including access of the media, to the Council and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

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

National Legislative Process

All Bills

73. (1) Any Bill may be introduced in the National Assembly.

(2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:

(a) a money Bill; or

(b) a Bill which provides for legislation envisaged in section 214.

[Sub-s. (2) substituted by s. 1 (a) of Act No. 61 of 2001.]

(3) A Bill referred to in section 76 (3), except a Bill referred to in subsection (2) (a) or (b) of this section, may be introduced in the National Council of Provinces.

[Sub-s. (3) substituted by s. 1 (b) of Act No. 61 of 2001.]

(4) Only a member or committee of the National Council of Provinces may introduce a Bill in the Council.

(5) A Bill passed by the National Assembly must be referred to the National Council of Provinces if it must be considered by the Council. A Bill passed by the Council must be referred to the Assembly.

Bills amending the Constitution

74. (1) Section 1 and this subsection may be amended by a Bill passed by -

(a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and

(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(2) Chapter 2 may be amended by a Bill passed by -

(a) the National Assembly, with a supporting vote of at least two thirds of its members; and

(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(3) Any other provision of the Constitution may be amended by a Bill passed -

(a) by the National Assembly, with a supporting vote of at least two thirds of its members; and

(b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment -

(i) relates to a matter that affects the Council;

(ii) alters provincial boundaries, powers, functions or institutions; or

(iii) amends a provision that deals specifically with a provincial matter.

(4) A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.

(5) At least 30 days before a Bill amending the Constitution is introduced in terms of section 73 (2), the person or committee intending to introduce the Bill must -

(a) publish in the national Government Gazette, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;

(b) submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and

(c) submit, in accordance with the rules and orders of the

National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

(6) When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures -

(a) to the Speaker for tabling in the National Assembly; and

(b) in respect of amendments referred to in subsection (1), (2) or (3) (b), to the Chairperson of the National Council of Provinces for tabling in the Council.

(7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of -

(a) its introduction, if the Assembly is sitting when the Bill is introduced; or

(b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.

(8) If a Bill referred to in subsection (3) (b), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.

(9) A Bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent.

Ordinary Bills not affecting provinces

75. (1) When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:

(a) The Council must -

(i) pass the Bill;

(ii) pass the Bill subject to amendments proposed by it; or

(iii) reject the Bill.

(b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.

(c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may -

(i) pass the Bill again, either with or without amendments; or

(ii) decide not to proceed with the Bill.

(d) A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent.

(2) When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead -

(a) each delegate in a provincial delegation has one vote;

(b) at least one third of the delegates must be present before a vote may be taken on the question; and

(c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote.

Ordinary Bills affecting provinces

76. (1) When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:

(a) The Council must -

(i) pass the Bill;

(ii) pass an amended Bill; or

(iii) reject the Bill.

(b) If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.

(c) If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.

(d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on -

(i) the Bill as passed by the Assembly;

(ii) the amended Bill as passed by the Council; or

(iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.

(f) If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if the Council passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent.

(i) If a Bill referred to the Council in terms of paragraph (f) or (h) is not passed by the Council, the Bill lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members.

(j) If a Bill referred to the Assembly in terms of paragraph (g) or (h) is not passed by the Assembly, that Bill lapses, but the Bill as originally passed by the Assembly may again be passed by the Assembly, but with a supporting vote of at least two thirds of its members.

(k) A Bill passed by the Assembly in terms of paragraph (e), (i) or (j) must be submitted to the President for assent.

(2) When the National Council of Provinces passes a Bill referred to in subsection (3), the Bill must be referred to the National Assembly and dealt with in accordance with the following procedure:

(a) The Assembly must -

(i) pass the Bill;

(ii) pass an amended Bill; or

(iii) reject the Bill.

(b) A Bill passed by the Assembly in terms of paragraph (a) (i) must be submitted to the President for assent.

(c) If the Assembly passes an amended Bill, the amended Bill must be referred to the Council, and if the Council passes the amended Bill, it must be submitted to the President for assent.

(d) If the Assembly rejects the Bill, or if the Council refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill must be referred to the Mediation Committee, which may agree on -

(i) the Bill as passed by the Council;

(ii) the amended Bill as passed by the Assembly; or

(iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses.

(f) If the Mediation Committee agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Council and the Assembly, and if it is passed by the Council and the Assembly, it must be submitted to the President for assent.

(i) If a Bill referred to the Assembly in terms of paragraph (f) or (h) is not passed by the Assembly, the Bill lapses.

(3) A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:

(a) Section 65 (2);

(b) section 163;

(c) section 182;

(d) section 195 (3) and (4);

(e) section 196; and

(f) section 197.

(4) A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation -

(a) envisaged in section 44 (2) or 220 (3); or

(b) envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government.

[Para. (b) substituted by s. 1 of Act No. 3 of 2003.]

(5) A Bill envisaged in section 42 (6) must be dealt with in accordance with the procedure established by subsection (1), except that -

(a) when the National Assembly votes on the Bill, the provisions of section 53 (1) do not apply; instead, the Bill may be passed only if a majority of the members of the Assembly vote in favour of it; and

(b) if the Bill is referred to the Mediation Committee, the following rules apply:

(i) If the National Assembly considers a Bill envisaged in subsection (1) (g) or (h), that Bill may be passed only if a majority of the members of the Assembly vote in favour of it.

(ii) If the National Assembly considers or reconsiders a Bill envisaged in subsection (1) (e), (i) or (j), that Bill may be passed only if at least two thirds of the members of the Assembly vote in favour of it.

(6) This section does not apply to money Bills.

Money Bills

77. (1) A Bill is a money Bill if it -

(a) appropriates money;

(b) imposes national taxes, levies, duties or surcharges;

(c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or

(d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except -

(a) a subordinate matter incidental to the appropriation of money;

(b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;

(c) the granting of exemption from national taxes, levies, duties or surcharges; or

(d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.

[S. 77 substituted by s. 2 of Act No. 61 of 2001.]

SCHEDULE 2

JOINT RULES OF PARLIAMENT

Public participation

6. (1) Members of the public may participate in the joint business of the Houses by -

(a) attending joint sittings of the Houses or meetings of joint committees;

(b) responding to public or specific invitations-

(i) to comment in writing on Bills or other matters before a joint committee; or

(ii) to give evidence or to make representations or recommendations before joint committees on such Bills or other matters, either in person or through a representative.

(2) Public participation in terms of subrule (1) is subject to, and must be exercised in accordance with, the applicable provisions of the Joint Rules.

Part 18: Joint Tagging Mechanism

Establishment

151. There is a Joint Tagging Mechanism consisting of -

(a) the Speaker and the Deputy Speaker; and

(b) the Chairperson and the permanent Deputy Chairperson of the Council.

Functions

152. The JTM serves, for purposes of parliamentary proceedings -

(a) as a decision-making structure to make final rulings in accordance with -

(i) joint rule 160 on the classification of all Bills introduced in the Assembly or the Council; and

(ii) joint rule 191 on whether a mixed section 75/76 Bill may be proceeded with or is out of order; and

(b) as a consultative structure for Assembly members and committees, Council members and committees, provincial delegations to the Council and joint committees to ensure that amendments to Bills do not render the Bill constitutionally or procedurally out of order in terms of joint rule 161.

Operating procedure

153. (1) Whenever the JTM must rule on the classification of a Bill or on a question whether a Bill or an amendment to a Bill is constitutionally or procedurally in order in terms of joint rule 161, the Bill, and a legal opinion on its classification or on the relevant question, must be submitted to the members of the JTM.

(2) The JTM decides the classification of a Bill or the question concerned by consensus. Consensus is reached when all available members of the JTM agree, provided that at least one from each House agrees.

(3) If there is no consensus the JTM must obtain a second legal opinion preferably from a constitutional expert approved by the JTM.

(4) When a matter is re-submitted to the members of the JTM they must without delay take a final decision on the matter, but are not bound by any legal advice.

(5) If the JTM is unable to reach consensus on the matter, the matter must be reported to the Assembly and the Council.

(6) If the Houses cannot resolve the matter through any other mechanisms at their disposal, a House may by resolution declare a dispute and apply to the Constitutional Court to resolve the dispute.

Submission of views to JTM

154. (1) Assembly and Council members and committees and provincial legislatures may submit their views on the classification of a Bill to the JTM in writing within the period stated in the ATC which may not be less than three working days.

(2) The JTM may not classify a Bill before the expiry of the period stated in the ATC.

JTM to be available at short notice

155. The JTM must be available at short notice, also during a recess of both or either of the Houses.

Time limits

156. The Joint Programme Committee may -

- (a) set a time limit for the JTM to make a final ruling on a Bill referred to it; or
- (b) extend any time limit set under paragraph (a).

Notification of classifications and findings

157. The JTM's classification of and, when appropriate, its findings on a Bill must without delay be -

- (a) tabled in the Assembly and the Council; and
- (b) conveyed to any Assembly committee, Council committee or joint committee to which the Bill may have been referred.

Binding force of JTM'S classifications and findings

158. For the purposes of all parliamentary proceedings the JTM's classification of and findings on a Bill are final and binding on both Houses

Chapter 4: Joint Legislative Process

Part 1: Steps Prior to the Introduction of Bills

Submission of draft Bills as approved by Cabinet to Speaker and Chairperson of Council

159. (1) A Cabinet member or Deputy Minister who intends introducing a Bill in the Assembly or who initiates the introduction of a Bill in the Council, must as soon as possible after the Bill has been approved by Cabinet, submit to the Speaker and the Chairperson of the Council -

- (a) the draft of the proposed Bill as approved by Cabinet, whether or not the draft has been legally or technically formalised as a proper draft Bill; and

(b) a memorandum explaining the objects of the proposed legislation.

Note: It is highly desirable that portfolio and select committees be informed of the content of proposed legislation well before the introduction of the legislation in order to assist them in planning and developing views on the legislation.

(2) The Speaker must refer the draft of the proposed Bill and the memorandum to the responsible portfolio committee and the Chairperson of the Council must refer the draft of the proposed Bill and the memorandum to the responsible select committee and the provincial legislatures in order -

(a) to assist the committee and legislatures in planning their work; and

(b) to enable the committee members and legislatures to acquaint themselves with and to develop their positions with regard to the proposed legislation.

(3) The Leader of Government Business in Parliament must liaise with Cabinet members to facilitate the implementation of this rule.

(4) This rule does not apply to -

(a) a money Bill in respect of which the responsible Minister follows the special introductory procedure set out in Assembly rule 288; or

(b) any other Bills in respect of which premature disclosure of their contents may result in prejudice to the state or the general public.

Part 2: Classification of Bills

Referral of Bills to JTM

160. (1) When a Bill is introduced it must without delay be referred to the JTM for classification in terms of this rule.

(2) When a Bill introduced as a constitution amendment Bill is referred to the JTM, it must make a finding on whether-

(a) the Bill is in fact a constitution amendment Bill;

(b) the Bill is in terms of section 74 of the Constitution required to be passed by both Houses or only by the Assembly;

(c) the Bill or any of its provisions is in terms of section 74 required to be passed by the Assembly with a supporting vote of at least two thirds or with a supporting vote of at least 75 per cent of the members;

(d) the Bill or any of its provisions is in terms of section 74 (8) required to be approved by any province or provinces before it is passed by the Council; and

(e) the Bill is constitutionally and procedurally in order.

(3) When a Bill introduced as a section 75 Bill is referred to the JTM, it must make a finding on whether the Bill -

(a) is in fact a section 75 Bill;

(b) includes any provisions to which the procedure prescribed in section 76 of the Constitution applies; and

(c) is constitutionally and procedurally in order.

(4) When a Bill introduced as a section 76 Bill is referred to the JTM, it must make a finding on whether the Bill -

(a) is in fact a section 76 Bill and if so, which of subsections (3), (4) or (5) of that section applies to the Bill;

(b) includes any provisions to which the procedure prescribed in section 75 applies; and

(c) is constitutionally and procedurally in order.

(5) When a Bill introduced as a mixed section 75/76 Bill is referred to the JTM, it must make a finding on whether the Bill -

(a) is in fact a mixed section 75/76 Bill; and

(b) is constitutionally and procedurally in order.

(6) Once it has made its findings, the JTM must classify the Bill as-

(a) a constitution amendment Bill;

(b) a section 75 Bill; or

(c) a money Bill;

(d) a section 76 Bill;

(e) a mixed section 75/76 Bill; or

(f) a Bill that is constitutionally or procedurally out of order.

When Bills are out of order

161. (1) A Bill is constitutionally out of order if it is in breach of -

(a) section 73 (2) or (4) of the Constitution, in that it was incorrectly introduced by an unauthorised person or committee;

(b) section 73 (3), in that the Bill was incorrectly introduced in the wrong House;

(c) section 74 (4), in that it contains both constitutional amendments and other provisions unconnected with those constitutional amendments;

(d) section 74 (5), in that the procedure prescribed in that section as a precondition for the introduction of the Bill has not been complied with; or

(e) section 77 (1), in that it is a money Bill that also deals with matters which are not subordinate and incidental to the appropriation of money or the imposition of taxes, levies or duties.

(2) A Bill is procedurally out of order if-

(a) the procedure prescribed in either the Assembly or Council rules as a precondition for the introduction of a Bill in the particular House has not been complied with;

(b) it is in breach of joint rule 172 in that it is a constitution amendment Bill that contains both constitutional amendments that may be passed by the Assembly alone and constitutional amendments that are required to be passed also by the Council;

(c) it is in breach of joint rule 193 in that it is a mixed section 75/76 Bill that was introduced in the Council; or

(d) it is in breach of joint rule 93 (b) in that a deadline set for the introduction of the Bill was not met and late introduction was not authorised

(3) Except as provided for in subrule (1) the JTM may not make a finding on the constitutional validity of the contents of a Bill.

Consequence of classification of Bill as constitutionally or procedurally out of order

162. (1) If the JTM classifies a Bill as constitutionally or procedurally out of order the Bill may not be proceeded with.

(2) Subrule (1) does not prevent a Bill-

(a) from being corrected and re-introduced, if it was found to be defective because of its contents; or

(b) from being re-introduced in accordance with the correct procedure, if it was found to be defective on a procedural point.

Reclassification of Bills

163. (1) The JTM may change the classification -

(a) of a mixed section 75/76 Bill to section 75 and section 76 Bills, if the Bill is split in terms of joint rule 194 (2)(a)(i), 196 (2)(a) or 200 (2) into separate section 75 and section 76 Bills;

(b) of a mixed section 75/76 Bill to either a section 75 or a section 76 Bill, if the Bill is amended in terms of joint rule 194 (2)(a)(ii) to become a section 75 or a section 76 Bill; or

(c) of a section 75 or a section 76 Bill to a mixed section 75/76 Bill, or a section 75 Bill to a section 76 Bill, or a section 76 to a section 75 Bill, but only if -

(i) the Bill was introduced in the Assembly; and

(ii) the Bill is amended before Second Reading of the Bill in the Assembly to become a mixed section 75/76 Bill, a section 76 Bill or a section 75 Bill, as the case may be.

(2) If the JTM reclassifies a Bill as a mixed section 75/76 Bill it must take a decision on the Bill as required by joint rule 191 (1)(a).

JTM may rule amendments constitutionally or procedurally out of order

164. (1) At any time before a House decides on an amendment to a Bill, the JTM may-

(a) rule the amendment constitutionally or procedurally out of order in terms of joint rule 161, whether or not the amendment has been referred to the JTM; and

(b) prescribe an ad hoc procedure with regard to the Bill to meet any procedural complications arising from its ruling in terms of paragraph (a).

(2) An amendment ruled out of order by the JTM may not be proceeded with.

(3) The JTM must without delay report to both Houses on any decision taken in terms of subrule (1).

Process in committee

167. (1) If the Bill has been published for public comment in terms of the Assembly or Council rules, the joint committee to which the Bill is referred may arrange its business in such a manner that interested persons and institutions have an opportunity to comment on the Bill.

(2) If a Bill has not been published for public comment, and the committee considers public comment on the Bill to be necessary, it may by way of invitations, press statements, advertisements or in any other manner, invite the public to comment on the Bill.

(3) The committee -

(a) must enquire into the subject of the Bill and report on it to both the Assembly and the Council;

(b) if it is a Bill amending provisions of an Act, may seek the permission of the Houses to inquire into amending other provisions of that Act;

(c) may consult the member in charge of the Bill;

(d) may consult any other joint committee or any Assembly or Council committee that has a direct interest in the substance of the Bill;

(e) may consult the JTM on whether any amendments to the Bill proposed in the committee -

(i) may affect the classification of the Bill: or

(ii) may render the Bill constitutionally or procedurally out of order within the meaning of joint rule 161;

(f) may not propose an amendment that -

(i) changes the classification of the Bill except as provided for in subrule (4) and joint rule 163; or

(ii) renders the Bill constitutionally or procedurally out of order within the meaning of joint rule 161;

(g) may recommend approval or rejection of the Bill or present with its report an amended Bill or a redraft of the Bill; and

(h) must report to both Houses in accordance with joint rule 168.

(4) The committee may propose an amendment that changes the classification of a section 75 or section 76 Bill to a mixed 75/76 Bill only if the JTM is of the view that the Bill as amended is unlikely to lead to unmanageable procedural complications.

Note: Subrule (4) must be suspended until the proposed procedure for mixed Bills is implemented.

Chapter 4: Part 7

Procedure for mixed 75/76 Bills

Note: The procedure for mixed section 75/76 Bills suggested below, is based on the following premises:

(1) A procedure can be provided only for mixed Bills introduced in -the Assembly Mixed Bills introduced in the Council are unconstitutional in that they contain section 75 provisions which cannot be introduced in the Council.

(2) Mixed Bills bound to lead to procedural confusion should be identified and disallowed at an early stage in the Assembly proceedings. A "screening " process for this purpose is essential.

(3) Procedural confusion can only occur -

(a) in the event of disagreement between the Houses; in other words when mediation, special NA majorities, etc., come into play; or

(b) when the two voting procedures in the Council lead to different results (see par. 7 below).

(4) Proper consultation between the Houses throughout the process (through conferring committees and joint committees) may minimise the likelihood of disputes between the Houses.

(5) The screening process should also apply to amendments.

(6) The Assembly and the Council should be able to convert mixed Bills into pure section 75 or section 76 Bills when a disagreement or a likelihood of a disagreement between the Houses arises.

(7) When a mixed Bill is referred to the Council, the Council should decide the Bill by a vote of provinces as well as by a vote of individual delegates.

(8) If this is done there is no need for the Council to distinguish between section .75 and section 76 provisions in the Bill.

(9) Provinces can give their mandates on the Bill as a whole.

(10) If procedural complications arise because of a disagreement between the Houses or when the two - voting procedures in the Council lead to different results, the mixed Bill should be split into separate section 75 and section 76 Bills and be dealt with accordingly.

(11) Each Bill should be considered and decided separately the Council and then proceeded with in terms of the relevant rules applicable to section 75 and section 76 Bills respectively.

(12) If a procedure for mixed section 75/76 Bills is politically acceptable, it would be advisable to refer the rules contained in this Part to the Constitutional Court for a ruling on their constitutionality. If the Court rules against this procedure, a constitutional amendment to authorise rules for such a procedure should be considered.

Note: The Joint Rules Committee approved Part 7 but decided that implementation should be held in abeyance pending legal clarity on its validity.

Mixed section 75/76 Bills introduced in Assembly

191. (1)

(a) If a Bill introduced in the Assembly is classified or reclassified by the JTM as a mixed section 75/76 Bill, the JTM must decide whether the Bill may be proceeded with or ruled out of order.

(b) In reaching its decision the JTM may require the appropriate Assembly portfolio and Council select committees to confer on the matter for advice.

(2) A mixed section 75/76 Bill must be ruled out of order unless -

(a) the Bill is of such a nature that a dispute between the Houses is unlikely to arise;

(b) the Bill is drafted in such a way that it would be possible to isolate the provisions in the Bill to which section 75 and section 76, respectively, apply should it become necessary during the proceedings -

(i) to split the Bill into two separate section 75 and section 76 Bills; or

(ii) to amend the Bill in order that it becomes either a section 75 or a section 76 Bill;
or

(c) the Bill is for any other reason unlikely to lead to unmanageable procedural complications.

(3) If the JTM cannot agree whether the Bill should be proceeded with, or ruled out of order, the Bill must be regarded as being out of order.

Consequence of decision

192. (1) A Bill ruled out of order may not be proceeded with in its format as a mixed section 75/76 Bill, but may be split into separate section 75 and section 76 Bills and reintroduced in the Assembly in terms of the Assembly rules.

(2) If a Bill is not ruled out of order, it must be proceeded with in terms of the applicable Assembly rules, subject to joint rule 194.

Mixed section 75/76 Bills introduced in the Council

193. If a Bill introduced in the Council is classified by the JTM as a mixed section 75/76 Bill, the Bill may not be proceeded with, but that part of it that falls within section 76 (3) of the Constitution may be separated and reintroduced as a separate section 76 Bill in the Council in terms of the Council rules.

Language requirements for Bills

220. (1) A Bill introduced in either the Assembly or the Council must be in one of the official languages. The Bill in the language in which it is introduced will be the official text for purposes of parliamentary proceedings.

(2) The official text of the Bill must be translated into at least one of the other official languages before the official text is sent to the President for assent.

[NCOP Subcommittee proposes that subrule (2) be replaced as follows:

(2) When a Bill is introduced it must be accompanied by at least one official translation].

(3) The cover page of a Bill must specify which language version is -

(a) the official text; and

(b) an official translation.

(4) In parliamentary proceedings only the official text of a Bill is considered, but the Secretary must ensure that all amendments to the official text are reflected in the official translation or translations.

Referral of Bills to President for assent

221. When the official text of the Bill is sent to the President for assent it must be accompanied by the official translation or translations.

Subsequent amendments

222. (1) If an Act passed after the adoption of joint rule 220 is amended, the official text of the amendment Bill amending that Act may be in any of the official languages.

(2) If the official text of the Bill is not in the same language as the signed text of the Act that is amended, then one of the official translations of the Bill must be in the language of the signed

SCHEDULE 3

RULES OF THE NATIONAL ASSEMBLY

Prior notice and publication of draft legislation

241(1) A bill may be introduced in the Assembly only if —

- (a) a copy of the draft legislation has been submitted to the Speaker in terms of Rule 233, if it is a bill initiated by the national executive and that Rule is applicable;
- (b) prior notice of its introduction has been given in the *Gazette*; and
- (c) an explanatory summary of the bill, or the draft bill as it is to be introduced, has been published in the *Gazette*.

(2) If the bill as it is to be introduced is published, the notice referred to in Subrule (1)(b) must contain an invitation to interested persons and institutions to submit written representations on the draft legislation to the Secretary within a specified period.

(3) If the draft bill itself is published, a memorandum setting out the objects of the bill must also be published.

(4) This Rule does not apply to —

- (a) constitution amendment bills, which must be dealt with in terms of Rule 258; and
- (b) money bills when the special procedure set out in Rule 287(2) is followed.

(5) Subrule (1) (b) and (c) does not apply to a bill that has been certified by the member in charge of the bill, in consultation with the Speaker, as an urgent matter.

Introduction of bills in Assembly

243 (1) A Cabinet member or Deputy Minister or an Assembly member or committee introduces a bill (other than a bill mentioned in Subrule (4)) by submitting to the Speaker —

- (a) a copy of the bill or, if the bill as it is introduced was published in terms of Rule 241(1)(c), a copy of the *Gazette* concerned;
- (b) the explanatory summary referred to in Rule 241(1)(c), if the bill itself was not published; and

- (c) a supporting memorandum which must —
- (i) state whether the bill is introduced as a section 75 bill, a section 76(1) bill, a money bill or a mixed section 75/76 bill;
 - (ii) explain the objects of the bill;
 - (iii) give an account of the financial implications of the bill for the state;
 - (iv) contain a list of all persons and institutions that have been consulted in preparing the bill; and
 - (v) if the bill is introduced by a Cabinet member or a Deputy Minister, include a legal opinion by a State law adviser, or a law adviser of the State department concerned, on the classification of the bill and any other question in respect of which the JTM is required to make a finding in terms of Joint Rule 160.

- (1A) A bill introduced by a Cabinet Member or Deputy Minister must be certified by the Chief State Law Adviser or a state law adviser designated by him/her as being-
- (a) consistent with the Constitution; and
 - (b) properly drafted in the form and style which conforms to legislative practice.

- (1B) If a Bill is not certified as contemplated in subrule (1A), the Bill must be accompanied by a report or legal opinion by a state law adviser mentioned in subrule (1A) on why it has not been so certified.

[Subrules (1A) and (1B) inserted, September 2002]

- (2) A bill introduced by a Cabinet member or Deputy Minister must contain on its cover page a reference to that Cabinet member or Deputy Minister as the person introducing the bill.

- (3) A bill introduced by an Assembly member or committee with the Assembly's permission in terms of Rule 236(3) or 238(3) must —
- (a) be accompanied by a statement to that effect; and
 - (b) contain on its cover page a reference to the name of the member or the committee as the member or committee introducing the bill.

- (4) This Rule does not apply to —
- (a) constitution amendment bills, which must be introduced in accordance with Rule 260; and
 - (b) money bills when the special procedure set out in Rule 287(2) is followed.

- (5) Bills initiated by Assembly members or committees may be introduced only when the Assembly is in session.

Process in committee

249 (1) If a bill has been published for public comment in terms of Rule 241 or 258, the Assembly committee to which the bill is referred must arrange its business in such a manner that interested persons and institutions have an opportunity to comment on the bill.

(2) If a bill has not been published for public comment, and the committee to which the bill is referred considers public comment on the bill to be necessary, it may by way of invitations, press statements, advertisements or in any other manner, invite the public to comment on the bill.

(3) The committee —

(a) must inquire into the subject of the bill and report on it to the Assembly;

(b) if it is a bill amending provisions of legislation, may seek the permission of the Assembly to inquire into amending other provisions of that legislation;

(c) may, or if ordered by the Speaker must, consult any other committee that has a direct interest in the substance of the bill;

(d) may consult the member in charge of the bill;

(e) may consult the JTM on whether any amendments to the bill proposed in the committee —

(i) may affect the classification of the bill; or

(ii) may render the bill constitutionally or procedurally out of order;

(f) may not propose an amendment that —

(i) affects the classification of the bill, except as provided in Subrule (4) and Joint Rule 163; or

(ii) renders the bill constitutionally or procedurally out of order within the meaning of Joint Rule 161;

(g) may recommend approval or rejection of the bill or present with its report an amended bill or a redraft of the bill; and

(h) must report to the Assembly in accordance with Rule 251.

(i) may report to the Assembly on a Bill introduced in the Assembly and classified as being subject to section 18(1) of the Traditional Leadership and Governance Framework Act, 2003, only after 30 days have passed since the referral to the National House of Traditional Leaders in terms of rule 332.

[Rule 249(3)(i) inserted, 13 September 2005]

(4) The committee may propose an amendment that changes the classification of a section 75 or section 76 bill to a mixed 75/76 bill only if the JTM is of the view that the bill as amended is unlikely to lead to unmanageable procedural complications.

[Note: Subrule (4) must be suspended until the proposed procedure for mixed bills is implemented.]

Second Reading

- 253 (1) (a) If a bill has been referred to an Assembly or joint committee, the debate on the Second Reading of the bill may not commence before at least three working days have elapsed —
- (i) since the committee's report was tabled; or
 - (ii) if a committee member has addressed the Assembly in terms of Rule 252, since the address was delivered.
- (b) If a bill has not been referred to a committee, the debate on the Second Reading of the bill may not commence before at least three Assembly working days have elapsed since the bill was introduced.

Introduction of constitution amendment bills

- 260 (1) A Cabinet member or Deputy Minister or an Assembly member or committee introduces a constitution amendment bill by submitting to the Speaker —
- (a) a copy of the bill, or if the bill itself, as it is introduced, has been published in the *Gazette* to give effect to section 74 (5) of the Constitution, a copy of the *Gazette*;
 - (b) a supporting memorandum which must —
 - (i) state that the bill is introduced as a constitution amendment bill;
 - (ii) explain the objects of the proposed constitutional amendment;
 - (iii) give an account of the financial implications of the proposed constitutional amendment for the state;
 - (iv) contain a list of all persons and institutions that have been consulted in preparing the bill; and
 - (v) if the bill is introduced by a Cabinet member or a Deputy Minister, include a legal opinion by a State law adviser, or a law adviser of the State department concerned, on the classification of the bill and any other question in respect of which the JTM is required to make a finding in terms of Joint Rule 160; and
 - (c) any written comments on the bill envisaged in section 74 (6) of the Constitution.
- (2) A constitution amendment bill introduced by a Cabinet member or a Deputy Minister must contain on its cover page a reference to that Cabinet member or Deputy Minister as the person introducing the bill.
- (3) A constitution amendment bill introduced by an Assembly member in an individual capacity or by an Assembly committee with the Assembly's permission in terms of Rule 236 (3) or 238 (3) must —
- (a) be accompanied by a statement to that effect; and
 - (b) contain a reference on its cover page to the name of the member or

committee as the member or committee introducing the bill.

(4) Constitutional amendment bills initiated by Assembly members or committees may be introduced only when the Assembly is in session.

Introduction of money bills

286. (1) Only the Minister of Finance may introduce a money bill.

(2) The Minister must introduce a money bill by following either the ordinary procedure set out in Rule 243 or the special procedure set out in Rule 287 (2), but if it is a bill appropriating money for the ordinary annual services of the government or imposing taxes, levies or duties for this purpose, the special procedure must be followed. The Minister must consult the Speaker when exercising a choice in terms of this Rule.

[Note:(1) The constitutional definition of "money bill" covers financial measures beyond the budget. A law imposing a levy for some odd reason, say to finance the activities of an agricultural control body, would fall within the definition of "money bill". It would seem that Rule 287(2) should be applied to budgetary measures as is customarily the case, but that the Minister should have a discretion to apply either Rule 287(2) or the ordinary procedure prescribed in Rule 243 for other "money bills".

(2) It must also be noted that only the Minister of Finance may introduce a money bill. (See sec. 73(2) of the Constitution.) The odd levy in say an agricultural bill introduced by the Minister of Agriculture may for this reason jeopardise the constitutionality of such a bill and also the levy. In such instances the provisions dealing with the levy should be included in a separate bill which would require introduction by the Minister of Finance.]

Procedure applicable to money bills

287. (1) If the ordinary procedure is followed, the bill in all respects must be dealt with in the Assembly as if it were an ordinary section 75 bill, subject to any legislation envisaged in section 77 (2) of the Constitution.

[Note: A money bill can be amended but the Constitution requires that a procedure be prescribed by an Act of Parliament. Proposed legislation in this regard is presently being attended to by the NA Portfolio Committee on Public Finance.]

(2) If the special procedure is followed, Parts 2, 3 and 4 of this Chapter do not apply and the bill must be dealt with in the Assembly in accordance with the following specific Rules.

[Note: The special introductory procedure comes from the existing Rules. These Rules may need to be replaced in view of procedures presently being attended to by the Portfolio Committee on Public Finance.]

Special introductory procedure

288. (1) The Minister in charge of the bill must deliver an introductory speech in the Assembly on the appointed day.

(2) After having delivered the introductory speech, the Minister must introduce the bill by tabling it and any accompanying schedule and papers in the Assembly: Provided that if the introductory speech was delivered by a Minister other than the Minister of Finance, that other Minister must introduce and table the bill on behalf of the Minister of Finance.

[Notes: This is necessary in view of the constitutional provision that only the Minister of Finance may introduce money bills.]

Bill placed on Order Paper for First Reading

289. (1) After introduction of the bill in terms of Rule 288 the Speaker must place the bill on the Order Paper for First Reading.

(2) The First Reading of the bill may be considered only after the report of the committee to which it was referred in terms of Rule 290 has been presented to the Assembly.

(3) If the Assembly rejects the First Reading of the bill, it rejects the bill.

SCHEDULE 4

RULES OF THE NATIONAL COUNCIL OF PROVINCES

Public participation

5. (1) Members of the public may participate in the proceedings of the Council by:

(a) attending sittings of the Council or meetings of Council committees;

(b) submitting petitions to the Council on any matter within the Council's competence;

(c) responding to public or specific invitations:

(i) to comment in writing on Bills or other matters before, or which are due to come before, the Council;

(ii) to make representations or recommendations in writing on such Bills or other matters; or

(iii) to give evidence or to make representations or recommendations before Council committees on such Bills or other matters, either in person or through a representative.

(2) Public participation in terms of subrule (1) is subject to, and must be exercised in accordance with, the applicable provisions of these Rules.

(3) The public has access to all official notices to members and to all documents tabled in the Council, subject to reasonable measures taken by the Chairperson of the Council to regulate such access, in a manner consistent with national laws.

Publication of section 76 (2) Bills

Prior notice and publication of draft legislation.

186. (1) A section 76(2) Bill, whether initiated by a Council member or committee or which is to be introduced by a Council member or committee on request of the national executive or a provincial executive or legislature, may be introduced in the Council only if -

(a) prior notice of its introduction has been given in the Gazette; and

(b) an explanatory summary of the Bill, or the draft Bill as it is to be introduced, has been published in the Gazette. The draft Bill itself, as it is to be introduced, must be published if the Chairperson of the Council so orders.

(2) The notice referred to in subrule (1)(a) must contain an invitation to interested persons and institutions to submit written representations on the draft legislation to the Secretary within a specified period.

(3) The Council committee or member intending to introduce the Bill must consult the Chairperson on whether the draft Bill itself or an explanatory summary should be published.

Introduction of section 76 (2) Bills

Method of introduction

188. (1) A Council member or committee introduces a section 76 (2) Bill by submitting to the Chairperson of the Council –

(a) a copy of the Bill or, if the Bill as it is introduced was published in terms of rule 186, a copy of the Gazette concerned;

(b) the explanatory summary referred to in rule 186 (1) (b), if the Bill itself was not published; and

(c) a supporting memorandum which must –

(i) state that the Bill is introduced as a section 76 (2) Bill;

(ii) explain the objects of the Bill;

(iii) give an account of the financial implications of the Bill for the state; and

(iv) contain a list of all persons and institutions that have been consulted in preparing the Bill.

(2) The Bill must contain on its cover page –

(a) a reference to the name of the member or committee as the member or committee introducing the Bill; and

(b) a statement to the effect that the Bill is introduced –

(i) with the permission of the Council; or

(ii) on request of the national executive or a provincial executive or legislature.

Committee's functions

193. The select committee or other Council committee to which the Bill is referred –

- (a) must enquire into the subject of the Bill; and
 - (b) if it is a Bill amending provisions of an Act, may seek the permission of the Council to enquire into amending other provisions of that Act;
 - (c) may, or if ordered by the Chairperson of the Council must, consult with any other committee that has a direct interest in the substance of the Bill;
 - (d) may consult the person in charge of the Bill;
 - (e) consult with the appropriate Assembly portfolio committee or chairperson of that committee;
 - (f) may consult the JTM on whether any amendments to the Bill proposed in the committee –
 - (i) may affect the classification of the Bill; or
 - (ii) may render the Bill constitutionally or procedurally out of order within the meaning of joint rule 161;
 - (g) may not propose an amendment that –
 - (i) changes the classification of the Bill;
 - (ii) renders the Bill constitutionally or procedurally out of order within the meaning of joint rule 161;
 - (h) may recommend approval or rejection of the Bill or present an amendment Bill; and
 - (i) must report to the Council in accordance with rule 196.
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