Report on Organs of the State Accountable to and Overseen by Parliament

Final Version

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Chapter 1

Introduction

The Democracy and Governance Programme at the Human Sciences Research Council (HSRC) is pleased to submit this report on *An Audit of Public Institutions and Organs of State Accountable to and Overseen by Parliament*. The report details the terms of reference (ToRs) defining the parameters of this study; how we understood and approached the objective of the study; a detailed description of the methodology; research method and related outcomes; as well as an analysis of the data acquired during the study. In addition, we consulted key informants in the research and legal community in order to reflect as much as possible on challenges pertinent to oversight and accountability in relation to procuring and analyzing data on state organs.

This introductory section provides an overview of the motivation behind the study, the formal objectives of the study, a comparative and legal examination of the questions underpinning these objectives, and concludes with a summary of the report's full contents.

1.1. Motivation for this Study

Our understanding of the need for this study was gleaned from a variety of documents and conversations exchanged between the researchers and Parliament's study team. Amongst the key factors influencing the commissioning of this study was to support South Africa's Parliament to pay greater attention to overseeing and holding Constitutional, Statutory and Executive bodies accountable for the implementation of legislation. Since 1994, much of Parliament's work focused on the review and drafting of legislation consistent with South Africa's political transformation. This study was intended to support Parliament to perform its oversight role, by acquiring information on public bodies required to account to it. A related and perhaps secondary motivation for this study can be traced to a series of activities being implemented by Parliament, all of which have been aimed at strengthening its ability in respect of oversight and accountability. This was conveyed to the researchers in a briefing on September 12, 2005. [1] These activities included a constitutional landscaping study, an analysis of institutions supporting democracy, and a focus group dealing specifically with enhancing the ability of parliamentary committees to perform oversight.

Such activities require structured baseline information on the existence, functions and obligations of bodies operating according to a public mandate. This information is imperative for lawmakers

[1] PowerPoint presentation entitled: Oversight and Accountability, presented to the HSRC by Parliament.

to be able to track and monitor the implementation of legislation where the form and functions of state bodies undergo constant change.

1.2. Summary and Understanding of the Terms of Reference

The objectives of this study were to:

- Determine the "scope" of the oversight and accountability role of the National Assembly (*in particular*), and to present Parliament with an electronic database that captures relevant information",
- Capture information on relevant fields including, *inter alia*, full identification (i.e. contact) details of bodies, bodies exercising powers and performing functions in terms of section 239 of the Constitution, bodies receiving state funding, the legal relationship of bodies to Parliament and the Government, as well as line function departments responsible for bodies.
- In further conversation with Parliament's study team, the HSRC suggested that we also try to obtain data on the latest available audit outcomes of bodies.

In meetings with parliamentary officials, the need for the National Assembly to acquire specific information on "organs of state", which on the basis of this identity, had a legal obligation to account to and be overseen by Parliament, was emphasized. The nature of the audit was thus dependent on certain legal conditionalities. Moreover, section 239 of the Constitution fundamentally informed our approach to acquiring and analyzing this data. We could not however, in keeping with the emphasis of this study, restrict ourselves to legal opinion and case law alone, when defining an organ of state, as this had proven inconclusive in previous pioneering work on the subject (the Corder Report, 1999; Parliament's Ad Hoc Joint Sub-Committee's Response, 2002). Our approach had to therefore subject an initial legal interpretation of section 239 to a concurrent attempt at documenting and classifying various state bodies that could potentially fall under the ambit of section 239.

Amongst the core functions of Parliament as stipulated by the Constitution is "oversee[ing] the actions of all organs of state and hold[ing] the national executive accountable". This firstly implies that the national executive and its constituent bodies are representative of said "organs", as well as assuming accountability of other bodies that would also presumably be defined as an "organ". Interestingly, the primary objective (point 6) of the ToR emphasized section 55 of the Constitution, which concerns the "powers of the National Assembly". The functions of the National Assembly according to section 55 include:

- Acting as the national legislator, initiating legislation except in the instance of money bills, and considering, passing, amending or repealing any legislation;
- Providing mechanisms to hold accountable all executive organs of state in the national sphere of government;
- Providing mechanisms to maintain oversight of national executive authority, including the implementation of legislation;
- Providing mechanisms to maintain oversight of any organ of state.

The National Council of Provinces has the power to consider, pass, amend, or reject legislation before it, and may initiate legislation of the type provided for in Constitution.[2]

The functions of provincial legislatures are to[3]:

- Act as provincial legislators, initiate and prepare legislation and consider pass or amend or reject any bill;
- Provide for mechanisms to hold accountable provincial executive organs of state in the province;
- Provide mechanisms to maintain oversight over the exercise of provincial executive authority in the province and any provincial organs of state.

1.2.1. Debating Parliamentary Oversight and Accountability: The National Council of Provinces

As indicated earlier, the thrust of the ToR concerns section 55(2) and the National Assembly's oversight obligations. This is directed principally but not exclusively at the exercise of national executive authority, as well as "any organ of state". [4] The decentralized structure of the South African state, coupled with the constitutional principle of "co-operative government", which stipulates that all three spheres of government are distinctive, interdependent, and interrelated, requires that an evaluation of parliamentary oversight must extend to all structures of Parliament playing an oversight role. It is imperative therefore that the oversight role of the National Council of Provinces (NCOP) is considered and distinguished from that of the National Assembly, which together comprise South Africa's Parliamentary architecture.

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[2] Section 68 of the Constitution

[3] Section 114 of the Constitution

[4] It is interesting to note that section 55(2), which specifically concerns the powers of the National Assembly, indicates in addition to oversight over "executive" organs of state in the national sphere of government, "any" organ of state, which could presumably then; depending upon an interpretation of section 239, comprise those at national, as well as provincial and local spheres. The powers of the NCOP are clearer as it concerns provincial and certain matters pertaining to local government.

Within the context of this study, which pivots around section 55(2) of the Constitution, the question at issue is: where does the NCOP fit in relation to the constitutional obligations borne by the NA, which is to maintain oversight over the exercise of "national executive authority" and "any organ of state"? It has been generally accepted that the NCOP is required to perform oversight functions, where these however differ from those of the NA. Calland (1999: 44) sought to explain this by observing that the NCOP does not have a mandate to exercise oversight over the executive "in the same way" as that granted to the NA by section 55. In their report on Parliamentary oversight and accountability, Corder, Jugwanth and Soltau (1999: 46) elaborated by stating that section 102 gives the NA the "ultimate" oversight power in relation to the national executive, that of the power to dissolve cabinet. While the NCOP does not retain such a power, the authors make the point that a reading of the Constitution leaves one in no doubt that the Executive is accountable to the NCOP via section 92(2). This states that members of cabinet (i.e. the national executive) "are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions". The operative word is "Parliament", which comprises the NA and the NCOP. The NCOP may exercise this accountability via, section 66 (2), requiring a member of the national and provincial executive to attend a meeting or a committee of the Council; together with section 69, which bestows upon the NCOP similar powers of summons and reporting as that held by the NA (Calland 1999: 44, see also Mkonto 1999).

Having established that the NCOP does possess an oversight role, further understanding can be gained by considering its position in the context of inter-governmental relations. For example, constitutional expert Christina Murray described the NCOP as a "linking mechanism that acts simultaneously to involve the provinces in national purposes and to ensure the responsiveness of national government to provincial interests" (NCOP 1999: 7). Beyond the national and provincial spheres, the NCOP is viewed as enabling the provincial sphere to work with national and local government in a "single legislative process" (ibid: 5). The argument is that the Council does not simply represent provincial interests on the national stage, but ensures that the interests of provinces are included in the exercise of national executive authority. Having said this, in formulating recommendations on levels and means of oversight, distinctions between the oversight and accountability responsibilities of the NA and NCOP, will be recognized. With respect to the latter, the following issues have been identified as potentially useful guiding provisions [5]

[5] See NCOP (1999: 24); Corder, Jugwanth and Soltau (1999: 23).

- Distinguishing between section 75 (Ordinary bills not affecting provinces) and section 76 (Ordinary bills affecting provinces), notwithstanding the fact that the Constitution requires bills other than section 76 to be considered by the NCOP, via section 44(1)(b)(iii) (NCOP 1999: 15). Relevant bills would be those conferring a public power or public function onto an organ of state;
- Section 100 interventions (national supervision of provincial administration);
- Section 139 interventions (provincial supervision of local government);
- Section 125(2)(b)(c), concerning the executive authority of provinces and the implementation of national legislation in particular (as this concerns state organs);
- Section 125(4) any dispute concerning the administrative capacity of a province with respect to any function must be referred to the NCOP for resolution;
- Section 216, concerning the stoppage of funds being transferred from the Treasury to a province, requiring the approval of both houses of Parliament.

A final point concerning the oversight role of the NCOP as it may impact on organs of state, refers to Corder, Jugwanth and Soltau's (1999: 23-24) position that the NCOP has a role to play in monitoring the effectiveness of IGR mechanisms in any field. The authors suggest that the NCOP exercises oversight over the "general structure and procedures" of intergovernmental relations, where it would seem logical that "intergovernmental executive *bodies*" should be subject to the oversight of the legislative body reflecting the multi-governance of South Africa. This seems to suggest that our analysis may need to distinguish amongst organs of state, those that could be termed "intergovernmental executive bodies", such as, the Department of Provincial and Local Government, and the South African Local Government Association.

1.2.2. Oversight and "Organs of State"

We now turn to a consideration of Parliament's obligation to perform an oversight role, which in the case of the NA is contained in section 55(2). This necessitates an understanding of the term "organ of state". The relationship between section 55 and section 239 of the Constitution underpins this question and indeed this entire study, which obligates the National Assembly to create mechanisms to ensure that organs of state in the national sphere of government are accountable to it (a); and to maintain oversight of the exercise of national executive authority (b)(i) and "any organ of state" (b)(ii). Thus, the definition of an organ of state is a prerequisite and material to the NA's ability to perform oversight and enforce accountability.

The ToR did not conclude on a definition of "organ of state", but did provide some hints as to how the researchers should proceed to investigate whether state bodies potentially fell under this

definition. A range of "information fields" were mentioned, on which the researchers was tasked with acquiring information. These included a body's "legal relationship to Parliament", whether a body received state funding via the National Revenue Fund, whether a body was required to comply with the Public Finance Management Act (No. 1 of 1999), and the body's "line function department". This last variable was mentioned in the *Announcements, Tablings and Committee Reports* (11 February 2004: 95, section 6.1), which referred to the commissioning of an audit of various bodies exercising public powers or performing public functions..." which should in addition clearly delineate which line function departments were responsible for the various organs of state.

The relationship between section 55 and section 239 is thus not one that was neatly defined in the ToR, and perhaps could not be. On the one hand the challenge for this study lay in providing a more conclusive definition of an "organ of state", based on legal opinion and the developing case law. On the other hand however the practicalities that the NA faces in consistently and resolutely applying such a definition when performing its daily oversight and accountability roles, has meant that it has had to subject such a legal interpretation to a host of other factors, including political and financial accountability-which may or may not have a bearing on a body's legal position as an "organ of state". [6] This was as much conceded in the Ad Hoc Joint Sub-Committee's Report on Oversight and Accountability (2002: 29), which in relating section 55(2) to "organs of state", appreciated the difficulty present in the "myriad" of bodies that could be covered by the phrase "organ of state". As daunting as that task appeared, it was said to require at least a concerted attempt to determine exactly how onerous such an exercise could be. This task essentially defined the present study on oversight and accountability.

1. 3. Defining Oversight and Accountability

The purpose of this study is to strengthen the role of Parliament in performing oversight and ensuring accountability. This is captured in section 55 of the Constitution. In response to this purpose and the aforementioned objectives, it is useful to situate this study in a broader context of what oversight and accountability implies in a system of government. The researchers referred first to how this question was dealt with by Corder, Jagwanth and Soltau's (1999) report on parliamentary oversight and accountability. In their report the authors defined accountability as giving account of actions or policies, or to account for actions, i.e. against certain expectations, commitments and mandates[7]. Although there appears to be a distinction here between giving an

[6] This includes the Ad Hoc Joint Sub-Committee's (2002: 7) reference to Parliament developing mechanisms to oversee organs of state, which may follow two broad approaches: "tracking the path of huge allocations of public money", and "focusing on issues of National Interest".

[7] The Ad Hoc Joint Sub-Committee's subsequent report (2002: 18) defined this in terms of "objective criteria".

account of certain actions, in practice, and accounting for actions in principle, the distinction between these views share a common variable. That is, giving an account of or accounting for actions must be performed against some mutually agreed expectations, commitments, and mandates. Although the precise details may differ, the principle remains a fundamental aspect of accountability.

The Corder (1999: 2) Report also distinguished oversight by referring to it as the "monitoring or review" of actions, said to traverse a far wider range of activity than accountability. Implicit in this distinction between oversight and accountability, seems to be that the onus of responsibility or initiative emphasizes the means (and these could vary) through which the overseer initiates and renders this function, which is furthermore dependent on accountability. We would further argue, as we did in our proposal (HSRC 2005: 3), that "legislative *oversight* is largely an instrumental means designed to ensure as well as influence executive *accountability*. The resulting quality of executive accountability is also considered a reflection of the strength of legislative oversight. In arguing this point, we would have to identify what variable or set of variables would be most critical for assuring the strength of the instruments through which parliamentary oversight is exercised.

Here, we may refer to the importance of information on public bodies said to be accountable to Parliament. One may also refer to Monstad's (1999: 15) study, which evaluated the post apartheid Parliament's oversight of the Executive branch of government. In this study, an elementary yet significant point was submitted, that "Accountability is linked to information. The rulers must provide the public with accurate information about how they performed their functions. This is done to determine responsibility for actions and decisions". Although implying an accountability relationship between rulers (Executive branch) and ruled (the public), the status of Parliaments as comprising representatives of the ruled, invests this body with a significant degree of responsibility for ensuring that accountability takes place, and correspondingly that oversight is performed. Furthermore this responsibility requires the acquisition and constant improvement in the ability to access and utilize information to inform the scope and practice of oversight and accountability.

1.3.1. International Experience on Parliamentary Oversight and Accountability

International experience from developing and developed countries demonstrates what a challenging task Parliaments face in accessing and utilizing information to perform oversight and accountability. Examples from African experience include a 2001 gathering of members of parliaments and legislatures in southern Africa, for a series of workshops on parliamentary

efficacy. The discussion in this forum acknowledged that parliamentarians needed to acquire knowledge, "sometimes in very precise ways", to be able to contribute constructively to the development, implementation and oversight of public policy (2001: 391). One of the key impediments to acquiring and acting on this knowledge in the region was said to be furnishing parliaments with the required tools, which when linked to the acquisition of knowledge, must comprise tools to access and maintain information pertinent to overseeing public policy.

Another factor impacting on information is Coghill's (1999: 199) argument that "Government and politics are now far too complex and sophisticated for the traditional straight line of accountability described by the doctrine [ministerial responsibility]". Referring to his PhD Dissertation analyzing Australian experience, he argued that "Sittings should extend beyond the dictates of the executive's legislative programme and be structured to facilitate questioning and debate on the discharge of ministerial responsibility". He added that flow of information was the lifeblood of accountability, adding that effective ministerial responsibility (and perhaps the assurance of this) had to recognize that this operated through a complex network, which extended beyond parliament as an institution, "constantly interacting [through a] range of institutions and relationships, which includes the Parliament and the opposition, but also the Auditor General, media, political party organizational wings, other institutions..."(Coghill 1999: 201).

The Parliamentary Centre (2001: 12) also made reference to the challenge for parliaments of accessing information flowing within the increasingly complex network surrounding Executive authority. In its report on strengthening accountability and oversight of key parliamentary committees (Kenya), it reported that one of the biggest problems of committees was the "lack of adequate information to perform their roles". The Centre also referred to the potential worsening of this problem by virtue of the Executive branch normally enjoying superior access to information and often not being inclined to share that knowledge, especially if it reflected poorly on its performance. In his analysis of question time (as an instrument of oversight) in the Australian Senate, Peter O'Keefe (XXXX: 85) also cited the informational challenge for legislators of questioning Ministers who typically came extensively briefed by political and public service staff on key issues of the day.

The Inter-Parliamentary Union recently published the proceedings of a gathering including a panel of high profile current and former parliamentarians, journalists and scholars, to discuss current perceptions of parliaments, and how they could increase their standing at national and international levels. Amongst the concerns shared at the gathering was the view that the role of parliaments in many areas of the world was being eroded, and that parliaments were increasingly being bypassed in the governing process (IPU 2005: 5). A proposal was submitted to establish

clear criteria for democratic parliaments that would facilitate greater understanding of their place and importance in the democratic process (ibid: 5-6).

The overriding concern that emerges from this brief reference to the efficacy of parliamentary oversight and accountability is perhaps best captured in the IPU forum, which expressed a future concern for the degree to which parliamentary influence pertaining to the conduct of public policy could be sustained and improved. Clearly the ability of parliaments and legislatures in rich and poor countries, to acquire and access sufficient information on Executive conduct of public policy, is critical to them being able to sustain and improve this role. The extent to which this role is being effectively performed by South Africa's Parliament requires more attention to the critical function that information plays in enabling this body to render oversight and assure accountability. The debate should not therefore become overshadowed by observations, rightly or wrongly, that Parliament simply lacks the "political will" (February 2006: 139).

1. 4. Defining an Organ of State within the Context of Oversight and Accountability

Section 239 of the Constitution of the Republic of South Africa (Act 108 of 1996) defines an "organ of state" according to the following categories:

a) *Any department of state or administration in the national, provincial and local sphere of government*
b) *Any other functionary or institution –*
    i. *exercising a power or performing a function in terms of the Constitution or a provincial constitution*
    ii. *exercising a power or performing a public function in terms of any legislation, but does not include a court or a judicial officer*

The purpose of soliciting a legal opinion was to guide the researchers in determining which public bodies could be said to fall within the definition of an "organ of state", and were subject to oversight of the National Assembly and accountable to it, as stipulated in section 55 of the Constitution. As part of this solicitation, an interpretation of the term "organ of state", as defined in section 239, was required, based on constitutional interpretation and the developing case law.

Section 239 of the Constitution divides organs of State into essentially two categories. The first category is descriptive in terms of which organs of State are defined as *any department of state or administration in the national, provincial or local sphere of government.* This category is, we believe, self-defining. For example, in its interpretation of this first category, the Corder Report (1999: 13) included bodies represented in Cabinet as comprising "national executive authority",

where accountability is vested at the political level via the doctrine of Ministerial responsibility (section 92(2). The terms any "department of state or administration" can further be traced to the Public Service Act (Act 103 of 1994), which refers specifically to national and provincial "departments", and other departments. Finally, the inclusion of the term "local" in this category of section 239 must also logically include municipalities[8], as these constitute administrative bodies operating in the local sphere of government.

The second category of s239 is sub-divided, and focuses on the conduct or activity of the organ of state and on the empowering provisions. These two sub-categories are:

- section 239(b)(i): any other functionary or institution which exercises power or performs functions in terms of the Constitution or any provincial constitution [9];

- section 239(b)(ii): any other functionary or institution which exercises a public power or performs a public function in terms of any legislation, but does not include a court or a judicial officer.

If the institution or functionary is exercising power or performing functions in terms of the national or a provincial constitution, then it is an organ of state. The nature of the power or function performed is irrelevant. In this category, the source of the power is the determining criterion. The Corder report (1999: 17) defined these more plainly as "state institutions supporting constitutional democracy and other bodies set up under the Constitution". These include a host of bodies empowered by the Constitution, namely those listed in Chapter 9.[10] This sub-category of s239 also includes bodies mentioned in the Constitution but are not listed in Chapter 9, including the Pan South African Language Board, The Financial and Fiscal Commission, The Judicial Services Commission, the Independent Commission for the Remuneration of Office Bearers, the South African Reserve Bank, and the Public Service Commission (see Corder Report). Finally, the Western Cape is the only province to have adopted a provincial constitution. [11]

We may refer to *Esack NO v Commission on Gender Equality*[12] in considering the case law pertaining to section 239(b)(i). Here the court gave a broad and generous interpretation to the

[8] Includes various categories of municipalities (section 155, as stipulated in the Constitution
[9] Referred to the in Corder report as State institutions supporting constitutional democracy
[10] The Public Protector, the Human Rights Commission, The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, The Commission for Gender Equality, the Auditor General, and the Independent Electoral Commission.
[11] Constitution of the Western Cape 1997, 1 of 1998. The Constitution of the Western Cape names three functionaries or institutions exercising a public power or performing a public function, namely a "cultural council", provincial Commissioner for the Environment, and provincial Commissioner for Children. Our research found that the latter two offices have not yet been established.
[12] Esack NO and Another v Commission on Gender Equality 2000 (7) BCLR 737 (W)

concept of control and held that if government is able to prescribe the functions of the body and how it is to be performed then the control test would be satisfied. In respect of the Commission for Gender Equality (CGE), the court held that as it was entrusted with the task of eradicating discrimination on the grounds of gender, it was performing a government function and was thus an organ of state. It is worth noting therefore that even though the independence of Chapter 9 institutions such as the CGE is entrenched in the Constitution, these are still regarded as being "organs of state".

The second sub-category is more circumscribed and has been the source of most of the uncertainty around section 239. It requires the institution or functionary to be exercising a public power or performing a public function *in terms of any legislation*. Courts and judicial officers are expressly excluded from this definition. The exercise of public power or the performance of public functions must be in terms of legislation. This definition was recently considered by the Constitutional Court in *Rail Commuters Action Group and Others v Transnet LTD T/A Metrorail and Others.* [13] The applicants sought an order declaring that the respondents had a legal duty to protect the lives and property of members of the public who commuted by rail and further wanted the court to direct the respondents to put in place safety and security measures to protect the constitutional rights of commuters. Section 8 (1) of the Constitution further provides:

> *The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.*

One of the submissions in the case was that if the respondents were organs of state then they would be bound by all the provisions of the bill of rights. The court held[14]:

> *The applicants argue that all the respondents are organs of State. There is no doubt that the third and fourth respondent as Ministers in the national Executive fall within the scope of "organs of State". The first and second respondents [Transnet and the South African Rail Commuter Corporation Ltd] exercise powers and perform functions in terms of the SATS Act and it was accordingly argued that they constitute "organs of State" within the meaning of section 239(b)(ii). This must be corroct. All the respondents are bearers of obligations in respect of the rights conferred by the Bill of Rights.*

In *Transnet Ltd v Goodman Brothers (Pty) LTD,*[15] Transnet sought to argue that it was not an organ of state and as a consequence not bound by certain provisions of the bill of rights. This

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[13] Rail Commuters Action Group v Transnet 2005 (4) SA BCLR 301 (CC)
[14] Ibid at para 67.
[15] Transnet Ltd v Goodman Brothers 2001 (1) SA 853 (SCA)

case was decided under the interim constitution, but is nevertheless a useful precedent. In a concurring judgment, Olivier JA noted that the division of private and public law had become blurred as a number of state institutions are utilizing the services of private law institutions to perform public functions.[16] In respect of Transnet, the judge found that it had stepped " into the shoes of the SA Transport Services" and, like its predecessor, was performing a public service and function. It is also of note that in *Hoffmann v South African Airways*, [17] the Constitutional Court held that as Transnet is a statutory body, under the control of the State, which has public powers and performs public powers in the public interest, it is an organ of state.

Thus in this sub-category, the functionary must be exercising a public power or performing a public function, and that power must be conferred on the body by legislation. Thus the source of the power must be a statutory enactment.

In *Inkatha Freedom Party v Truth and Reconciliation Commission*,[18] the court had to consider whether the TRC could be classified as an organ of state. It expanded on previous tests and held that definition of organs of state in section 239 of the Constitution was extended to include a functionary and institutions which may not be part of government but which exercises powers which are considered to be of a public nature.[19] The TRC was required both through its enabling act and the interim constitution to achieve the vital public duty of achieving reconciliation. The court went on to hold: [20]

> *The definition of organ of State in the 1996 Constitution expands the definition beyond such institutions for it includes within the definition those institutions or functionaries who might otherwise be outside of the state but which exercised public power [which in this case could be linked to statutory or constitutional mandates].*

In having reviewed the case law, the Corder report (1999: 19) captured the complexity presented by section 239, category (b)(ii), by arguing that it would appear to include under its domain a "vast range of bodies such as various councils, boards and financial, cultural, agricultural, professional, research and educational institutions, which function in terms of statutory enactments. Moreover the Public Finance Management Act (Act 1 of 1999) explicitly lists many of these statutory bodies in its Schedules, in both the national and provincial spheres, classifying these according to the term "public entity". Furthermore, the Corder report (1999: 19) referred to section 55(2)(b)(ii) in arguing that the term "organ of state" was not qualified by the word "national", prompting the

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[16] Ibid at para 31.
[17] Hoffman v South African Airways. 2001 (1) SA 1.
[18] Inkatha Freedom Party v Truth and Reconciliation Commission. 2000 (3) SA 119.
[19] Ibid at page 132.
[20] Ibid at 133.

assumption that the National Assembly would have to "also [be] empowered to carry out some manner of oversight function in relation to provincial organs of state". [21]

The general oversight authority of the NA covers all organs of state including provincial organs of state. This may mean that provincial organs of state may be subject to the oversight of both provincial legislatures and the National Assembly. [22] The exercise of oversight by the NA over provincial organs of state must however take cognizance of the principles of co-operative government in chapter 3 of the Constitution, which recognizes that government is constituted as national, provincial and local spheres which are distinctive, interdependent and interrelated. [23] Thus the oversight powers of the NA over provincial organs of state must be exercised in a manner that does not encroach on the functional integrity of the provincial legislature. [24] Mechanisms set up by the NA to ensure such oversight would have to take cognizance of the provincial legislature's constitutionally sanctioned powers in respect of oversight over provincial organs of state. Finally, the oversight authority of the NA over organs of state in general, as depicted by section 55(2)(b)(ii), must also be subject to the guiding provisions concerning the NCOP's oversight responsibilities, mentioned earlier in this chapter.

Setting aside for the moment the oversight powers of the NA in this regard, the extent that bodies listed in the PFMA are considered by virtue of this listing organs, would be dependent on whether the PFMA empowers these bodies to exercise a public power or perform a public function, and so meets the requirement of *any legislation*, under section 239 part (b)(ii). This would be in respect of bodies listed in the PFMA, where it might not appear that these bodies derive public power or perform a public function in terms of enabling legislation. Parliament's Ad Hoc Joint Sub-committee's (2002: 6) report also referred to this grey area, by noting that when read with section 239, section 55(2) creates the responsibility for the National Assembly to hold organs of state accountable, *whose precise definition may* traverse numerous bodies, including those listed in the Public Finance Management Act. This question is significant for responding to the question left by the Corder Report (1999: 20), which is "how does the definition of public entity relate to the definition of organ of state". The question then becomes:

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[21] See footnote 4 concerning the need to inquire into the oversight role of the NCOP as it concerns this unqualified reference to "organ of state"

[22] AFREC (2003), at the University of Cape Town, developed a course for Parliament on the PFMA and Parliamentary Oversight. In this course it referred to those functions listed in Schedule 5 of the Constitution as exclusive provincial functions. It stated that the constitution conferred on provincial legislatures the power to pass legislation with regard to these matters (section 104(1)(b)(ii)), but added that this power was circumscribed by national legislative authority in section 44(1)(ii) and 44 (2). It added that the extent to which this undermined provincial legislative freedom was something that still needed to be tested.

[23] Section 40 (1) of the Constitution.

[24] Section 41(1)(g) of the Constitution.

Can bodies, by virtue of their listing in the PFMA, be classified as organs of state? Stated differently, the proposition is whether a listing in the PFMA amounts to the performance of a public power or a public function in terms of legislation.

According to section 239 (b)(ii) of the Constitution, there must be a link between the exercise of the public power or the performance of the public function and the enabling legislation. The legislation must authorize the institution or functionary to exercise the public power or perform the public function.

Some assistance, although indirect, can be obtained from the decision of the SCA in *Cape Metropolitan Council v Metro Inspection Services and Others.* [25] In this case a municipality had entered into a contract with a supplier and after a while cancelled the agreement as it suspected fraudulent practices on the part of the supplier. The issue was whether the cancellation of the agreement amounted to the exercise of public power.

The court held:

The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority... When it purported to cancel the contract, it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties, in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power.

This view was taken although a municipality is required in general to act in accordance with a number of statutes such as the Local Government Municipal Systems Act and Municipal Structures Act.

It would thus appear that the mere listing of functionaries and institutions in the PFMA does not convert them into organs of state. The key question is whether the functionary or institution in exercising the power or carrying out the function, over which oversight is sought, is in fact implementing legislation. As the PFMA regulates as opposed to empowers functionaries and institutions to perform specific powers and functions, the mere listing is unlikely to have the effect of converting them into organs of state.

[25] Cape Metropolitan Council v Metro Inspection Services and Others 2001 (10) BCLR 1026 at para 18.

In the context of 239(b)(ii) as it refers to developing case law, the exact nature of the body does not appear to be determinative. A non-public body may be an organ of state if it is empowered to exercise public powers or perform public functions by legislation. There is no clear dividing line between exercising a public power *or* performing a public function. The following is a broad, but correct, interpretation of public function[26]:

> *Public bodies exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services... They also do so if they regulate commercial and professional activities to ensure compliance with proper standard.*

The authors define "public goods" as a term used by economists to refer to services such as defence, lighthouses and public street lighting for which a free market cannot operate efficiently. " A public good is one for which the consumption of the good by one individual does not detract from that of any other individual."[27]

1.4.1 Grey Areas pertaining to "Organs of State"

As previously noted, the HSRC did not consciously limit itself to a legal and case law opinion on which bodies constituted "organs of state". It combined legal interpretations with a working attempt at documenting and classifying bodies that could potentially fall under the domain of this term. As this study was primarily an audit of public institutions, and not simply the rendering of a legal opinion on the NA's Constitutional obligations, we recognized early on that it would not be sufficient to simply offer a legal interpretation of section 239, which had previously been the case (i.e. Corder Report). Material to a more substantive critique of the clause was an account of the ramifications for defining an organ of state, brought about by recent legislative developments (i.e. the PFMA). This issue was mentioned earlier in this introductory section.

Amongst other grey areas that we encountered whilst documenting potential "organs of state" was the status of Public Private Partnerships (PPP) and institutions of higher education. We present the following considered legal opinions.

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[26] De Smith , Woolf, & Jowell *Principles of Judicial Review* (1999) at 65 to 66.
[27] Ibid at footnote 56 of page 65.

1.4.1.1 Do institutions of higher education (i.e. universities) constitute organs of state, as per section 239 of the Constitution? Does the Higher Education Act of 1997 assist in the consideration of this classification?

This question will be dealt with by reference to the case law. The cases have not been unanimous in interpreting "organs of State". Some have adopted a broad approach while other judgments have adopted a fairly restrictive interpretation.

Interpreting the interim constitution, Friedman JP held in *Baloro and others v University of Bophuthatswana,* [28]:

> *It is essential that the words 'organ of state' in s7 (1), as Professor Du Plessis has pointed out, be given an extended meaning. They must include (i) statutory bodies; (ii) parastatals (iii) bodies or institutions established by statute but managed and maintained privately, such as universities, law societies, the South African Medical and Dental Council, etc; (iv) all bodies supported by the state and operating in close co-operation with structures of state authority; and (v) certain private bodies or institutions fulfilling certain key functions under the supervision of organs of state.*

The judge held that in order to give effect to the values of the Constitution, a broad interpretation must be given to 'organs of state'. For the purposes of classifying universities as "organs of state" however, it is likely that these bodies would be regarded as such. They are empowered by the Higher Education Act (1997), and perform the public function of providing higher education and research for the benefit of the nation. In addition, universities are funded in the main by the state in accordance with a funding formula determined by the state. It is probable that the concept of "control" would be given a broader interpretation in line with recent developments. The Higher Education Act gives the Minister of Education considerable regulatory and oversight powers over Universities. The following are some specific examples:

- The Council for Higher Education has far reaching recommendatory and other powers and is appointed by the Minister,
- Universities and Technikons are established by the government,
- The Minister may merge public tertiary institutions,
- The Minister may after consulting with the Council on Higher Education, and if the conditions in the Act are satisfied, close public universities and technikons. In the event of the closure, the assets of the closed institution vests in the Minister,

[28] Bafaro and Others v University of Bophuthatswana 1995 (4) SA 197

- The Minister may appoint up to 5 members of the Council of a public university or technikon,
- Any institutional statute adopted by the public university or technikon must be approved by the Minister,
- A Council of any public higher education institution is required to submit a report to the Minister dealing with governance issues and to provide duly audited financial statements,
- The Minister has powers to withhold funding if councils fail to comply with the Act or with the conditions laid down,
- The Minister may appoint independent assessors to conduct investigations at public higher education institutions.

Taken cumulatively, these provisions would suffice to indicate that the requisite degree of control exists.

1.4.1.2 Do Public Private Partnerships (PPP) constitute "organs of state", as per section 239 of the Constitution?

Section 76 of the Public Finance Management Act 29 of 1999 enables the National Treasury to make regulations aimed at the effective and efficient use of financial resources. Pursuant to this enabling section, the NT promulgated regulation 16, which defines a Public Private Partnership (PPP) and sets out the steps, requirements and consents required from those entering into such an agreement. PPP is defined as:

> A commercial transaction between an institution and a private party in terms of which the private party –
>
> (a) performs an institutional function on behalf of the [state] institution; and/or
> (b) acquires the use of state property for its own commercial purposes and
> (c) assumes a substantial financial, technical and operational risk in connection with the performance of the institutional function and/or use of state property; and
> (d) receives benefit for performing the institutional function or for utilizing the state property, either by way of;
> (i) consideration to be paid by the institution which derives from a revenue fund or, where the institution is a national government business enterprise or a provincial government enterprise, from the revenues of such institution; or
> (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
> (iii) a combination of such consideration and such charges or fees.

The regulations require a written contract recording the terms of the agreement between a state institution and a private party. Treasury approvals are required at various stages of the project. The regulations subject PPP's to three tests, namely:

- Can the institution afford the deal?
- Is it a value for money solution?
- Is substantial technical, operational and financial risk transferred to the private party?

The treasury regulations control the process of concluding a PPP agreement and sets out the phases and tests that it will have to go through. It lays down a regulatory regime for PPPs. The regulations do not empower a private body to exercise a specific public power or perform a specific public function. Therefore while the public partner to the PPP may be an organ of state, the private partner is less likely to be an organ of state. If the private partner falls within either category of section 239(b) of the Constitution, then the private partner may be an organ of state over which oversight must be performed.

Similarly, the institution or public partner may be an organ of state, not by virtue of regulation 16, but because it, in most instances, would fall under one of the categories of section 239 of the Constitution. In summary therefore and in our opinion, a PPP arrangement cannot constitute a distinct organ of state, separate from and over and above parties to such an arrangement falling under one of the categories of section 239 of the Constitution. It would appear that any oversight of PPPs would have to be exercised through the institution or public partner or through oversight of the National Treasury, which plays a pivotal role in monitoring, regulating and supervising PPPs.

The PPP issue, in respect of section 239(b)(ii), refers to a broader question of whether the label of "organ of state" can be applied to bodies whose public powers and public functions do not appear to be invested by enabling legislation (PFMA compliance could not substitute and therefore would not meet this requirement). Does the matter of "state control" then become potentially significant? The case of *Korf v Health Professions Council of South Africa* [29] is cited here. The court held that the determining factor was whether the state had control over the institution. The test was expressed as follows[30]:

[29] Korf v Health Professions Council of SA.
[30] Ibid at page 1177.

In all these cases therefore the test applied in order to determine whether a body or functionary is an organ of state is whether the body or functionary is directly or indirectly controlled by the State.

As the state did not control the Health Professions Council, it was not, in terms of this judgment, an organ of state. The HPCSA is however empowered by the Health Professions Act (No. 56 of 1974), which in this instance would appear to confirm its status as an "organ of state" as per the argument being developed thus far. The implication would appear to emphasize, for the purposes of this study, that when determining the status of an "organ of state", the search for the following is critical: "a link between the exercise of the public power or the performance of the public function and the enabling legislation. The legislation must authorize the institution or functionary to exercise the public power or perform the public function": (Page 11)

This interpretation accepts the political imperative of determining what if any formal line of accountability exists between bodies not easily identified as organs of state, and bodies that can be proven to be so. The more crucial question however, and indeed the challenge of identifying which bodies fall under section 239(b)(ii), appears to be demonstrating that these bodies have been empowered by legislative statute to exercise a public power or perform a public function.

1.4.1.3. What impact do the comments of the Constitutional Court in SARFU v President of Republic of SA [31] have on any interpretation of 'organs of State'?

The case *SARFU v President of the Republic of South Africa* was referred to the constitutional expert as it was briefly mentioned in the Ad Hoc Joint Sub-Committee's 2002 report (page 3) and we felt needed elaboration for the purposes of defining an organ of state. The specific comments posed to the constitutional expert related to the following[32]:

In section 33 the adjective "administrative" and not " executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of the government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is "administrative

[31] SARFU v President of the Republic of South Africa 1999 (10) BCLR 1059 (CC)
[32] Ibid at para 141.

action" is not on the arm of the government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

The court in this case was not considering the meaning of "organs of State", but was interpreting the term "administrative action" in the context of section 33 of the Constitution. Section 33 provides that everyone has a right to administrative action that is lawful, reasonable and procedurally fair. The point of the dicta is that functionaries perform a variety of functions, some of which can be classified as administrative action and others not. Only those functions that can be classified as administrative action can be assessed against section 33 of the Constitution. If the administrative action is inconsistent with section 33 and further, is not reasonable and justifiable in terms of section 36 of the Constitution, then such administrative action will be set aside.

These comments do however have some relevance when ascertaining the meaning of section 239(b)(ii) of the Constitution, which is the second subcategory of category 2 of the definition. This part of the definition, by requiring that there be the exercise of public power or the performance of a public function, focuses on the nature of the power being exercised rather than on the nature of the functionary or institution exercising the power. As Davis J put in the TRC case [33],

An examination of para (b) of the definition of organ of State as contained in s 239 reveals that the term organ of State is extended to include a functionary and institution which might well not be part of government but which exercises powers which are considered to be of a public nature. In this case the classification rests on an identification of the nature of the power rather than the nature of the functionary or institution.

1.4.2 Concluding Remarks on Section 239

In respect of the question, the following conclusions are drawn:

1. The definition of organ of state includes all departments of state in the national, provincial and local sphere of government,
2. It includes all functionaries and institutions, other than departments of state, exercising a power or performing a function in terms of a national or provincial constitution (see page 11 along with footnotes),

[33] IFP v TRC 2000 (3) SA 119 at 132.

3. It includes all functionaries and institutions, other than departments of state, exercising a public power or performing a public function in terms of any legislation (in consideration of the interpretations rendered in this introduction)

1.5. Conclusion

This chapter presented our interpretation and approach to the ToR, discussed the principle and practice of oversight and accountability in government and as applied to Parliament, provided a brief overview of oversight and accountability in other countries, and concluded by discussing the constitutional parameters facing Parliament in performing oversight and ensuring accountability. The remainder of this report is structured as follows: Research Methodology and Methods Employed; Findings and Analysis; and Recommendations and Conclusion. The section on methodology and methods provides a detailed summary of the thinking behind our data gathering, i.e. how we proceeded to identify, collect, collate, collect and house data on organs of state; as well as the various methods employed in gathering this information. The section on findings and analysis will provide an overview (with illustrations) of the data collected, including a general statistical profile of the various types of organs of state, and the variables used in classifying these. The section on recommendations is aimed specifically at section 6(f.) of the ToR, which requires us to "set out and distinguish among the appropriate levels and means of accountability and oversight in terms of section 55(2) for each category.

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Chapter 2

Research Methodology and Data Collection Methods

2.1. Introduction

Chapter one provided an overview of the purpose and objectives of this study, which concerns strengthening the oversight role of Parliament and the National Assembly in particular, to ensure that the institution improves its ability to hold organs or state to account. It also presented a detailed discussion of the political and legal elements associated with Parliament's practice of oversight, including in particular defining the subject of oversight: "organs of state". The Chapter concluded by stating a position on the general profile of distinguishing organs of state, which this study would employ when capturing data on such bodies. Chapter two will continue this discussion by explaining in detail how the data-gathering component of this study was organised. This will principally involve explaining the research methodology, design and methods. This will range from the various fields of information on organs of state, to how we interpreted these fields and whether we thought additional indicators were needed to support the objectives of this study.

2. 2. Enumerating the Universe of "Organs of State"

The introduction dealt at length with aspects of "organs of state", in terms of their legal and political definitions, as well as by reference to various cases representing developing jurisprudence around both the definitions and concomitant obligations of these organs. Thus, the definitional process through which we arrived at our understanding of an organ of state will not be repeated here. Suffice it to say that section 239 (a) of the Constitution was clear, where this represented the starting point for initially isolating bodies that could be classified as organs of state. An initial reading of clause 239 in its totality also provided some basic starting point for identifying other bodies that could potentially fall under section 239 (b) (i) and (ii), i.e. bodies either explicitly mentioned in the Constitution and required by it to be created, in addition to those in Chapter 9; and other bodies exercising powers and performing functions in terms of legislation. Section 239 (b) (i) provided sufficient initial guidance for us to consult the Constitution for the names of bodies to be created, whose powers and functions in most cases needed to be further defined by an Act of Parliament. Section 239 (b) (ii) also provided an initial basis for cataloguing potential organs of state, which was linked largely to "public entities". Enumerating potential organs of state was also informed by the Corder Reports' interpretation of clause 239, in terms of which bodies could potentially fall under it.

Having said all this, the deliberate strategy of the research team was to collect data concurrently with legal interpretation to locate potential organs, in order to maximise available time, as well as to ensure that legal interpretations and case law could be informed by considering bodies appearing in our early scan which could potentially be classified as organs of state.

2. 3. Constructing a Data Gathering Template

During the first few weeks of study, which were dedicated to legal interpretation and enumeration of potential organs of state, the study team met for a day long workshop to discuss, identify and debate the specific information fields required to present information on organs of state. This workshop took place on 14 September 2005 in Pretoria. The workshop discussed and debated an initial set of indicators mentioned by Parliament in the ToR, which included:

- Name of organ
- Address and contact details
- Nature of business
- Legal relationship of organ to Parliament
- Legal relationship of organ to Government
- Do organs receive monies from the National Revenue Fund
- Responsible line function department (where appropriate)

The initial fields suggested an emphasis on clarifying Parliament's understanding of the lines of accountability between itself and organs of state, as well as that of organs functioning within the government system. After extensive debate and a number of revisions, a final template was agreed upon and utilised by the team in constructing the framework of the electronic database. The final list of fields, and the rationale behind their selection, will now be discussed.

2.3.1. ***Identification of organs and contact information***: The following fields were agreed upon here:

- *Name of Organ*- Full name of organ

- *Sphere of Government* – national, provincial and local. Section 239 refers to all three "spheres", which obligates us to capture information on corresponding organs. Read with section 239 is section 55(b)(2), which does not qualify its reference to organ of state in terms of a particular sphere.

- Province – Specifying which provinces the organs were situated in was a rational extension of including the provincial sphere of government. This field included the 9 provinces of Gauteng, Limpopo, Mpumalanga, Western Cape, Eastern Cape, North West, KwaZulu-Natal, Free State, and Northern Cape.

- Contact Information – Fields were created in the database to outline contact details. These fields included the postal and physical addresses of the organs, the website addresses and an e-mail contact address.

2.3.2. ***Governance and Nature of Business:*** The following fields were agreed upon

- *Governance portfolio*: Although this field was not explicitly included in the ToR, it is a key indicator of lines of accountability. This field generally refers to corporate governance and relates to the organ's primary seat of governance or political accountability. This includes Chairpersons of controlling bodies (i.e. boards), Ministers of national government departments, MECs of provincial departments, and Mayors of municipalities.

- *Accounting Officer*: As per legislation such as the PFMA and the MFMA, the "Accounting Officer" designation generally refers to the Executive heads of organs. This includes Directors-General for national departments, Head of Departments for provincial departments, Municipal Managers for municipalities, and Chief Executive Officers of constitutional institutions and statutory bodies.

- *Nature of Business* – this field was created to briefly describe the functional purpose of organs. Given the number of organs, coupled with the fact that in many cases these shared similar purposes, the team decided to qualitatively code functional purposes. This included for example "Research Institute", "Water Board", "Category B Municipality", "Higher Education Institution", and "Provincial Department". More specific descriptions were given for more unique organs.

2.3.3. ***Legal and Functional Profile of organs:*** The following fields were agreed upon:

- *Relationship to Parliament*: This was a significant field in defining Parliament's legislative oversight over organs, and therefore in a large sense established whether bodies could be defined as such. This was split into "constitutional clause", "national

legislation", "provincial legislation", and "other". [34] A sub-field was also created to capture the details of the specific clause or act.

- *Relationship to Government*: This field determines how the organ's functioning could be classified within the government system. Eleven types were recorded, including 'Member of the National Executive', 'Member of the Provincial Executive', 'Member of Municipal Council', PFMA Public Entity (schedule 2), PFMA Public Entity (schedule 3A), PFMA Public Entity (schedule 3B), PFMA Public Entity (schedule 3C), Public Service Act (Schedule 3 organisational component), Public Service Act (Schedule 1 Department), Constitutional Organ, and "Other" [35]

- *Responsible Line Function/Line of Accountability:* Under this field, we identified the line of direct political oversight/accountability for each organ. This field was specifically mentioned in the ToR. Such a role was predominately played by members of national and provincial executive authorities, i.e. Ministers and MECs. Some bodies represented subsidiaries of organs (i.e. those of public entities), which were subject firstly to the principal organ.

2.3.4. *Financial obligations of organs:* the following fields were agreed upon:

- *National Revenue Fund:* A Yes or No field indicating whether the organ received funding from the National Revenue Fund.
- *NRF Funding Amount:* If receiving funding from the NRF, we identified the latest available (i.e. 2005/2006) amount allocated to the organ.
- *Statutory Reporting Obligations* –This question asked whether the organ was bound by the provisions (in particular the reporting provisions) of the Public Finance Management Act (1999), or the Municipal Finance Management Act (2003) in the case of Municipalities.
- *Audit Information* – This was an additional field which did not appear in the ToR. We endeavoured to collect information on the latest available audit findings for reach organ, including the year and the audit opinion. Opinions included "qualified", "matters emphasized", "unqualified", "clean report", "audit not finalized", or "information not available".

[34] These bodies usually were operating in terms of the Companies Act (1973), which strictly speaking could not render them "organs of state" under section 239. However in a number of cases empowering legislation was being prepared for bodies. Examples here included CASIDRA (Cape Agency for Sustainable Integrated Development in Rural Areas) and the South African National Accreditation System (SANAS)
[35] This referred to Higher Education Institutions (i.e. Universities)

2.3.5. Organ Classification: This field was not specified in the ToR and was created as a macro-field designed to disaggregate all organs of state in the database according to the three primary designations flowing from section 239. This included:

- Department of State or Administration
- Constitutional functionary of institution
- Statutory functionary of institution

2. 4. Methods of Data Collection

The collection of data on organs of state corresponding to the fields outlined in section 3 generally employed the following activities:

- The use of secondary sources, such as Internet searches; government publications and reports, consultant reports, lists on public bodies maintained by these themselves,
- Primary contact via email, fax and telephone correspondence with relevant public bodies;
- Personal meetings with sources within public bodies

In our proposal, we suggested that data collection be structured according to three streams, divided between national, provincial and local spheres. The rationale for this came largely from an initial reading of section 239, as well as a basic knowledge of the Constitution and the structure of government, which comprises bodies located in one of three spheres. The logical next step was to structure data collection teams according to the three spheres, where individual researchers were allocated to specific spheres under the supervision of a senior researcher. In addition to the collection, the researchers were encouraged to keep a 'research diary', documenting contact details, successes and failures in contacting data sources, and other such experiences along the way. The following recounts the experiences of our three data collection streams:

2.4.1 National Sphere

As with the other two spheres, the national sphere had to take into account the three sub-categories of section 239: departments of state or administration, constitutional bodies, and statutory bodies functioning at the national level. Identifying and collecting information on national departments and constitutional bodies was relatively simple and straightforward, given the relative clarity of their "organ of state" status. However, similar to the provincial sphere, finding information on national statutory bodies, such as those defined as "public entities" in the PFMA, was more challenging, owing in large part to ongoing changes in the existence and identity

(disestablishment, re-incorporation into line departments, mergers, as well as legislative mandate) of these bodies.

As indicated earlier, multiple methods were utilised. These specifically included internet websites (Government website and the GCIS: http://www.gov.za); individual department websites, and a government contacts database maintained by the HSRC itself. We verified and obtained further data through telephone/email/fax correspondence with relevant departmental officials, working in Communications and Financial Management sections. The combination of these efforts proved generally successful in retrieving information on a majority of the categories mentioned earlier. For specialised categories, such as NRF allocation and auditing reports, the researchers consulted budget documentation from the National Treasury, such as the 2005 Appropriations and Division of Revenue Acts, and communicated directly with the Office of the Auditor General to obtain audit information.

It has already been mentioned that the status of public entities as organs of state was not definitive, but did provide at least a provisional basis for investigating whether they met the statutory conditions for an "organ of state" indicated by section 239(b) (ii). To expedite the process of data collection, we had to first establish which entities were presently functioning. This was dealt with by cross-referencing existing lists of public entities in order to establish an authoritative list. An obvious starting point was Schedule 3A of the PFMA, and cross referencing this with more up to date lists obtained from the National Treasury's unit dealing with public entities. Furthermore, the Inkwazi/HSRC Report, which reviewed the governance frameworks of public entities in 2003 for the National Treasury and DPSA, had collected a great deal of governance data on public entities. In addition to these sources, the research team also consulted:

- A list of public entities from http://www.acts.co.za. This website contained a number of national entities as regulated by the Public Finance Management Act (1999).
- The website: http://www.polity.org.za provided a range of information on government, including policy documents, speeches, and legislation
- The South African Reserve Banks Institutional Sector Classification Guide (February 2005)
- The Department of Public Service and Administration (DPSA) distributed a publication on The Machinery of Government: Structure and Functions of Government.

- A list of bodies reporting to Parliament, provided to the research team by Parliament's project managers. [36]

The second step was to establish what information already existed on these entities and then collate, clean and format the data accordingly. Through the assistance of Dr. Olivier, we were able to establish an ongoing relationship with the National Treasury, and specifically their sections dealing with national and provincial public entities. Through our ongoing consultation with the Treasury, were realised that the NT was itself busy with the constant and ongoing task of updating and re-classifying public entities, which has most recently been finalised in the form of a proposed change in the policy framework governing these bodies (November 2005). We were able to receive and recorded a total of 383 entries (comprising both national and provincial public entities) in the first excel sheet provided to us by the NT. The data covered a limited number of areas though such as:

- Names of the public entities,
- Contact information
- Chief Executive Officers

The NT did advise us that further details on public entities would have to be checked and verified before we could access them. We thus had to identify additional sources of data to expedite the process, including checking the Inkwazi/HSRC study which established lines of political accountability between public entities and national and provincial departments, as well as consulting departments directly on public entities required to report to them. A key component of identifying public entities as "organs of state" turned out to be their legislative mandate, which was captured in the field "relationship to parliament". This proved to be challenging for those public entities that we could not contact directly, i.e. via websites or contact details obtained from NT. Also, in a minority of cases we were not able to establish a definitive legislative mandate, which we categorised as "other" in the database. In terms of the financial data, we mentioned earlier on that NRF allocations and audit statuses were obtained from NT budget documentation and the Auditor General.

The third step was trying to plug as many outstanding gaps in the data as possible. This proved to be particularly challenging at the level of national public entities. As the field "relationship to parliament" was identified as crucial for determining whether a body was an "organ of state", we prioritised the search for such data. In a number of cases this was not immediately available, and

[36] Titles here included an MS Excel sheet entitled "Consolidated List-Public Entities", and MS Word documents entitled "Institutions Reporting to Parliament", "Public Entities Reporting to National Departments", and "List of Public Entities".

we were left with a minority of bodies established by national departments, cabinet or through other contractual arrangements, but with no or a seemingly unclear legislative mandate. We have been trying to fill these gaps by calling the entities directly.

2.4.2 Provincial Sphere

Collecting information for the provincial sphere was the most challenging aspect of this study. This did not however prove to be difficult for provincial "departments of state" or provincial constitutional bodies. We were able to obtain data on these bodies, via websites and secondary contact databases mentioned in section 2.2.1. Additionally, the Western Cape is the only province with a provincial constitution. Collecting data on provincial public entities, i.e. those empowered by provincial statutes, proved to be more difficult.

A number of methods (as mentioned above) were utilized for data collection (see Appendix A for list of sources). The main problem experienced in data collection revolved around accumulating current and updated information on provincial public entities, as there appeared to be greater flux in the existence and the forms of existence of these bodies. Our provincial data-gathering stream dealt with these issues by linking up with the National Treasury's section responsible for provincial public entities. In our discussions with the NT, we were informed that the section was presently in the midst of verifying its existing data on provincial entities, which was proving to be time consuming. We were able to obtain some information from Treasury on the names and contact details of provincial public entities. A second method employed was contacting provincial treasuries, who we were informed kept more extensive data. The NT facilitated this by contacting the provinces prior to our direct engagement. Provincial treasuries proved useful for confirming the existence of entities and providing some financial information. We needed to employ other means however to establish under which provincial statutes these bodies were empowered, which would bear heavily on their identity as organs of state. Finally, we were able to retrieve some financial data (i.e. NRF or PRF funding) via provincial budget information (2005 Appropriations) on the NT website.

Confirming the "organ of state" existence of provincial public entities was mixed. In some cases the task was made easier by the cataloguing of provincial statutes on provincial government websites, including in the cases of North West, Free State, the Western Cape, and to some extent Gauteng. We were able to relatively easily cross-reference known provincial entities with available information on provincial statutes. The Eastern Cape Provincial Legislature did not catalogue provincial statutes on its website, which made it difficult to establish this link.

In other cases provincial government websites included links to provincial departments, under which public entities were required to report. In a smaller number of cases provincial public entities had their own websites. The continuing challenge for us has been to verify the status of provincial public entities. Oversight of public entities in the provincial sphere is one area that needs increased attention.

2.4.3. Local Sphere

Data collection at the local sphere of government was perhaps the simplest and most straightforward of the three spheres. The primary reason for this is that the local sphere does not contain as much variation in public body forms, when compared with national and provincial spheres. Municipalities essentially represent "departments of state or administration" at the local sphere, and so fall under section 239 (a) of the Constitution. Three primary sources of information were used at the local sphere: the Department of Provincial and Local Government, responsible for providing support to local governments; the Demarcation Board, and the South African Local Government Association (SALGA), which represents municipal interests.

Internet searches of municipalities were used to augment information expected from the three primary sources of data. Relevant persons in these municipalities were also contacted directly, either through email or telephonically, for verification of data. After weeks of being in contact with specific persons at the three primary sources of information, and being referred on several occasions to other persons, it was possible to obtain information on municipalities, which largely comprised full contact details. Overall, information obtained from DPLG, SALGA and the Demarcation Board was. extensive, useful and provided most of the contact details of Municipalities and political principles. However, more specific information like e-mails, web pages, finances and Audited opinions needed to be found elsewhere. For this purpose, and to have more reliable sources to compare information, the HSRC purchased a publication on local government; the "Gaffney's Local Government in South Africa- Official Yearbook 2004-2006" and obtained the "Portfolio, Municipalities in South Africa 2005, in association with SALGA". These publications proved to be a great input and a reliable source of information for updating and verifying data already captured by the team. A final step was to compare the information available on paper from the different sources and to collate them in an excel format. Several municipalities were contacted to confirm some of the data and to obtain missing information.

Data that proved essential for confirming the status of municipalities as "organs of state" and for establishing their accountability responsibility included their relationship to Parliament and their line of accountability. Municipalities derive their powers and functions principally from Chapter 7

of the Constitution. In addition, constitutional and the evolving law on inter-governmental relations have instituted a role for provincial governments in the performance of municipalities situated within provinces. [37] Although municipalities therefore continue to function as separate spheres under section 239, questions of oversight and accountability incorporate some role for provincial legislatures and executives.

2.5. Technical Construction of Database

As a final section for this chapter, we provide an overview of the technical construction of the database, which will have implications for how the National Assembly wishes to consult and maintain it. All data gathered was captured initially in Microsoft Excel format, which is a stable software programme for storing and manipulating raw data. Each of the three data streams used separate but identical templates to capture data, which was gradually merged into a single master sheet as the study progressed. To make the data user friendly and to allow for easy manipulation, it was decided that database software such as Microsoft Access should be adopted as opposed to Filemaker Pro, Oracle or SQL Server. Microsoft Access organizes large quantities of data in a flexible manner. It includes facilities to add, modify or delete data from databases, ask questions about the data stored in the database, and produce reports summarizing selected contents.

The template chosen for both the Excel format and the database was derived from a set of 14 questions (see Appendix B). These questions were specifically created to meet the objectives of identifying the National Assembly's role of 'oversight' and 'accountability' of organs of state. The task at hand was not only to ensure that this information was packaged in an appropriate and easily understandable software package, but more importantly to ensure that the data clearly reflected the legal and financial obligations of these organs.

[37] See for example section 139 of the Constitution; and in terms of accountability, section 47 of the Municipal Systems Act (2000)

Chapter 3

Analysis of Data on Organs of the State

3. 1. Introduction

Chapter 1 introduced this study by emphasising the definition of an "organ of state". Our approach was guided by a legal interpretation of section 239 of the Constitution as well as the developing case law pertaining to the matter. The definition of an organ of state is situated at the heart of this study, which is tasked with auditing the scope of Parliament's oversight obligations in respect of these bodies. Chapter two presented a detailed overview of the methodology utilised to enumerate organs of state, as well as the methods we employed to acquire data on these bodies. The practicalities of obtaining data from various sources and its attendant challenges were also commented on. Chapter three which follows illustrates some of the more relevant observations made when we undertook an analysis of the data collected on organs of state. It must be stressed that as this study was primarily about the acquisition of data and presentation of that data in an electronic database. This chapter therefore limits its illustrations to data that we deemed most significant to this study. Having said this, the framework for overall data collection included the following fields:

- Name of organ
- Address and contact details
- Nature of business
- Legal relationship of organ to Parliament
- Legal relationship of organ to Government
- Do organs receive monies from the National Revenue Fund/Provincial Revenue Fund
- Responsible line function department (where appropriate)

The analysis presented in this chapter is limited to those data fields deemed most relevant to the task of performing oversight. The first deals with the "scope" of organs of state, disaggregated according to sphere of government. This is in direct response to ToR. The second concerns a body's "relationship to Parliament", which in large measure defines its status as an organ of state. The third is a body's "relationship to government", which classifies the body's functioning within the government. As with a body's relationship to parliament, its classification within the government system was data that the ToR required us to obtain. Beyond a body's statutory identity though, its relationship to government is considered vital for Parliamentarians to be able discern a body's line of executive accountability within government as well as track, in the case of public entities, changes in a body's functional form. The analysis then proceeds to submit

observations on the public financial obligations of bodies as well as information on their latest audit findings. We include a further illustration of how bodies disaggregate in terms of their allocations from the National Revenue Fund. Finally, we provide a global classification of all bodies according to language of section 239 of the Constitution.

3. 2. Overview of Main Data Findings

The data set contains information on 742 organs of state, functioning at the national, provincial and local spheres of government. The figure of 742 represents the extent that the study team, in the available time allocated, could confirm the state organ status of bodies based on the primary criterion used in arriving at this definition (see chapter 1).

Table 1: Sphere of government

Organs according to Sphere of Government	N	%
National	288	39
Provincial	170	23
Local	284	38
Total	**742**	**100**

The information in Table 1 shows that about 39% of all organs of state exist at the national sphere. These include among others national departments, public entities, constitutional bodies and universities. About 38% of organs are represented in the local sphere, with 23% operating in the provincial sphere.

Table 2: Relationship to Parliament

Enabling legislation	N	%
Constitutional clause	437	59
National legislation	249	33
Provincial legislation	54	7
Other	2	-
Total	**742**	**100**

In terms of their relationship to Parliament, 59% of organs can trace their primary statutory relationship to Parliament via a constitutional clause. Organs making up this block comprise mostly national, provincial and municipal executive authorities, which, while deriving the source of their mandate from the Constitution, are independently responsible for implementing various pieces of legislation pertaining to their functions. While a smaller number of bodies within this group can also trace their origins to the Constitution, they draw their primary powers and functions from a separate Act of Parliament. These make up approximately 3% of the 59%. The primary statutory relationship to Parliament for a further 33% of bodies can be traced to national

legislation. Finally, 7% of bodies are constituted on the basis of provincial legislation. We were unable to find an enabling legislative source for 2 bodies. While these bodies had all the characteristics of "organs" of state based on other criterion, they lacked an enabling legislative mandate[38]. These bodies did however indicate to us that enabling legislation pertaining to their functions was soon to be introduced.

Table 3 illustrates how the organs were distributed according to their position within the government system. This is a vital piece of information for Parliamentary oversight and accountability, because in many cases such as with public entities and Public Service Act organisational components, organ status may be subject to classificatory change pertaining to, for example, the ability of government to render more effective and efficient services. This is the case at the moment with the National Treasury having recently tabled its proposed changes to the classification of public entities. [39] In order for such a proposal to take effect, it would have to eventually be tabled in Parliament.

Table 3: Relationship to Government

Status within the Government System	N	%
Member of National Executive	30	4
Member of Provincial Executive	98	13
Member of Municipal Council	284	38
PFMA (schedule 2)	41	6
PFMA (schedule 3A)	143	19
PFMA (schedule 3B)	28	4
PFMA (schedule 3C)	61	8
Public Service Act (schedule 3 – organisational component)	1	-
Public Service Act (schedule 1 – department)	3	-
Constitutional Organ	27	3
Other (Universities)	26	3
Total	**742**	**100**

The biggest block of organs in the government system is municipalities, representing embers of Municipal Councils. These account for 38% of the total. Public entities classified under schedule 3A of the PFMA account for a further 19% of organs, with members of Provincial Executives comprising 13%. This particular table should not so much be read in terms of the relative quantitative significance of organs in the government system, but according to lines of accountability between the organs. For example, the fact that only 4% of organs in the government system constitute members of the National Executive should not discount the

[38] Relationship to Parliament: Other (created under Section 21, Companies Act 1973). Include CASIDRA (Pty) Ltd, S A National Accreditation Systems.
[39] Information on the particulars of the proposed changes is available from the National Treasury, at the Office indicated in Appendix 1 to this report.

authority of these bodies relative to other organs, i.e. public entities report directly to national or provincial executive authorities. As mentioned in Chapter 1, the Constitution does not establish an impermeable barrier between the powers and functions of national, provincial and local executive authorities, stipulating matters that would have to be dealt with cooperatively or where the powers and functions of one sphere may have to override another. This will be dealt with more extensively in chapter 4.

Table 4: Transmission of Public Monies

National Revenue Fund/Provincial Revenue Fund Allocation	N	%
Yes	609	82
Unconfirmed	133	18
Total	**742**	**100**

We were able to confirm 609 organs or 82% of the total received allocations from National or Provincial Revenue Funds. We were not able to confirm this for the remaining 18% of organs. It is generally the case that allocations to national and provincial executive authorities are higher, given their wider ambit of policy of oversight. This refers in particular to transfer payments to public entities exercising powers and performing functions under the direct policy mandate of executive authorities, and the significant implementation role of provincial administrations in the delivery of health, education and social services. The NRF allocation makes up a proportionally smaller amount of municipal budgets.

Coupled with NRF/PRF statuses, we were also able to confirm that 94% of organs must maintain compliance with either the Public Finance Management Act (No. 1 of 1999) or the Municipal Finance Management Act (No. 56 of 2003). Specifically, we found that 56% of organs are required to comply with the PFMA, including national and provincial executive authorities, constitutional organs, and public entities. At the municipal end of the scale 38% of organs must comply with the MFMA. We were unable to confirm financial reporting obligations under the PFMA for about 6% of organs.

Table 5: Financial Obligations

Statute	N	%
Public Finance Management Act (1999)	414	56
Municipal Finance Management Act (2003)	284	38
Not known/unconfirmed	44	6
Total	**742**	**100**

We were able to identify audit information for only about 25% of organs, primarily for the 2003/2004 periods. This information was largely obtained from the Office of the Auditor General. Most of the organs that we were able to obtain information on produced a "matters emphasised"

audit opinion, followed by 27% reporting a "clean" report, and 20% reporting a "qualified" report. We wish to address the poor showing of information on this question by stating that it was an item that the research team itself proposed to Parliament's project team, and therefore this item did not appear in the original ToR. When we encountered difficulty at the level and detail of information available from the AG's office, we had to take the decision that as this question was not as significant to the study as those stipulated in the ToR we could not afford to spend too much time on it. The Office of the Auditor General (Technical Support Services), informed us that they were moving towards providing greater disaggregated audit information in their General Audit Reports, which for the present study limited our ability to obtain audit findings for most municipalities, and only selected provincial departments and public entities. Audit information on national departments was generally more comprehensive.

Table 6: Audit opinion

Audit Opinion	N	%
Qualified	38	20
Matters Emphasised	85	46
Clean Report	51	27
Audit not finalised	12	6
Total	**186**	**100**

The ToR required us to indicate, where appropriate, line function departments responsible for organs of state. We interpreted "line function department" broadly to capture the "line of accountability" of organs of state within the inter-governmental system. We felt it was necessary to apply this interpretation as it reflected developing inter-governmental relations practice. This perspective is also deemed potentially significant in facilitating Parliamentary oversight, when dealing with the kinds of numbers turned up by this study. As to the numbers presented in table 7, we were firstly not able to determine the line function departments for some of the organs, about 9% of the total. The line department/line of accountability for around 45% of the organs went through national Ministers. Premiers and MECs oversaw about 8% of organs. The line of accountability for Municipalities, which took up about 38% of the entire sample of organs of state, went first through provincial MECs for Local Government. Chapter 4 will elaborate on these lines of accountability, as these will be material to recommendations on levels and means of oversight.

Table 7: Line Function Department/Line of Accountability

Overseeing Office	N	%
Ministers	334	45
MEC for Local Government (Municipalities)	284	38
MEC (other) and Premier	58	8
Unconfirmed	66	9
Total	742	**100**

3. 3. Classification Framework

As the language of section 239 of the Constitution itself provides a framework for classifying the various organs of state (see the discussion in chapter 1), a classification framework based on this section would probably be the least ambiguous and as a result the least open to challenge. We therefore decided to classify all organs of state in the database according to categories derived from our interpretation of section 239. These are presented in table 8.

Table 8: Organs Classification

Section 239 criteria	N	%
Department of state or administration	416	56
Constitutional functionary or institution	27	4
Statutory functionary or institution	299	40
Total	**742**	**100**

This classification framework resulted in 56% of organs being classified as a department of state or administration in the national, provincial or local sphere of government. A further 40% of organs were classified as statutory functionaries or institutions, with 4% representing constitutional functionaries or institutions.

Chapter 4 will draw conclusions and offer recommendations on appropriate levels and means of oversight by Parliament, by reflecting on such numbers together with those attached to other criterion referred to in this chapter. It is however clear from the information presented in this chapter that Parliament faces a daunting task in proceeding to exercise oversight over such a large and varied number of bodies. It would seem to confirm previous observations that it would be unrealistic for Parliament not to prioritise its approach in addressing the volume of information that is generated in any given working year, whilst at the same time trying to maintain overall effectiveness. Various means of prioritising organs may be appropriate, including financial commitments (i.e. organisational and public monies allocated), as well as organs distinguished by their contribution to public policy priority areas. It seems apparent however, that for Parliament to prioritise its oversight work viz. "organs of state", which goes unqualified in the Constitution, it

would have to identify a means for doing so within the interrelated system of Government. Chapter 4 sketches out the implications for oversight.

Chapter 4

Improving Parliamentary Oversight over Organs of State

4. 1. Introduction

This chapter draws on the findings of this study to determine the most appropriate methods of parliamentary oversight of organs of state. The study team was given some guidance in this respect in the form of the following:

- Setting out and distinguishing among the appropriate *levels* and *means* of accountability and oversight in terms of section 55(2) for each category. The inclusion of the word "category" was furthermore linked to the requirement that the study categorise organs of state represented in the audit.
- The study team was expected to determine the current oversight accountability levels and practices of organs captured in the audit.
- Finally, as noted in chapter three, the identification of line function departments or "lines of accountability", will likely have an impact on our suggestions pertaining to the practice of oversight.

This chapter will be structured to correspond with the requirements set out in section 1 above. It will also draw on the content of chapters 1 and 3 of this report.

4. 2. Categorisation, Levels and Means of Accountability and Oversight

The request that organs of state captured in this study should be categorised, is an indication that Parliament has already identified a preferred approach to performing its oversight role. It was indicated in chapter 3 that "organ of state", both in section 55 (2) and in section 239 of the Constitution are not qualified, aside from section 55 (2) (a) which limits its reference to "executive organs of state in the national sphere". We know however that national executive organs are not the only organs falling under the ambit of Parliament's oversight responsibility, given section 55 (2) (b) (ii)'s conjoining reference to "any organ of state", which takes one automatically to section 239. It is this clause which gives ultimate definition to the term "organ of state". As concluded in chapter 1, section 239 includes in this definition bodies falling outside national executive authority, including provincial and local government departments, constitutional institutions and statutory bodies. Given the scope of this definition, it would appear reasonable therefore to find that Parliament, in an effort to categorise organs of state, would seek to prioritise its oversight of such bodies. We use the term "Parliament" and not just "National Assembly" to indicate that any

recommendations made about oversight pertaining to section 55 (2) must also take into account any oversight role borne by the NCOP.

Categorisation of organs of state could occur on the basis of more than one variable, including by sphere of government, sector portfolio, or indeed according to the three sub-sets of section 239: department of state or administration, constitutional bodies, and statutory bodies. Our preference and hence our suggestion to Parliament is that the selection of an approach should as much as possible correspond with the status of organs in the organisational framework of government. The organisational framework of government refers to the inter-relationships between government organisations (i.e. organs), including how lines of accountability are distributed amongst the organs. The organisational framework is also constantly subject to change, including shifting lines of accountability between organs as well as changes to the organisational forms of organs. A preferred system of legislative oversight must therefore be able to respond adeptly to changes, whilst effectively discerning the inter-relationships between organs in the system.

Our argument is that categorising organs by sector portfolio is a less desirable approach. This does not mean to suggest that the current structure of parliamentary committees on the basis of ministerial portfolios should be changed, or indeed is wholly unsuitable. Indeed section 55 (2) principally requires that the National Assembly ensure that all "executive organs of state in the national sphere" are accountable to it, including the maintenance of oversight over "national executive authority". The ramifications of section 239 however, and in particular it's broadening the scope of the organ of state definition, does however indicate that some adaptations may be needed. Secondly, we believe that categorising bodies on the basis of their corresponding section 239 sub-sets is also less desirable. This system, whilst clarifying the definition of an organ of state, is less suitable as a basis for performing oversight, because it tends to favour breadth of accountability as opposed to distinguishing lines of accountability. The latter is necessary to begin to prioritise levels and means of oversight. Indeed the purpose of the section 239 sub-sets is to illustrate breadth of accountability, which in practice refers to defining the universe of bodies designated as organs of state.

4.2.1 Levels and Means of Oversight

Section two favoured a system of oversight based on the status of organs within the organisational framework of government. Such a system would be aimed principally at distinguishing and adapting the lines of accountability, to facilitate the determination of levels and means of oversight. We therefore submit that bodies should be primarily categorised according to *sphere of government*. In a decentralised but co-operative unitary state structure such as South Africa's, sphere of government is more likely to accommodate the breadth of accountability

represented by section 239, whilst at the same time distinguishing amongst lines of accountability within the system. "Sphere" of government also holds the status of a constitutional precept (Chapter 3). Furthermore, evolving legislation such as the Intergovernmental Relations Framework Act (No. 13 of 2005) coupled with various constitutional clauses guiding the principle of "co-operative government", uphold the prominence of a sphere (d) system. What impact does utilising sphere of government as a basis for parliamentary oversight, have on distinguishing levels and means of oversight?

Our understanding of "levels" of oversight is multidimensional. On the one hand it could be based on the doctrine of executive accountability, referred to in section 92 of the Constitution. In this regard, at what level in the line of accountability should oversight be directed in each category? This could refer to executive authorities. Indeed one must recall again section 55 (2)'s reference to maintaining oversight of the "exercise of national executive authority", which in this instance is vested in the President and members of Cabinet. Level of oversight is also mentioned in section 6(f)(ii) of the ToR in relation to reporting obligations of organs of state viz. empowering legislation or regulatory legislation, such as the PFMA.

Our understanding of "means" of oversight refers to the instruments developed by parliamentary structures to perform oversight and to ensure that organs of state are accountable to it. This may include the submission of written reports, or appearance before parliamentary bodies to give evidence or respond to questions posed by Members. Our task in this report is to distinguish amongst the "appropriate" means of oversight for each category of organ of state.

4. 3. Findings

4.3.1 National Sphere

The audit found that the national sphere of government, as a category, comprised the following organs under four sub-categories:

- Members of National Executive Authority (national departments headed by members of Cabinet)
- National department/organisational components as defined in the Public Service Act (Act 103 of 1994)
- Constitutional bodies (Chapter 9 institutions and other bodies)
- Public Entities as defined in the PFMA (Schedules 2, 3A, 3B)

Members of the National Executive accounted for 30 organs in the database. In terms of "levels" of accountability, members of the National Executive (i.e. national departments headed by Cabinet Ministers) are, according to section 92 of the Constitution, accountable to Parliament for the exercise of their powers and the performance of their functions. This includes providing Parliament with "full and regular reports concerning matters under their control". Moreover, this would apply not simply to the National Assembly via section 55 (2) (b) (i), but would also appear to include the National Council of Provinces, via section 66 (2) and section 69. In addition, the maintenance of oversight over "national executive authority, including the implementation of legislation..." must also take into account the sharing of "functional areas of concurrent national and provincial legislative competence", as stipulated in Schedule 4 of the Constitution. This substantiates the formal oversight role of the NCOP when it concerns provincial matters resulting from the implementation of legislation by national executive authorities.

The most appropriate means of ensuring that members of the National Executive are held accountable, and correspondingly the preferred methods of oversight, would include:

- The provision of full and regular reports to the National Assembly by national executive authority heads (i.e. Cabinet members) concerning the execution of powers and performance of functions under their direct control (i.e. Departmental business). This may take various forms, including the tabling of formal reports (annual reports and financial statements), giving evidence or information before the Assembly (i.e. Question time), and attending and giving evidence before Assembly committees on the exercise of powers and performance of functions. This would include compliance with financial regulations as set out in the PFMA.
- The above would have to include the NCOP, at minimum, when it concerns section 100 interventions (national executive supervision of provincial administration); section 125 (2) (b) (c), (4) (implementation and administration of national legislation, as well as administrative capacity); and section 216 (the regulation of funding transfers by national executive authority to provinces).

Schedule 1 and Schedule 3 of the Public Service Act also define national departments and organisational components. These include:

- Statistics South Africa (Minister of Finance)
- South African Management Development Institute (Minister of Public Service and Administration)
- South African Secret Service (Minister of Intelligence)

- Independent Complaints Directorate (Minister of Safety and Security)

In terms of accountability, these bodies are directly overseen by National Executive Authority and are captured, in terms of section 239, as part of "any department of state or administration..." The first line of accountability would therefore run through Cabinet Ministers overseeing the performance of these bodies, as stated above. In this instance these organs can be held ultimately accountable through the same means as referred above to members of the National Executive. The organs must, in addition, provide regular reports on their activities to the National Assembly via appropriate NA committees, including the heads of these organs appearing before these committees when requested.

The national sphere includes various organs that can trace their origins specifically to the Constitution. These include a group called the Chapter 9 Institutions, or "State Institutions Supporting Constitutional Democracy", and other bodies required by the Constitution to be established in various functional areas. [40] These bodies are generally regarded as having an existence independent from national executive authority, and whose first line of accountability is to Parliament and, legislatively, to the Constitution.

In terms of their accountability, the Chapter 9 institutions [41] are required to:

- Report to the National Assembly on their activities and performance of their functions at least once a year. This would typically take the form of directly tabling annual reports and financial statements, in addition to appearing before the NA to give evidence or provide information. In addition to the six Chapter Nine institutions required to account directly to Parliament, we include an additional two: The Independent Commission for the Remuneration of Public Office Bearers and the Public Service Commission.

Other institutions that derive their existence from the Constitution appear to be accountable, in terms of the execution of their powers and performance of their functions, to Parliament via national executive authorities. [42] This should not however be confused with the sanctity of their independent and impartial role.

[40] This includes Parliament and the Provincial Legislatures as "organs of state", bound only to the Constitution and a Provincial Constitution (*where relevant*).
[41] Includes the Public Protector, The Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor- General, and the Electoral Commission.
[42] These include the Municipal Demarcation Board, the Financial and Fiscal Commission, the National House of Traditional Leaders, the South African Reserve Bank, the Independent Communications Authority, the SA Local Government Association, the Western Cape Cultural Commission, and the Pan South African Language Board.

- Accountability with respect to these bodies should be shared between the heads of the institutions and the Cabinet Ministers to whom they are required to account.

- Oversight should be directed at Cabinet Ministers in the form of giving evidence or information before Parliament concerning the execution of powers and performance of functions of these organs. Secondly, the organs concerned must directly table before Parliament annual reports and financial statements.

The last segment of organs in the national category is public entities, as defined in the PFMA (Schedules 2, 3A, 3B). Public entities comprise a variety of functional forms, i.e. government business enterprises, regulatory bodies, commissions, boards, agencies and research institutions, all exercising a public power or performing a public function in terms of legislation. The primary line of accountability of these statutory bodies, numbering over 200 at national level, runs through national departments and hence through members of the national executive.

- It has become customary that the substantive business of these bodies is discussed in parliamentary committees designated to oversee the performance of members of the national executive authority (via Departmental business), to whom these bodies must primarily account. In practice this has meant that the business of public entities falls directly under the remit of section 92 (3) (b), where members of the Cabinet must "provide Parliament with full and regular reports concerning matters under their control".
- Furthermore, section 65 of the PFMA requires the executive authority responsible for a department "or public entity" to table the annual report, financial statements and audit report on these statements to, *inter alia*, the National Assembly. The significance of this provision is also reflected in monies transferred to public entities from the National Revenue Fund. We were able to confirm NRF transfers to public entities for 52% of the public entities in the database.

Together, these provisions define the minimum level of accountability of public entities to Parliament. The numbers as well as the constant change in public entity functional forms, based on effectiveness and efficiency criteria, represents the most significant challenge for parliamentary oversight. In principle, Parliament has little choice but to ensure that the powers and functions of all these organs are overseen. In this regard annual reports and financial statements must be reviewed regularly and issues connected thereto debated. This would probably leave Parliament and the National Assembly in particular, with little room to even prioritise its oversight over public entities during an annual cycle.

While prioritising the business of certain public entities on the basis of size or strategic public policy issue area may have to occur, it will be incumbent on committees of Parliament to streamline their processes for overseeing the business of public entities falling within their designated portfolios. The ultimate objective of such an exercise would be to ensure that effective oversight is performed on as many of these organs as possible during an annual cycle. Such an exercise may have to take into account clustering entities on the basis of functions, and capitalising on opportunities to raise issues concerning entities directly with executive authorities.

4.3.2 Provincial Sphere

The audit found that the provincial sphere of government, as a category, comprised the following organs under two sub-categories:

- Members of Provincial Executive Authority (provincial departments headed by members of a provincial executive, i.e. Premier and MECs)
- Provincial public entities as defined in the PFMA (Schedule 3C)
- Constitutional bodies (i.e. bodies deriving their existence from provincial constitutions)

Members of the Provincial Executive totalled 98 organs in the database. In terms of "levels" of accountability, members of the Provincial Executive (i.e. provincial departments headed by MECs, and presided over by Premiers) are accountable collectively and individually to the provincial "legislature" for the exercise of their powers and performance of their functions. This mirrors the accountability of national executive authority to Parliament. Having said this, the designation of provincial departments as "organs of state" under section 239, i.e. "any department of state or administration in the national, *provincial*, or local sphere of government", means that these bodies must also fall under the ambit of parliamentary oversight.

It is noteworthy to refer to the recent link between national executive authority and provincial executive authority drawn in the Intergovernmental Relations Framework Act (No. 13 of 2005). This called for the establishment of national intergovernmental forums as bodies where national and provincial executive authorities could consult on shared functional matters. Furthermore, sections 100, 125 (2) (b) (c) and (4), and section 216 refer specifically to instances where national and provincial executive authority to implement legislation intersect. In all of these instances the oversight role of the NCOP becomes necessary.

The practicalities of Parliament rendering oversight over 98 organs required to account principally to provincial legislatures should be dealt with here. In this regard, the following is suggested:

- That the oversight role of the NCOP should extend to the intersection of national and provincial executive authority as defined in the aforementioned provisions. In respect of section 125, this should deal directly with disputes concerning the administrative capacity of a province.

- Other matters pertaining to the oversight of provincial executive authorities should be performed by relevant provincial legislatures. Having said this, the terms of the Intergovernmental Relations Framework Act would appear to equip national executive authorities (Cabinet members) with overall responsibility for functional areas also represented in the provincial sphere. As such, it should be incumbent upon national executive authorities to account to Parliament (to the NA and NCOP) in relation to this provision as part of their primary responsibility under section 92 (3) (b). It would be correspondingly incumbent on Parliament to exercise oversight to ensure this accountability.

Provincial public entities are defined in Schedule 3C of the PFMA. These mirror national public entities discussed in section 2.1 The primary line of accountability of these provincial statutory bodies, numbering 61 organs in the database, runs via provincial departments and hence through members of provincial executives.

- It is recommended that the primary level of accountability of provincial public entities run through provincial executive authorities, which in turn are required to account to provincial legislatures.

- To the extent that the performance of provincial public entities falls within the intersection of national and provincial executive authority to implement legislation, characterised by any or all of sections 100, 125 (2) (b) (c) and (4), and section 216, the oversight role of the NCOP would be activated.

Finally, the provincial sphere also must make provision for constitutional organs deriving their existence from provincial constitutions. Our study picked up only one such body in the Western Cape: the Western Cape Cultural Commission, referred to in the Constitution of the Western Cape (1998), and whose first line of accountability is to the MEC for Cultural Affairs and Sport. The Provincial Parliament of the Western Cape should oversee this body.

4.3.3 Local Sphere

The audit found that the local sphere of government, as a category, comprised the following organs:

- Members of Municipal Councils (municipalities headed by Members of a Municipal Council)

Members of Municipal Councils totalled 284 organs in the database. In terms of "levels" of accountability and section 151 (2) of the Constitution, the executive and legislative authority of a municipality is vested in its Municipal Council, which is presided over by a Mayor. Similarly to provincial organs of state, it is only the wording of section 239 that brings municipalities into the universe of organs of state, and not section 55 (2) nor section 92. Parliament cannot therefore be held responsible for directly overseeing municipal organs of state. Having said that, there are constitutional and statutory provisions concerning municipal government, which may be useful in determining lines of accountability between municipal, provincial and national organs.

We may refer firstly to section 47 of the Municipal Systems Act (No. 32 of 2000), which requires provincial MECs for Local Government to compile and submit to provincial legislatures and the Minister (i.e. of Provincial and Local Government) annual consolidated reports on the performance of municipalities in their respective provinces. A copy of the report must also be submitted to the NCOP. In addition, section 48 of the Act stipulates that the Minister must annually compile and submit to Parliament (the NA and NCOP) and the MECs for Local Government a consolidated report on local government performance.

Such provisions indicate that accountability in respect of the performance of municipal organs of state should:

- Be held by MECs for Local Government, which in turn requires oversight to be performed by provincial legislatures over municipal organs through the MEC,
- Be held by the Minister of Provincial and Local Government, through a section 48 (Municipal Systems Act) tabling before Parliament, which is furthermore consistent with the Minister's responsibility under section 92 (3) (b). This in turn requires the NA and NCOP to ensure that oversight over municipal organs is performed through the Minister.

It is conceivable that the circumstances making up municipal performance, contained in reports to Parliament and provincial legislatures, may include that of provincial or national executive intervention stipulated in section 139 of the Constitution. In this regard, provincial and national executive authorities would be required to give account of the intervention to legislatures and Parliament. Moreover, the NCOP has a direct oversight role in matters concerning section 139 (2) (b), which requires a notice of intervention to be tabled in provincial legislatures and the NCOP within 14 days of their respective first sittings, after the commencement of the intervention. It is also conceivable that matters arising in respect of intergovernmental and functional consultation between provincial governments and municipalities located within provincial borders, as stipulated in the IGR Framework Act, would be included in the tabling before provincial legislatures and Parliament.

4. 4. Conclusion

This chapter has tried to illustrate its findings on the basis of a logical sequence of measures impacting on where the accountability of organs of state is located, and correspondingly how parliamentary oversight could be applied. It has also attempted to situate the practicalities of performing oversight in the context of a web of constitutional provisions coupled with evolving intergovernmental statutes. The rationale for this approach was intended to discern how lines of accountability are arranged across the three spheres of government, and how this accountability chain impacts on organs of state exercising public powers and performing public functions.

Appendix 1

Revised Template for Capturing Data on Organs of State

FINAL-15 NOVEMBER 2005

1. **Name of Organ of State:** _____

2. **Sphere of Government (drop down menu)**
   a. National
   b. Provincial
   c. Local

3. **Address**
   a. Postal: _____
   b. Physical: _____
   c. Website URL: _____

4. **Contact details**
   a. Telephone: _____
   b. Facsimile: _____
   c. Email: _____

5. **Governance Portfolio** _____

6. **Official in Governance Portfolio**

   a. Surname _____
   b. Title _____
   c. Initials _____

7. **Nature of Business**

   _____
   _____
   _____

8. **Relationship to Parliament (drop down menu)**
   a. Enabling Act of National Legislation
   b. Constitutional clause
   c. Other

8 (a) Comment _____

9. **Relationship to Government (drop down menu)**
   d. Member of National Executive
   e. Member of Provincial Executive
   f. Member of Municipal Council
   d. PFMA Public Entity (Schedule 2)
   e. PFMA Public Entity (Schedule 3A)
   f. PFMA Public Entity (Schedule 3B)
   g. PFMA Public Entity (Schedule 3C)
   h. Public Service Act (Schedule 3 Organisational Component)
   i. Public Service Act (Schedule 1 Department)

j. Constitutional Organ

10. Responsible Line Function/Line of Accountability

_____

11. Description of Financial Sources

a. Does organ receive funding from the National Revenue Fund: (Yes/No)
b. Current allocation (R '000) _____

12. Obligations under Financial Legislation (drop down menu)

a. Public Finance Management Act (1999)
b. Municipal Finance Management Act (2003)

13. Last Year of Audit: _____

14. Audit Opinion: _____

Appendix 2

Suggested Sources of Information for Updating the Electronic Database of Organs of State

1. National Treasury (unit dealing with national public entities) Nataleigh Young, Tel: 012 315 5552, Fax: 012 315 5786, Email: Nataleigh.Young@treasury.gov.za
2. National Treasury (Unit dealing with provincial public entities) Dondo Mogajane, Director, Provincial Budget Analysis, Tel: 012 315 5977, Dondo.Mogajane@treasury.gov.za
3. National Treasury Home Page (Internet: http://www.treasury.gov.za): "Budgets and Related Documents", is an excellent source of updated financial information concerning organs of state.
4. Office of the Auditor General: Wessel Pretorius, Business Executive, Technical Support Services, Tel: 012 426 8248, Fax: 012 426 8225, Email: wesselp@agsa.co.za
5. Government Communication and Information System (GCIS)
6. Reserve Bank of South Africa
7. Department of Provincial and Local Government (information on municipalities)
8. 2005. *Gaffney's Local Government in South Africa- Official Yearbook 2004-2006.* Johannesburg: Gaffney Group.
9. 2005. *Portfolio: Municipalities in South Africa, in association with the South African Local Government Association.* Port Elizabeth: Platinum Media.
10. Provincial Treasuries (see attached)

Eastern Cape Provincial Treasury
Bessy Joseph
Tel: 040 - 609 5005
bessy.joseph@treasury.ecprov.gov.za

Free State Provincial Treasury
Ben Sediane
Tel: 051 405 4141
sedianeb@dteea.fs.gov.za

Gauteng Provincial Finance
Elizabeth Mokoena (GPFIN)
Tel: 011 355 8016
Elizabeth.Mokoena@gpg.gov.za

Limpopo Treasury
Deon Mangoale
Tel: 015 298 7162/7014/7162

Mpumalanga Provincial Treasury

Zodwa Mginyana
Assistant Director - Accounting Services
Tel: (013) 766 4288
zmginyana@nel.mpu.gov.za

Western Cape Provincial Treasury
GL Verwey
Tel: (021) 483 4289
Glverwey@pgwc.gov.za

North West Finance
Kgotso Monnaemang
Tel: 018 387 3445
Sfry@nwpg.gov.za

Northern Cape Treasury
Susan Visser
Tel: (053) 839 4047
svisser@met.ncape.gov.za

KwaZulu-Natal Provincial Treasury
Thembiso Mkhwanazi
Tel: 033 897 4200
THEMBISO.MKHWANAZI@treasury.kzntl.gov.za