

CONTENTS



Preface	2
Foreword	3
The goals of this guide	4
Chapter 1: Introduction	5
Chapter 2: The constitutional mandate	9
Chapter 3: Rules and procedures	17
Part 1 National Council of Provinces rules and procedures	17
Part 2 Rules and procedures in provincial legislatures	29
Chapter 4: Practical suggestions and examples	35
Chapter 5: Conclusion	39
Resources	40
Useful websites	41

FOREWORD



Preface

In June 2002, I was one of the facilitators in a one-day workshop with the Committee on Members' Legislative Proposals of the National Council of Provinces. The workshop addressed the situation that members of the nine provincial legislatures and the National Council of Provinces do not make use of their constitutional right to initiate legislation.

The reasons seemed to be diverse, but mainly related to:

- a lack of clarity about the constitutional mandate of individual members and provinces in relation to the process of public policy making and
- problems with the processes and procedures for members' and provincial initiatives for legislation.

During the workshop participants identified a number of practical obstacles for members who wish to make a legislative proposal.

The workshop actively engaged participants in a discussion and analysis of the issues and problems they identified and provided expert information.

The publication of this guide for members and staff of the nine provincial legislatures and the National Council of Provinces is a sequel to the workshop. It seeks to make the information used and discussed more widely available, thus extending the benefits of the workshop beyond the circle of participants.

I would like to thank Christina Murray for her expert advice and comments on the earlier drafts of this guide, Anton Meyer for his contribution in relation to parliamentary rules and legal drafting, Jan Hofmeyr and the DDP for their support, and the members in the workshop for their active participation.

I hope this guide will assist MPLs and delegates to the National Council of Provinces in using their constitutional right to initiate legislation.

Lia Nijzink

March 2004

This is the first practical guide for Members of the National Council of Provinces and Provincial Legislatures on the topic of Members' Legislative Proposals.

Members' Legislative Proposals give MPs and MPLs the opportunity to be pro-active and not just to react to government bills. In order to identify issues on which new legislation or amendments to existing legislation are desirable, members will of course have to interact with their constituents, civil society, NGOs, professional bodies, organised business, organised agriculture, academic institutions, etc. The fact that a member is able to offer them the opportunity of presenting their ideas, not only to the member, but if they convince him/her of the soundness thereof, also to Parliament in the form of a member's legislative proposal, should in itself greatly enhance our parliamentary democracy.

Even though the chances of a member's legislative proposal being enacted as such may not be very good, experience here, and in many other parliamentary democracies, has proved that a legislative proposal is the most powerful instrument in the hands of an individual member to shine a very bright light on an issue - with the possibility of even getting his or her name into the statute books.

Where the government decides to take over the idea of a member's legislative proposal, that member can of course justifiably claim the credit for having initiated such legislation.

I trust that this guide will serve to inspire and empower all of us in the National Council of Provinces and Provincial Legislatures to make full use of this powerful instrument in our hands, in order that we may succeed in constantly improving the quality of life of those whom we represent.

A big thank you to Mr Jan Hofmeyr of the Democracy Development Programme for this organisation's assistance to make this publication possible. Thanks also goes to Mrs Naledi Pandor MP, Mr MJ Mahlangu MP and Mr Enver Surty MP, Chairperson, Deputy Chairperson and Chief Whip of the National Council of Provinces respectively, and all the members of the Select Committee on Members' Legislative Proposals for their active support. The facilitators of the workshop, Professor Christina Murray, Adv. Anton Meyer SC and Ms Lia Nijzink (who also compiled this publication) are congratulated and thanked for a job well done!

Piet Matthee MP

Chairperson of Select Committee on Members' Legislative Proposals
National Council of Provinces, Cape Town

March 2004

1 Introduction



The goals of this guide

The overarching goal of this guide is to deepen understanding of the role of members' legislative proposals in South Africa's representative democracy and to empower members in their role as public representatives.

Members of the nine provincial legislatures are elected to represent the people in their province when they fulfil their constitutional mandate of selecting officials, overseeing the executive, linking provincial government with its citizens and making laws. Delegates to the National Council of Provinces are elected to represent the interest of their province in the national sphere of government. MPLs, as well as and delegates to the Council play a key role in the process of public policy making.

As public representatives, MPLs and delegates to the National Council of Provinces have a limited yet, special responsibility, to make laws in cases that fall outside the legislative programme initiated by the executive. Their legislative proposals can be crucial to:

- fill a gap in provincial or national legislation
- address a problem of policy implementation
- address legislative issues that are less appropriate for the provincial or national executive to deal with or
- draw political attention to a particular issue of concern to their electorate.

This guide seeks to empower members by:

- Providing a good understanding of the constitutional mandate of members in relation to public policy making
- Developing an understanding of the right to initiate legislation and the processes that can assist members in exercising this right
- Exploring the importance of legislative proposals made by members and provinces, and the practical steps involved in initiating legislation
- Identifying ways to overcome the challenges members face when they wish to introduce a bill
- Providing basic skills to prepare a legislative proposal.

Traditionally, legislatures have been described as law-making bodies and executives as the bodies with the responsibility to implement laws. However, modern government is much more complex than this approach acknowledges. Areas of public policy making have expanded dramatically in the past decades. Governments in modern societies regulate many aspects of the lives of their citizens. This requires more advanced systems of governance and a more complex division of labour between legislatures and executives.

Nowadays, the initiative in public policy making lies with the executive. This is especially important in the relatively young democracy of South Africa with its powerful imperative for social and economic transformation. At the same time, the emphasis in the work of legislatures is extended from primarily law-making activity, to also include monitoring and oversight of the executive, and the implementation of its policies.

South African legislatures, like their counterparts elsewhere, need to acknowledge that their responsibility for making laws has certain limits. Most laws are, and should be, prepared and drafted by the executive and presented to the legislature for approval. The legislature bears the responsibility for ensuring that laws that are passed are appropriate and effective and reflect policy choices acceptable to the majority. Most significantly, while laws are considered in the legislature, there is an opportunity for public debate and public participation in the law-making process.

Whilst the task of developing legislation in major policy areas falls to the executive, the South African Constitution expressly gives the National Assembly, the provincial legislatures, the National Council of Provinces and the committees and individual members of these institutions the power to initiate legislation. The right of individual representatives to introduce bills is recognised in most democratic systems, but is not usually enshrined in the constitution. The fact that it is a power protected by the Constitution in South Africa, reflects the importance that the drafters of the Constitution attached to it.

Constitution section 68

"In exercising its legislative power, the National Council of Provinces may - [...] (b) initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76 (3), but may not initiate or prepare money Bills."

Constitution section 73 (4)

"Only a member or a committee of the National Council of Provinces may introduce a Bill in the Council."

Constitution section 114 (1)

"In exercising its legislative power, a provincial legislature may - [...] (b) initiate or prepare legislation, except money Bills."

Constitution section 119

"Only members of the Executive Council of a province or a committee or member of a provincial legislature may introduce a Bill in the legislature; but only the member of the Executive Council who is responsible for financial matters in the province may introduce a money Bill in the legislature."

The advanced division of responsibilities in South Africa's modern system of governance means that there are situations in which it is appropriate for an MP or MPL to initiate legislation. The right to do so is an important part of their current law-making responsibility, even if they are unlikely to initiate legislation that involves key areas of government policy. And, although members will probably not exercise this right very frequently, it is an important aspect of their role as public representatives to initiate legislation when there is a gap in national or provincial legislation or an issue of policy implementation that needs to be addressed.

What is a member's legislative proposal?

Generally, a member's legislative proposal is a proposal for legislation initiated by an individual member of a legislature, who is not a member of the executive.

Ordinary members of the National Assembly and the provincial legislatures, as well as delegates to the National Council of Provinces, have the right to take the initiative for legislation. But, this guide is written for members of provincial legislatures and the National Council of Provinces in particular. It deals with the process of law-making in so far as it affects provinces. Therefore, we do not deal with legislative proposals by members of the National Assembly.

When we refer to a member's legislative proposal we mean:

- a proposal for provincial legislation made by an MPL who is not a member of the Executive Council; or
- a proposal for national legislation affecting provinces (so called section 76 legislation) made by a permanent or special delegate to the National Council of Provinces.

A member's proposal for provincial legislation must be introduced in the provincial legislature of the relevant province, whilst a member's proposal for national legislation affecting provinces is introduced in the National Council of Provinces.

What is a provincial proposal?

Occasionally, a province may want to initiate national legislation affecting provinces. However, the Constitution does not expressly provide for provinces to make legislative proposals to the National Council of Provinces.

Constitution section 73 (4):

"Only a member or committee of the National Council of Provinces may introduce a Bill in the Council."

When a province wants to initiate national legislation for introduction in the National Council of Provinces¹, that legislation needs to be introduced by a Council member or committee. There are two avenues for provincial proposals to the National Council of Provinces. A provincial initiative may be adopted by a Council committee and that committee subsequently introduces the bill in the National Council of Provinces. Or the legislative proposal is prepared by a provincial legislature or provincial executive and a delegate takes care of the introduction in the Council. In the latter case, the province may appoint a special delegate or request a permanent delegate to introduce the bill.

This guide deals with legislative proposals that are brought forward by an individual member, either in a provincial legislature or in the National Council of Provinces. It does not expressly deal with legislative proposals by committees. Committee proposals for legislation, whether in provincial legislatures or in the National Council of Provinces are a related, but essentially different issue. Therefore, when we refer to a provincial proposal we mean a proposal for national legislation that is initiated by a provincial executive or provincial legislature, and is introduced by a delegate to the National Council of Provinces.

2 The Constitutional Mandate ²



The structure of this guide

The remainder of this guide is structured as follows. In chapter 2, we discuss the constitutional mandate of members of the provincial legislatures and the National Council of Provinces in relation to public policy making. The chapter explores the legal and political background of the right of members and provinces to initiate legislation. Chapter 3 deals with the relevant rules and procedures. It looks at the Rules of the National Council of Provinces and provincial legislatures. We discuss the role of a special committee for legislative proposals as well as the steps involved in initiating legislation. In chapter 4, we provide some practical suggestions and a number of examples of members' initiatives. Finally, chapter 5 looks at the success or failure of legislative proposals: what is a successful member's or provincial initiative?

The Constitution establishes the role and responsibilities of South Africa's legislative institutions. It sets up the National Assembly, the National Council of Provinces and the provincial legislatures as the centrepieces of the new system of representative democracy. As such they are the products of South Africa's democratic transition. They are also meant to be active agents in the constitutional project of transforming the country. They are designed to become forums for forging links between society and the state. They are intended to be dynamic and pro-active in the process of public policy making. But, most importantly, they are designed to be truly representative institutions.

Members of the nine provincial legislatures and the National Council of Provinces are the target audience of this guide. Each provincial legislature represents the people in a particular province, whilst the National Council of Provinces represents the provinces in the national sphere of government. According to the Constitution, they have four major responsibilities in fulfilling their representative role:

Selecting officials for the legislature and elsewhere

Every legislature must have procedures to identify its office bearers (presiding officers, committee chairs etc.). In addition, each provincial legislature elects the Premier of the province from among its members (section 128 of the Constitution).

Monitoring and overseeing the executive

Provincial legislatures monitor and oversee the provincial executives through the operation of accountable government. The legislature creates the executive by electing the Premier. The Premier is elected by a majority of the legislature and remains in office only as long as he or she maintains this confidence. In other words, executive power, as described in the Constitution, is sustained by the legislatures. Once the executive is in office the role of the legislature shifts. In the day to day work of a legislature the fundamental responsibility is to provide ongoing scrutiny or oversight of the executive. It is the responsibility of the entire legislature and its members, regardless of party affiliation, to ensure that the executive acts within the confines of the Constitution and the law. In practice, oversight means the review of government actions and decisions (which includes actions of government officials). It also includes scrutiny of the annual budget (sections 114 (2) and 141 of the Constitution). Especially oversight of the way in which the executive implements its policies may lead to members' initiatives for public policy changes.

Linking citizens and the legislature

Every legislature must ensure that it represents its electorate in the fullest way possible. It must provide a link between government and the people, and give citizens the best possible opportunities for making themselves heard. To fulfil this responsibility, legislative proceedings must be open and accessible (sections 72 and 118 of the Constitution). In addition, legislatures may undertake a range of activities through public hearings, public education programmes, and information services that promote close contact between members and their electorate. Sometimes, when an initiative to propose legislation is the most appropriate response to concerns raised by members of the public, contact with the people may lead to a member's legislative proposal.

Making law

Law-making is a critical part of the work of each legislature. After all, legislatures are named for their law-making activities. But in a modern parliamentary system, with partly fused legislative and executive powers, the law-making responsibility of legislatures is more modest than their name may suggest. The main responsibility of the legislature is rather to ensure that legislation initiated by the executive is fully scrutinised and debated in an open public forum; that all the issues raised by the legislation are adequately addressed; that the needs of citizens are properly accommodated; and that appropriate amendments are made. Most of the law-making work of legislatures, therefore, takes place in their consideration of bills initiated by the executive. But legislatures are not limited to such work. They can do more. The Constitution expressly states that in exercising their legislative powers the provincial legislatures and the National Council of Provinces may initiate or prepare legislation, except money bills (sections 68 (b) and 114 (1) (b)). The constitutional right of a member or a committee to introduce bills (sections 73 (4) and 119) backs up these provisions.

A multi-sphere system of government

The National Council of Provinces and the nine provincial legislatures have a distinctly provincial focus of representation. Within the context of the multi-sphere system of government set out in the Constitution, their representative role is geared towards provincial matters. In other words, when making appointments, forging links with the public, overseeing the executive or making laws their focus will be on provincial concerns, needs and interests. This should also be the point of departure when their members initiate legislation.

Constitution Schedule 4

Functional Areas of Concurrent National and Provincial Legislative Competence

Part A

- Administration of indigenous forests
- Agriculture
- Airports other than international and national airports
- Animal control and diseases
- Casinos, racing, gambling and wagering, excluding lotteries and sports pools
- Consumer protection
- Cultural matters
- Disaster management
- Education at all levels, excluding tertiary education
- Environment
- Health services
- Housing
- Indigenous law and customary law, subject to Chapter 12 of the Constitution
- Industrial promotion
- Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
- Media services directly controlled or provided by the provincial government, subject to section 192
- Nature conservation, excluding national parks, national botanical gardens and marine resources
- Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
- Pollution control
- Population development
- Property transfer fees
- Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
- Public transport
- Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
- Regional planning and development
- Road traffic regulation

- Soil conservation
- Tourism
- Trade
- Traditional leadership, subject to Chapter 12 of the Constitution
- Urban and rural development
- Vehicle licensing
- Welfare services

Constitution Schedule 5

Functional Areas of Exclusive Provincial Legislative Competence

Part A

- Abattoirs
- Ambulance Services
- Archives other than national archives
- Libraries other than national libraries
- Liquor licences
- Museums other than national museums
- Provincial planning
- Provincial cultural matters
- Provincial recreation and amenities
- Provincial sport
- Provincial roads and traffic
- Veterinary services, excluding regulation of the profession

Also falling within the competence of the provinces are -

1. certain categories of legislation listed in part B of schedules 4 and 5 allowing provinces to regulate local government; and
2. legislation providing for or dealing with
 - a. a uniform procedure in terms of which provincial legislatures confer authority on their delegations to the National Council of Provinces to cast votes (Constitution section 65 (2))
 - b. the recognition and involvement of organised local government in the provincial and national sphere of government (Constitution section 163)
 - c. the powers and functions of the Public Protector (Constitution section 182)
 - d. the values and principles governing public administration (Constitution section 195 (3) and (4))
 - e. the Public Service Commission (Constitution section 196)
 - f. the Public Service (Constitution section 197)

The national sphere of government has power over all matters except those areas of exclusive provincial legislative competence listed in schedule 5 of the Constitution. Provincial legislatures are constitutionally mandated to deal with issues listed in schedules 4 and 5 and a few other specific constitutional provisions. Although matters outside this

list may be brought to the provincial legislatures, attention paid to such issues would have to supplement the fulfilment of their specific role in the multi-sphere system of government and not displace it.

The law-making responsibility of provincial legislatures needs to be understood in the context of their specific role in the multi-sphere system of government. In most multilevel systems, the responsibility of provincial legislatures is to make laws within their own jurisdiction. The South African Constitution suggests that, initially at least, the most important law-making function of provincial legislatures is their engagement with section 76 legislation - that is, national laws that directly affect the provinces. Such legislation provides the norms and standards in terms of which provinces must fulfil their schedule 4 responsibilities. National legislation falling within section 76 is usually to be implemented by the provinces. But as national policies are put in place, provincial legislatures are able to pay more attention to developing provincial legislation or to initiating national legislation through the National Council of Provinces.

The role of the National Council of Provinces as a representative body is quite different from that of the provincial legislatures. It is composed of a delegation from each of the nine provinces, each with one vote in all but exceptional matters. In terms of section 67 of the Constitution, a maximum of ten part-time representatives, designated by local government (in terms of section 163), may participate when necessary in the proceedings of the National Council of Provinces, but may not vote. The National Council of Provinces' main function is to represent provinces as political entities. This, of course, does not mean that the National Council of Provinces has no role in representing the people. But, its role as a representative institution must complement rather than duplicate the role of the National Assembly. Thus, the National Council of Provinces needs to be most active in those areas in which the Constitution or national legislation expects provinces to implement policies. For the same reason, members' and provincial proposals have an important role in the National Council of Provinces.

Constitution section 42 (4):

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

In the law-making process, the National Council of Provinces' approval of national legislation concerning the provinces is constitutionally required. The Constitution also determines that, whilst all national bills may be introduced in the National Assembly, only bills referred to in section 76 (3) may be introduced in the National Council of Provinces. This means that any member's legislative proposal or provincial proposal introduced in the National Council of Provinces must concern a section 76 matter.

On section 76 matters provincial delegations in the National Council of Provinces vote on the mandate of the provincial legislatures. This results in an extra challenge for members of provincial legislatures: they have to act in two distinct capacities. MPLs must deal with purely provincial matters, but they must also participate in decision-making in the national sphere through the National Council of Provinces. This draws MPLs into matters that concern the province as a whole, and these interests will sometimes cut across party lines, or at least obscure them.

The two distinct capacities of MPLs mean that they can initiate both a member's proposal for provincial legislation and a member's or provincial proposal for national legislation affecting provinces. Because of this, one would expect most of the member's initiatives in the multi-sphere system of government to come from MPLs. The constitutional mandate in relation to the process of public policy making puts MPLs in a position where legislative work is not defined entirely by party politics. MPLs, therefore, have a better chance of making their legislative initiatives a success than their counterparts in the National Assembly. But this is only true if their role in the multi-sphere system of government is fully realised.

Whilst all provinces have the same constitutional obligations in the system of co-operative government, each province faces different challenges based on its particular social, economic and geographical needs. Taking this diversity into account, how do provincial legislatures fulfil their constitutional mandate in terms of the multi-sphere system of government? Do members focus their attention on specific provincial interests? Do they manage to help build specific provincial identities?

Members of provincial legislatures have an important role in building provincial confidence and finding the provinces' proper place in the system. MPLs can link the electorate to the government in the province and ensure that the province's government responds properly to provincial needs and interests. In doing so, they will enrich the system of representation, adding depth and nuance to party politics.

Should members of the governing party initiate legislation?

Member's legislative proposals traditionally refer to proposals by members who are not part of the executive. But, one should not understand this to mean that only members of

the opposition should use the right to initiate legislation. Just as the responsibility to oversee the executive falls on all members of the legislature including members of the governing party, so the right to initiate legislation extends to members of the party in government. A member of the governing party may want to use this right to complement the legislative programme of the government – or fix a problem relating to the implementation of government policies. Thus, he or she may be able to support and strengthen the position of the governing party.

It is also important to recognise that for any legislative proposal, whether initiated by a member of the governing or an opposition party, a constructive and co-operative rather than a confrontational style will contribute to success. After all, one would want the proposal to be accepted in the legislature and implemented by the executive.

To look at members' legislative proposals from a perspective that goes beyond the simple dichotomy of government and opposition is especially important in the context of the National Council of Provinces and provincial legislatures. Provincial interests do not necessarily coincide with the interests of nationally-oriented political parties. The interest of the province will sometimes cut across party lines or make partisan interests less salient. Especially members' and provincial proposals in the National Council of Provinces could be driven by provincial needs and concerns that go beyond partisan considerations only.

We have seen that provincial proposals to the National Council of Provinces must be introduced by a Council committee or member. In the latter case, either a permanent or a special delegate introduces the bill in the National Council of Provinces. It could very well be a Member of an Executive Council in his or her capacity as special delegate who is introducing the bill. This means that the division between provincial executive and provincial legislature is less relevant in case of a provincial proposal. When the proposal deals with matters that concern the province as a whole, the most relevant distinction lies between the province and the national sphere of government. Whether the proposal in question comes from a member of the governing party or a member of the opposition is not completely irrelevant - the National Council of Provinces is not devoid of party politics - but it is not the most important feature of the proposal.

Members of the provincial legislatures may also want to look beyond the more obviously partisan dynamics in provincial politics when considering a member's initiative for provincial legislation. The size of provincial legislatures differs from 80 seats in KwaZulu-Natal to 30 seats in the Northern Cape, Mpumalanga and the Free State. In addition, party composition of provincial legislatures varies. Some provinces, like Limpopo, have very low minority party representation in their legislature, with only one opposition MPL for every eleven majority party MPLs. This means that to simply leave members' initiatives

3 Rules and Procedures



to members of the opposition does not always do justice to a situation. It could mean that a gap in provincial legislation goes unnoticed or public concerns in the province remain unattended.

Finally, the right to initiate legislation is linked to the right to amend legislation. The right to amend legislative proposals from the government is widely accepted and frequently exercised. Parliamentary committees amend government bills almost on a daily basis. Sometimes a government bill is accepted with only very small amendments. Sometimes the amendments are substantial. Sometimes a member introduces his or her own legislative proposal. This may happen because the government is taking a long time to introduce legislation on the matter or because an amendment is called for after the government's bill has been passed. A member's legislative proposal is one way of bringing about necessary changes to an existing Act. Sometimes, it may even be easier for the executive to accept a member's proposal which fills a gap in its legislative programme than to introduce the appropriate legislation from its side. In other words, some members' initiatives could be to the executive's advantage.

Part 1 – National Council of Provinces rules and procedures

- What is the role of the Committee on Members' Legislative Proposals?
- What is the role of the select committee?
- Recommendations to the Council
- What are the steps in the process of a delegate's initiative for national legislation?
- What are the steps in the process of a provincial initiative for national legislation?

Part 2 – Rules and procedures in provincial legislatures

- What are the steps in the process of a member's initiative for provincial legislation?
- What are the steps in the process of a provincial initiative for national legislation?

Part 1 – National Council of Provinces rules and procedures

Delegates to the National Council of Provinces have a constitutional right to initiate legislation, but the Rules of the National Council of Provinces³ determine the process a delegate must follow when exercising this right.

National Council of Provinces Rule 163

1. The Council initiates legislation through its committees and members acting with the permission of the Council in terms of these Rules.
2. Any committee or member of the Council may, in terms of section 73 (4) of the Constitution, introduce a Bill in the Council that has been initiated in terms of subrule (1)

National Council of Provinces Rule 164

If the national executive or a provincial executive or legislature initiates and prepares legislation for introduction in the Council, that legislation may only be introduced by a Council member or committee in terms of these Rules.

The Rules of the National Council of Provinces make a distinction between members' and provincial initiatives for legislation. In the case of a proposal initiated by a member, permission of the Council is needed to introduce the bill. In the case of a proposal initiated by a provincial executive or legislature, no such permission is required. This means that the process prior to the actual introduction of the proposal in the form of a bill is different for members' and provincial proposals. A member's initiative is channelled through the Committee on Members' Legislative Proposals, whilst provincial initiatives enter the National Council of Provinces process at a later stage via a different route.

What is the role of the Committee on Members' Legislative Proposals?

In Westminster systems like the UK and Canada, a lottery is used to deal with members' legislative proposals: a draw decides which member gets his or her proposal on the Order Paper. In the South African system, it is the task of a committee to process proposals. In the National Council of Provinces, the Committee on Members' Legislative Proposals is responsible for considering proposals and making recommendations to the Council.

National Council of Provinces Rule 147 (1)

"The Committee on Members' Legislative Proposals consists of one Council member from each province designated by the delegation head."

National Council of Provinces Rule 149

"The Committee on Members' Legislative Proposals must consider and make recommendations to the Council on all legislative proposals made by Council members intending to introduce Bills and referred to the Committee in terms of rule 179."

National Council of Provinces Rule 150

"A question before the Committee on Members' Legislative Proposals is agreed when at least five provinces vote in favour of the question."

The National Council of Provinces Committee on Members' Legislative Proposals makes recommendations to the Council on all members' legislative proposals. It can recommend either that permission be given to the member to proceed with the proposed legislation or that permission be refused.

When the committee decides what to recommend to the Council it needs to consider:

- the financial implications of the member's proposal;
- how the proposed legislation relates to the existing legislative framework;
- the feasibility of options other than a members' bill to address the matter; and
- whether the member's legislative proposal is so trivial, frivolous, or bizarre that it does not warrant any further debate in the relevant select committee.

The Committee on Members' Legislative Proposals can play a facilitating role in the process by informing members and encouraging them to use their constitutional right to initiate legislation. The key to such a facilitating role is to ensure that the process does not become politicised at an early stage. Therefore, it is preferable that the committee refrains from screening proposals from a partisan perspective and limits its considerations to the four issues mentioned above, and any procedural requirements for processing the initiative.

Ideally, the committee would focus on the following questions:

- Is the proposal clear enough?
- Is it presented in the proper format?
- What information is required to decide whether or not to proceed with the proposed legislation?

If the committee were to go beyond these questions and screen proposals on political grounds, its role could become negative and restricting. This is obviously not recommended as it hampers the process and makes it difficult for members to exercise their constitutional right. There is ample room for partisan considerations once a members' bill is introduced and runs the normal route through the legislative process, so there is no need to place any unnecessary restrictions on members' legislative proposals at this early stage.

In fact, it would be advisable for the committee to discourage only clearly trivial or bizarre proposals and be generous in its recommendations regarding the rest. Even if there is little chance of the member's bill being adopted by the Council, the proposal may deal with an important issue of concern to the public that needs the attention of the legislature. A debate on a member's bill in a plenary meeting of the Council may therefore be appropriate and desirable. The Council, and not the committee, is the forum for public consideration of issues. In other words, the committee must be careful not to stifle political debate by rejecting proposals that are not agreeable to the majority party.

The facilitating role of the committee also means that it is the committee's task to guide the initiative through the process, liaise with the relevant select committee and prevent any unnecessary delays.

Sometimes, the committee designated to deal with members' legislative proposals also performs other tasks. The committee for members' initiatives of the National Assembly, for example, combines its work with a role in the petitions process. It should be carefully considered whether such a link is desirable, because it may have the effect of conflating two very different and separate processes. The provincial petitions processes appear to be developing in a different direction altogether.

National Council of Provinces Rule 179

1. The Chairperson of the Council must refer the member's memorandum to the Committee on Members' Legislative Proposals.
2. The Committee must consult the select committee within whose authority the proposal falls.
3. If the Committee after such consultation is of the view that the member's proposal warrants further investigation, but that it has financial implications for the state that may be significant enough to affect its desirability, the Committee must request the Chairperson of the Council to refer the member's memorandum to the appropriate select committee for a report on the financial implications of the proposal.
4. After considering the memorandum and the select committee's report, if there is such a report, the Committee must recommend that permission either be -
 - a. given to the member to proceed with the proposed legislation; or
 - b. refused.
5. If the Committee recommends that the proposed legislation be proceeded with, it may -
 - a. express itself on the desirability of the proposal;
 - b. recommend that the Council approve the member's proposal in principle; or
 - c. recommend that the permission be given, subject to conditions.

What is the role of the Select Committee?

The relationship between the Committee on Members' Legislative Proposals and the relevant select committee is crucial when processing members' legislative proposals. The Rules require the Committee on Members' Legislative Proposals to consult the relevant select committee on every members' proposal that is referred to it. Because the select committee has the expertise and knowledge of the relevant policy area, it is well placed to assist the Committee on Members' Legislative Proposals with regard to

- the financial implications of a legislative proposal;
- the existing legislative framework;
- the feasibility of options other than a members' bill to address the matter; and
- a decision whether the proposal is so trivial, frivolous, or bizarre that it does not warrant any further debate in the relevant select committee.

The consultations need not take the form of a formal report by the relevant select committee. But, after the initial consultations, the Committee on Members' Legislative Proposals may request that the select committee expressly reports on the financial implications of the proposal.

Any input from the relevant select committee, national executive, or department should be received and considered by the Committee on Members' Legislative Proposals. At this stage in the process, it is important that the input of the select committee and the executive is limited to the issues mentioned above. There is ample room for both the select committee and the executive to comment on the merits or desirability of a proposal once it is actually introduced in the National Council of Provinces.

In other words, this is not the moment to decide whether funds should be allocated towards the implementation of the proposed legislation. The select committee should at this stage merely assist with identifying possible financial implications of the proposal that may influence the decision whether or not the legislation should be introduced.

Similarly, this is not the moment to consider the merits of the proposed legislation or to compare it with existing policy or government initiatives. The select committee should merely consider the proposal in relation to the existing legislative framework: how does the proposed legislation relate to existing laws or legislative programmes of the executive? Does the government intend to legislate on the matter within the foreseeable future?

And finally, this is not the moment to judge the chances of the proposed legislation being accepted by a majority. The select committee should merely consider whether legislation is appropriate to address the issue and to identify other possible ways of achieving the objects of the proposal.

Recommendations to the Council

The views of the select committee should assist the Committee on Members' Legislative Proposals when it makes a recommendation to the Council with regard to permission for the introduction of a member's legislative proposal. If the Committee recommends that permission be given, it may express itself on the desirability of the proposal. In other words, the Committee may express doubts about the desirability of the proposed legislation, but recommend that it be introduced in order to foster public debate on the matter. The Committee may, for example, find that a proposal is not viable unless it is part of a broad policy initiative by the executive, but recommend that permission be given for the introduction of the bill in order to facilitate political debate on the matter.

The Committee on Members' Legislative Proposals may also recommend that permission to proceed with the proposed legislation is subject to certain conditions. The permission may, for example, be given on the condition that the member reaches an agreement with the executive regarding the financial implications of the proposal. Or confirmation by the executive that a gap in legislation exists may be a condition for permission to introduce a member's bill.

Finally, each member of the Committee on Members' Legislative Proposals represents his or her province. Committee members will, therefore, communicate with their provinces about the initiatives they are considering. The Constitution requires mandates only for decision making in the House. However, in terms of Rule 150, a question before the Committee on Members' Legislative Proposals is agreed to when at least five provinces vote in favour of the question.

What are the steps in the process of a delegate's initiative for national legislation?

Step 1 - You submit a memorandum to the Chairperson of the National Council of Provinces

National Council of Provinces Rule 178

"A Council member intending to introduce a section 76 (2) Bill in the Council in an individual capacity (other than on request by the national executive or a provincial executive or legislature) must, for the purpose of obtaining the Council's permission in terms of Rule 163 (1), submit to the Chairperson of the Council a memorandum which -

- sets out particulars of the proposed legislation;
- explains the objects of the proposed legislation; and
- states whether the proposed legislation will have financial implications for the state and, if so, whether those implications may be a determining factor when the proposed legislation is considered."

Your initiative for national legislation starts with submitting a memorandum to the Chairperson of the National Council of Provinces. The memorandum must include -

- the particulars of the proposed legislation;
- the objects (reasons for the proposal); and
- whether the proposal has any financial implications that may influence the decision whether or not the legislation should be introduced.

The memorandum must contain sufficient details to show what the existing problem is and how you propose to rectify it. A full draft of the bill may be attached, but is not necessary. Below is an example of a memorandum. You will see that you do not need to include a detailed description of the likely financial implications at this stage. A short statement is enough.

Example:

Legislative Proposal by Mrs./Mr.,
Delegate to the National Council of
Provinces for

Memorandum in terms of National Council of Provinces Rule 178

The purpose of this memorandum is to obtain the permission of the National Council of Provinces in terms of rule 163 (1) to initiate legislation.

Particulars of the proposed legislation:

Here you have 3 options.

Option 1

Legislation must limit the permissible speed of buses and minibus taxis to 80 kilometres per hour after dusk.

If you choose this option you merely state what the law should say, without elaborating where the new legislation should fit into the existing legislative framework.

Option 2

It is proposed that the National Road Traffic Act, 1996, be amended to provide that between the hours of sunset and sunrise a speed limit of 80 kilometres per hour applies to all buses and minibuses used for the conveyance of persons for reward.

If you choose this option you set out what the proposed legislation should provide for and how it relates to existing laws, without trying to formulate a draft bill.

Option 3

Particulars of the legislative proposal are set out in the attached draft bill to amend the National Road Traffic Act, 1996 (Act 93 of 1996)

If you choose this option a draft of the proposed bill must be attached. This need not be a complete draft bill that is in all respects ready for introduction - as long as it is reasonably clear what the proposed legislation entails.

Objects of the proposed legislation:

Research shows that most road accidents involving buses and minibuses occur at night time, and that excessive speed often plays a major role. The object of the legislative proposal is to slow down buses and minibuses after dusk in order to save lives.

Financial implications:

The proposed legislation will have no direct financial implications for the state. Traffic officers will be responsible for the implementation of the proposed legislation without receiving extra remuneration.

Step 2 - The Chairperson of the National Council of Provinces refers your memorandum to the Committee on Members' Legislative Proposals

After you have submitted your memorandum to the Chairperson, he or she must refer it to the Committee on Members' Legislative Proposals. You probably want to appear before the Committee to present your proposal. When you do so you must take into account the specific mandate of the Committee and the division of responsibilities between it and the relevant select committee. At this stage, you need to prepare yourself for any questions relating to -

- the way your proposal fits into the existing legislative framework;
- the feasibility of options other than your members' bill to address the matter;
- whether the legislative proposal is so trivial, frivolous, or bizarre that it does not warrant further debate in the relevant select committee; and
- the financial implications of your proposal

Step 3 - The Committee on Members' Legislative Proposals consults with the relevant select committee

It is the task of the Committee on Members' Legislative Proposals to liaise with the relevant select committee and, where appropriate, the executive, about your legislative proposal in the light of the four issues we have mentioned above. If you are going to appear before the Committee on Members' Legislative Proposals or the relevant select committee, it is advisable to also know exactly what the executive thinks of your proposal.

Step 4 - The Committee on Members' Legislative Proposals decides whether a report on the financial implications of your proposal is required.

Step 4a - If so, the Committee on Members' Legislative Proposals asks the Chairperson of the National Council of Provinces to refer your memorandum to the relevant select committee for a report on the financial implications

Step 4b - The relevant select committee reports to the Committee on Members' Legislative Proposals about the financial implications of your proposal

If the Committee on Members' Legislative Proposals deems it necessary, the select committee will be asked to submit a report about the financial implications of your proposal. This will probably be done if your proposal has important financial implications for the state. In that case, much will depend on the position of the executive. This does not necessarily mean that you have less chance of obtaining permission to introduce your member's bill; it does mean that the success of your proposal is largely dependent on any agreement you may be able to reach with the national executive about the financial consequences and implementation of your initiative.

Step 5 - The Committee on Members' Legislative Proposals adopts its recommendations to the Council

The Committee may recommend -

- that the Council refuses to give you permission to introduce your members' bill; or
- that the Council gives you permission to proceed.

In the latter case, the Committee may include its views with regard to the desirability of the legislation you propose in the recommendation. The Committee may also recommend that such permission should be subject to certain conditions, such as an agreement with the executive about the financial implications or prior consultations with provinces that are directly affected by the proposed legislation.

Step 6 - Your memorandum and the recommendation of the Committee on Members' Legislative Proposals are sent to the Speakers of the provincial legislatures to obtain the views of the legislatures.

The matter is thereafter placed on the Order Paper of the National Council of Provinces for a decision of the Council.

National Council of Provinces Rule 180

1. Member's memorandum and the recommendation of the Committee on Members' Legislative Proposals, including any views of a select committee on the financial and other implications of the proposal, must -
 - a. be sent to the Speaker of each provincial legislature to enable the legislature to develop its position with regard to the proposed legislation; and
 - b. be placed on the Order Paper for a decision in terms of section 65 of the Constitution.
2. The Council may -
 - a. give permission that the proposal be proceeded with;
 - b. refer the proposal back to the Committee or the select committee concerned for a further report; or
 - c. refuse permission.
3. If the Council gives permission that the proposal be proceeded with, it may, if it so chooses -
 - a. express itself on the desirability of the proposal; or
 - b. subject its permission to conditions.

Step 7 - The Council either -

- gives you permission to introduce a bill;
- refers your proposal back to the Committee on Members' Legislative Proposals or the relevant select committee for a further report; or
- refuses permission to proceed.

When the Council decides whether or not to give you permission to introduce the bill, you will have a chance to briefly present your proposal.

Step 7a - If the Council decides that more information is required, it will refer your proposal back to the Committee on Members' Legislative Proposals or the select committee for a further report. This means that the decision about permission to introduce your bill is postponed and your proposal will have to come back to the Council at a later stage.

Step 7b - If the Council decides to refuse permission, the process stops here.

Step 7c - If the Council gives permission to proceed with the proposal, it may express an opinion about the desirability of the legislation you propose and it may subject its permission to certain conditions. Obviously, you will have to meet those conditions before you can continue with the next step in the process. Given its facilitating role, the Committee on Members' Legislative Proposals may be able to assist you here.

Step 8 - You convert your legislative proposal into a draft bill

National Council of Provinces Rule 181

1. If the Council gives permission that the proposal be proceeded with, the member concerned must -
 - a. prepare a draft Bill, and a memorandum setting out the objects of the Bill, in a form and style that complies with any prescribed requirements;
 - b. consult the JTM for advice on the classification of the Bill, and
 - c. comply with rule 186.
2. The Secretary must reimburse a member for any reasonable expenses the member may have incurred in giving effect to subrule (1), provided that those expenses were approved by the Chairperson of the Council before they were incurred.

Step 8a - If you want the National Council of Provinces to bear the costs, you get prior approval of the Chairperson of the Council for your drafting expenses

Step 8b - You prepare a draft bill

Step 8c - You prepare a memorandum in the correct form and style

Step 8d - You consult the JTM for advice on classification of the bill

National Council of Provinces Rule 186

1. A section 76(2) Bill, whether initiated by a Council member or committee or which is to be introduced by a Council member or committee on request of the national executive or a provincial executive or legislature, may be introduced in the Council only if -
 - a. prior notice of its introduction has been given in the Gazette; and
 - b. an explanatory summary of the Bill, or the draft Bill as it is to be introduced, has been published in the Gazette. The draft Bill itself, as it is to be introduced, must be published if the Chairperson of the Council so orders.
2. The notice referred to in subrule (1)(a) must contain an invitation to interested persons and institutions to submit written representations on the draft legislation to the Secretary within a specified period.
3. The Council committee or member intending to introduce the Bill must consult the Chairperson on whether the draft Bill itself or an explanatory summary should be published.

National Council of Provinces Rule 187

1. If a Council committee or member decides not to proceed with the introduction of a Bill after rule 186 has been complied with, the committee or member must without delay inform the Secretary in writing of the decision.
2. The Secretary must publish a notice in the Gazette stating that the proposed legislation has been withdrawn.

Step 9 - The Secretary gives notice of introduction of the bill in the Gazette

National Council of Provinces Rule 188

1. A Council member or committee introduces a section 76(2) Bill by submitting to the Chairperson of the Council -
 - a. a copy of the Bill, or if the Bill as it is introduced was published in terms of rule 186, a copy of the Gazette concerned;
 - b. the explanatory summary referred to in rule 186 (1)(b), if the Bill itself was not published; and
 - c. a supporting memorandum which must -
 - i. state that the Bill is introduced as a section 76(2) Bill;
 - ii. give an account of the financial implications of the Bill for the state; and
 - iii. contain a list of all persons and institutions that have been consulted in preparing the Bill.
2. The Bill must contain on its cover page -
 - a. a reference to the name of the member or committee as the member or committee introducing the Bill and
 - b. a statement to the effect that the Bill is introduced -
 - i. with the permission of the Council; or
 - ii. on request of the national executive or a provincial executive or legislature.

Step 10 - You introduce the bill

What follows after these steps is -

- tabling the Bill in the House;
- JTM classification; and
- sending the Bill to all Speakers of the provincial legislatures.

The bill will then be referred to the relevant select committee and follow the normal route of all bills.

You are the member who introduced the bill. Therefore, you are the member in charge. This means that you must guide the bill through the legislative process.

What are the steps in the process of a provincial initiative for national legislation?

In the case of a provincial initiative for legislation, there are two options:

- you are appointed by the province as a special delegate to introduce the provincial proposal in the National Council of Provinces; or
- you are a permanent delegate and the provincial executive or legislature has requested you to introduce the bill.

In both cases the provincial legislature or executive must provide you with a properly drafted bill and give notice of the introduction of the bill in the Gazette in the way set out in National Council of Provinces Rule 186.

National Council of Provinces Rule 186

1. A section 76(2) Bill, whether initiated by a Council member or committee or which is to be introduced by a Council member or committee on request of the national executive or a provincial executive or legislature, may be introduced in the Council only if -
 - a. prior notice of its introduction has been given in the Gazette; and
 - b. an explanatory summary of the Bill, or the draft Bill as it is to be introduced, has been published in the Gazette. The draft Bill itself, as it is to be introduced, must be published if the Chairperson of the Council so orders.
2. The notice referred to in subrule (1)(a) must contain an invitation to interested persons and institutions to submit written representations on the draft legislation to the Secretary within a specified period.
3. The Council committee or member intending to introduce the Bill must consult the Chairperson on whether the draft Bill itself or an explanatory summary should be published.

National Council of Provinces Rule 187

1. If a Council committee or member decides not to proceed with the introduction of a Bill after rule 186 has been complied with, the committee or member must without delay inform the Secretary in writing of the decision.
2. The Secretary must publish a notice in the Gazette stating that the proposed legislation has been withdrawn.

Thereafter you introduce the bill in your name or the name of the committee, including a statement that the bill is introduced with the permission of the Council, or on request of the national executive, or the provincial executive of the legislature, as set out in National Council of Provinces Rule 188.

National Council of Provinces Rule 188

1. A Council member or committee introduces a section 76(2) Bill by submitting to the Chairperson of the Council -
 - a. a copy of the Bill, or if the Bill as it is introduced was published in terms of rule 186, a copy of the Gazette concerned;
 - b. the explanatory summary referred to in rule 186 (1)(b), if the Bill itself was not published; and
 - c. a supporting memorandum which must -
 - i. state that the Bill is introduced as a section 76(2) Bill;
 - ii. give an account of the financial implications of the Bill for the state; and
 - iii. contain a list of all persons and institutions that have been consulted in preparing the Bill.
2. The Bill must contain on its cover page -
 - a. a reference to the name of the member or committee as the member or committee introducing the Bill and
 - b. a statement to the effect that the Bill is introduced -
 - i. with the permission of the Council; or
 - ii. on request of the national executive or a provincial executive or legislature.

What follows after these steps is -

- tabling the Bill in the House;
- JTM classification; and
- sending the Bill to all Speakers of the provincial legislatures.

The bill will then be referred to the relevant select committee and follow the normal route of all bills. The member who introduced the bill is the member in charge of the bill and must guide this initiative through the legislative process.

Part 2 – Rules and procedures in provincial legislatures

Provincial legislatures and their members have a constitutional right to initiate legislation. To exercise this right, MPLs must follow the procedures determined by the Rules of their legislature.

Some provincial legislatures have old provisions on members' bills in their rules, which they have inherited from the pre-1994 national parliament. Apart from the fact that those provisions are not very well suited to the process of public policy making under the new dispensation, they also give rise to questions of constitutionality. Other provincial legislatures have not yet expressly dealt with the procedures for members' and provincial legislative proposals in their rules. Therefore, we have included a number of model provisions that capture the main steps in the provincial process for legislative initiatives.⁴

Members' proposals for provincial legislation

1. A member may introduce a bill other than a money bill in the Legislature.
2. When a member wishes to introduce a bill the member must submit to the Speaker a memorandum which -
 - a. sets out the particulars of the proposed legislation;
 - b. explains the objects of the legislation, including the reasons for its introduction;
 - c. states whether the legislation will have financial implications for the province; and
 - d. provides any other information that may be relevant in deciding whether or not the legislation should be introduced.
3. A draft bill may be submitted to the Speaker together with the memorandum referred to in sub rule (2).
4. The Speaker must refer the proposal for legislation to the relevant committee within 15 working days.
5. When a proposal for legislation is referred to a committee, the committee must recommend to the House whether or not permission should be given to the member to introduce the bill.
6. The Speaker must place the committee's report together with the member's proposal on the Order Paper for a decision.
7. If the House resolves that the member should be given permission to introduce the bill the Secretary -
 - a. must draft the bill unless the member submitted a draft bill with the initial memorandum; and
 - b. prepare the memorandum that must accompany every bill that is introduced.
8. Before the bill is introduced, the Secretary must publish it with its memorandum and a notice inviting comments and representations from the public.

To introduce a member's proposal for provincial legislation you need the permission of your provincial legislature. Before the House decides whether or not to give you permission to introduce a bill in the province, your initiative must be sent to the relevant committee for recommendations.

It is most practical and appropriate for the portfolio committees of the legislature to fulfil this task. The relevant portfolio committee has the expertise and knowledge to consider:

- the financial implications of a legislative proposal;
- how the proposed legislation fits into the existing legislative framework; and
- the feasibility of options other than a members' bill to address the matter.

And, the portfolio committee is in the position to liaise with the relevant Member of the Executive Council.

A provincial legislature could establish a special committee responsible for processing members' initiatives, like the National Council of Provinces Committee on Members' Legislative Proposals. However, given the size of most provincial legislatures and the availability of resources, it seems most practical and appropriate that proposals of MPLs for provincial legislation are sent directly to the relevant portfolio committee.

The committee should at this stage play a facilitating and procedural role, just like the role of the Committee on Members' Legislative Proposals in the National Council of Provinces, and leave any partisan considerations until a later stage in the process. The task of the relevant committee is to make recommendations to the House as to whether or not permission should be given to proceed with the introduction of the member's bill. These recommendations must be based on a consideration of:

- the financial implications of the proposal;
- the relation of the proposal to the existing legislative framework;
- the feasibility of options other than a members' bill to address the matter; and
- whether the legislative proposal is so trivial, frivolous, or bizarre that it does not warrant further debate.

At this stage, the committee should not try to decide whether funds should be allocated towards the implementation of the proposed legislation. The committee should merely identify and assess possible financial implications of the proposal that may influence the decision whether or not the legislation should be introduced.

Similarly, the committee should not consider the merits of the proposed legislation at this stage or compare it with existing policy or government initiatives. It should merely consider how the proposed legislation relates to existing laws or legislative programmes of the executive and confirm whether the government intends to legislate on the matter within the foreseeable future.

And finally, the committee should at this stage not try to assess the chances of the proposed legislation being accepted by a majority. The committee should limit itself to considering whether legislation is appropriate to address the issue and identifying and assessing other possible ways in which the objects of the proposal could be achieved.

What are the steps in the process of a member's initiative for provincial legislation?

Step 1 - You submit a memorandum to the Speaker

A member's initiative for provincial legislation starts with submitting a memorandum to the Speaker of the provincial legislature. The memorandum must include -

- the particulars of the proposed legislation;
- the objects of the legislation (reasons for the proposal);
- whether the proposal has any financial implications for the province; and
- any other information that may influence the decision whether or not the legislation should be introduced.

The memorandum must contain sufficient details to show what the existing problem is and how you propose to rectify it. A full draft of the bill may, but does not have to be, attached. At this stage you do not need to include a detailed description of the likely financial implications. A short statement regarding the financial implications of the proposal is sufficient

Step 2 - The Speaker refers your proposal to the relevant committee

After you have submitted your memorandum to the Speaker, the Speaker must refer it to the relevant committee within a certain period of time (check with your legislature for the exact period). You probably want to appear before the committee to present your proposal. Therefore, you may also want to contact the chair of the committee regarding the scheduling of committee meetings and your presentation.

Step 3 - The committee makes recommendations to the House

The committee must recommend to the House whether or not you should be given permission to introduce a provincial bill. This means that at this stage the committee is not supposed to be concerned with the merits of your proposal. It must focus on its specific mandate and any procedural aspects. The committee will look at the policy that is currently in place, the likely financial implications of your proposal, whether or not provincial legislation is an appropriate way to address the issue, and whether the legislative proposal is so trivial, frivolous, or bizarre that it does not warrant further debate. Therefore, it is advisable to be prepared on these aspects.

The committee will probably ask the relevant member of the Executive Council for a reaction especially when your proposal could have financial implications for the province.

The input from the side of the executive should primarily concern the executive's current policy position on the issue and any financial implications of the proposed legislation. At a later stage in the process, after you have introduced your provincial bill in the legislature, there is ample room for the executive and the committee to comment on the merits of your proposal.

Step 4 - The committee report, together with your proposal is placed on the Order Paper

It is unlikely that the House will go against the recommendations of the committee. In other words, you probably would want to muster support for your proposal and convince people of your initiative before your proposal is placed on the Order Paper for a decision by the House.

Step 5 - The House gives or refuses you permission to introduce the bill

The House may decide to give you permission to introduce the bill or the House may refuse such permission. When the House debates this decision you will get a chance to present your proposal. If the House does not give you permission to proceed, the process ends here.

Step 6 - The Secretary must turn your proposal into a properly drafted bill

If the House has given you permission to proceed with your legislative initiative, your proposal must be turned into a properly drafted bill. In these model provisions, the Secretary of your legislature is responsible for this step in the process, but perhaps you have already drafted a bill or obtained drafting assistance from outside the legislature.

Step 7 - The Secretary must publish the bill

Once your bill is properly drafted it needs to be published together with a notice to invite comments and representations from the public. Again, in the model provisions we use here, the Secretary is responsible for this step in the process.

Step 8 - You introduce the bill

Once your proposal is properly drafted and published, you may formally introduce the bill by submitting it together with its memorandum to the Speaker. Once the Speaker has accepted the bill, you as the member in charge may deliver an introductory speech.

What follows after these steps is the normal process for provincial legislation.

You are the member in charge of the bill, which means that you are responsible for guiding this bill through the legislative process.

What are the steps in the process of a provincial initiative for national legislation?

To initiate a provincial proposal for national legislation to be introduced in the National Council of Provinces, you require the approval of your provincial legislature. In fact, the

approval of the provincial legislature turns your initiative into a provincial proposal. Provincial initiatives for national legislation are channelled through the relevant portfolio committee in the province. The House subsequently decides whether or not a legislative proposal should be submitted to the National Council of Provinces.

Step 1 - You convince the relevant committee to draft a memorandum proposing the introduction of section 76 (2) legislation in the National Council of Provinces

Step 2 - The committee submits the proposal (including a recommendation as to who should introduce it in the National Council of Provinces) to the House

Step 3 - The House decides to support, amend or reject the committee proposal

Step 4 - If supported or amended, the Speaker forwards the provincial proposal to the relevant National Council of Provinces delegate, who is either a permanent delegate or a special delegate appointed to introduce the bill in the National Council of Provinces.

Step 5 - The National Council of Provinces delegate starts the process for provincial initiatives in the National Council of Provinces

4 Practical Suggestions and Examples



Provincial proposals for national legislation

1. If a committee identifies a matter that should be dealt with in national legislation, it must draft a memorandum proposing the introduction of the legislation in the National Council of Provinces. The proposal should comply with the requirements in the National Council of Provinces Rules for the initiation of a bill by an National Council of Provinces delegate.
2. A proposal for the introduction of legislation must concern a matter that would be passed under section 76(2) of the Constitution.
3. The committee must submit the proposal to the House with a recommendation as to who should introduce the proposal in the National Council of Provinces. The committee may recommend that -
 - a. the province's permanent delegate who usually deals with such matters in the National Council of Provinces should introduce the proposal in the National Council of Provinces; or
 - b. a special delegate should submit the proposal to the National Council of Provinces.
4. A committee's report on a legislative proposal must indicate -
 - a. if it is possible, the law on the matter in other provinces;
 - b. what steps the committee has taken to consult other provincial legislatures on the matter;
 - c. the outcome of any consultations;
 - d. the implications of the matter under consideration for promoting the human rights protected in the Bill of Rights and, particularly, gender equity and socio-economic rights;
 - e. differing views in the committee, clearly identifying issues on which there is disagreement – and the reasons for that disagreement; and
 - f. whether or not the committee is satisfied that the proposal is constitutional.
5. If the House supports the committee proposal or an amended proposal, the Speaker must forward it to the relevant National Council of Provinces delegate to introduce in the National Council of Provinces.

What follows after these steps is the National Council of Provinces process for provincial initiatives as outlined in part 1 of this chapter, p. 27 and 28

There are a number of questions you may want to ask yourself before you decide to use your constitutional right to initiate legislation. Below, we have included the main questions and possible sources you may want to call upon when answering them.

Before you start a Member's Legislative Initiative ask yourself...

1. What is the practical situation that needs attention?
 - a problem of an individual member of the public
 - lack of service delivery in a specific area
 - a specific group of people affected by a certain policy

Possible sources of answers:

- your constituency work
- an oversight visit with one of your committees
- other contacts with the public

2. What is the current policy/practice relating to the situation?
 - the current policy and legislation: are there any gaps?
 - the method of policy implementation: are there any problems?
 - if there is no specific policy: what is the current practice?

Possible sources of answers:

- a member of the executive or officials of the relevant department
- other members and staff of the legislature, members and staff of other legislatures and/or the National Council of Provinces
- external policy experts from universities, NGOs etc.

3. Who should do what?
 - who can best deal with the situation?
 - should it be dealt with at a provincial or national level?
 - what action is required?
 - why is legislation required? provincial or national legislation?

When you have decided to initiate provincial legislation it is advisable to consult with the MEC and the relevant department, other members of the legislature, and possible stakeholders/interested members of the public before submitting a proposal to your legislature.

When you have decided to initiate national legislation you will have to

- a. convince either the Executive Council or your legislature to initiate a proposal to the National Council of Provinces as a provincial proposal; or
- b. find a permanent delegate to introduce a proposal in the National Council of Provinces as a member's legislative proposal.

The services of a legal drafting expert may be advisable when you need to convert your proposal into a draft bill. In the case of a member's proposal in the National Council of Provinces, you need to obtain the permission of the Council to introduce your bill as well as prior approval of the Chairperson for any drafting expenses. This will entitle you to reimbursement of the costs of drafting a bill ready for introduction.

Examples of legislative initiatives

There are many situations in which it is appropriate to initiate provincial or national legislation. You can make a legislative proposal because you wish to fill an existing gap in provincial or national legislation or address a problem of policy implementation. Perhaps you wish to address a legislative issue that is less appropriate for the provincial or national executive to initiate or you simply want to draw political attention to a particular issue of concern to your electorate. The situations described below are hypothetical. They are chosen to give you an idea of the way your right to initiate legislation could work in practice.

1. Concerned members of the public come to your constituency office. They belong to a church group that has serious problems relating to the new provincial Gambling Act. This Act contains a definition of gambling that includes social bingo. Because of this definition, the bingo evenings they used to organise to raise funds for their church now have to comply with a range of regulations designed to discourage gambling. This is making it almost impossible for them to continue raising church funds by way of bingo evenings, thus jeopardising the church's very existence.
You raise the issue with the MEC who tells you that changing the definition in the Act is the only way to remedy this problem, but that her department has just finished work on the Act and moved on to other priorities. You agree to write a proposal for legislation amending the definition of gambling in the provincial Gambling Act.
2. It is the constitutional right of every citizen to bring a petition to the provincial legislature. The Western Cape Legislature has worked out a procedure for dealing with petitions. It is captured in the Western Cape Petitions Act. Several members of the public come to your constituency office telling you they have approached the legislature and were referred to the Act as a guide for their petitions. They

subsequently got lost in the process and failed to understand what was expected of them and what they could expect from the staff of the legislature. You discover that the current Act hinders rather than facilitates the petitions process. It does not include the general principles of the petitions process. It is also ambiguous, leaving room for different interpretations about what assistance can reasonably be expected from the legislature. You decide to initiate a new Western Cape Petitions Bill to replace the current one.

3. You are an MEC in the Eastern Cape and concerned about consumer protection. Your legislature has asked you to take the initiative to improve the labels on tinned produce in order to improve information to consumers. You hear that your counterparts in the Northern Cape and Mpumalanga have similar ideas. Instead of preparing a Consumer Protection Bill for the Eastern Cape, that may have different standards for labels to those being proposed in the Northern Cape and Mpumalanga you decide to take a national approach. You first consult with other MECs and manage to reach an agreement. You then introduce a bill in the National Council of Provinces, proposing national standards for the labelling of tinned produce.
4. You are a permanent delegate for Limpopo and have been very active in working out an efficient procedure with which your provincial legislature gives voting mandates to your provincial delegation. You have also worked extensively with permanent delegates of other provinces in order to streamline mandating procedures. As a result of this process you and your colleagues decide to initiate legislation in terms of section 65 (2) of the Constitution, which will set out a uniform procedure for all provinces to give voting mandates to their delegations. Together you draft a bill and the group subsequently asks you to become the member in charge and introduce the bill in the Council.
5. You are an MPL in the Northern Cape Legislature and a member of the portfolio committee for education. During a visit to several schools in your province you hear a number of complaints about schools frequently sending pupils home because of excessive heat without making up for the lost teaching time. You look into the matter and discover that these schools are not allowed to make up the lost time by starting earlier in the morning because of a provision in the national legislation covering school hours. You decide to request permission from your legislature to become a special delegate to the National Council of Provinces to initiate legislation amending this provision.
6. It is the United Nations Year of the Elderly. You have just met with a number of NGOs and community representatives calling for urgent attention to the

5 Conclusion



circumstances of the elderly in the old age homes in your province. They have already asked the MEC on numerous occasions to give his attention to the problem of mismanagement of homes for the elderly and you yourself have also repeatedly asked written and oral questions in the legislature about the issue. The MEC repeatedly assures you the problem has his best attention, but during the past 3 years nothing has been done to address the problem. You decide to initiate legislation for the provincial registration and regulation of old age homes in order to highlight the current lack of attention to the problem.

When is a legislative proposal successful?

Your initiative for public policy change has been successful when your member's bill has gone through the legislative process, is passed by the legislature and is implemented by the executive. This obviously requires a majority of the votes in the legislature in support of your initiative as well as some capacity in the provincial or national administration to implement the policy change you initiated. The latter may even include the availability of public funds for implementation. In any case, such a success will mean that you have had to convince many people including members of the executive and at least some if not all of the governing party of the value of your proposal.

But it could very well be that the executive actually wanted you to initiate and proceed with legislation on this issue. Perhaps supporting your initiative was easier for the executive than fixing the problem or legislative gap from their side. Or perhaps the executive thought it more appropriate to take a step back and have you rather than someone of their own ranks take the initiative. Or, now that major pieces of transformative legislation have been put in place there is more room for detail and fine tuning that does not necessarily have to originate with the executive. Another measure of the success of your initiative could be when you withdraw your proposal and allow the executive to take over the initiative (and probably claim most of the credit as well).

If the executive takes over your proposal, you have ensured majority support for your initiative and enhanced the chances of the policy change being implemented. Especially if you are a member of an opposition party this may not earn you maximum points in the partisan arena, but it will help the effectiveness of your proposal. It may even speed up the legislative process, which could be important, particularly when it concerns a situation where the implementation of existing policies needs to be rectified. In other words, a successful proposal can also mean that you only receive credit for your work behind the scenes.

And finally, your initiative can also be successful when it does not result in legislation, but nevertheless makes the legislature and the executive more responsive to public concerns. If the legislature gives attention to an issue of concern that you have raised, it can also be regarded as a form of success. In these cases, your proposal serves as a way of getting attention on the parliamentary platform. If your legislative proposal forces a non-legislative solution in co-operation with the executive, or just gets the executive to pay attention to the issue it has been a success. Especially in the situation where a problem just doesn't seem to get on any minister's priority list, a member's initiative to propose legislation can be just the little push that is required to get the department working on the problem.

Since 1994, there have been 3 successful initiatives for national legislation in South Africa:

- Correctional Services (Act 14 of 1996)
- Council of Traditional Leaders (Act 85 of 1998)
- Alienation of Land (Act 103 of 1998)

These bills were all introduced by members of the National Assembly. Successful members' legislative proposals like these can contribute to the quality of public policy and the quality of the policy making process. Until now, delegates to the National Council of Provinces and members of the provincial legislatures have not been very active in this regard, but there is no reason why this cannot change in the future.

Endnotes

- 1 According to the Constitution, section 76(3) legislation, which includes legislation falling in areas listed in schedule 4, is the only legislation that may be introduced in the National Council of Provinces. All other national legislation must be introduced in the National Assembly.
- 2 This chapter is largely based on Murray, C. & Nijzink L. 2002, *Building Representative Democracy: South Africa's Legislatures and the Constitution*, Cape Town: The Parliamentary Support Programme.
- 3 Throughout this guide we have used the Rules of the National Council of Provinces, as approved on 25 March 1999 and as amended on 9 November 1999, 9 March 2000, 19 September 2000, 28 March 2001 and 2 August 2002.
- 4 The Gauteng Legislature is currently revising its Rules. The Rules Committee is considering these provisions or similar ones for inclusion in the new Rules for the Gauteng Legislature.

Resources

Murray, C. & Nijzink L. 2002,
Building Representative Democracy: South Africa's Legislatures and the Constitution,
Cape Town: The Parliamentary Support Programme.
also available on http://www.eupsp.org.za/newsletters/building_democracy/index.html

Mattson, I. 1995,
'Private Members' Initiatives and Amendments', in: H. Doering (ed.) *Parliaments and
Majority Rule in Western Europe*, Frankfurt/New York: Campus Verlag/St. Martin's Press,
1995, pp. 448-487.
also available on
http://www.uni-potsdam.de/u/ls_vergleich/Publications/First%20publication.htm