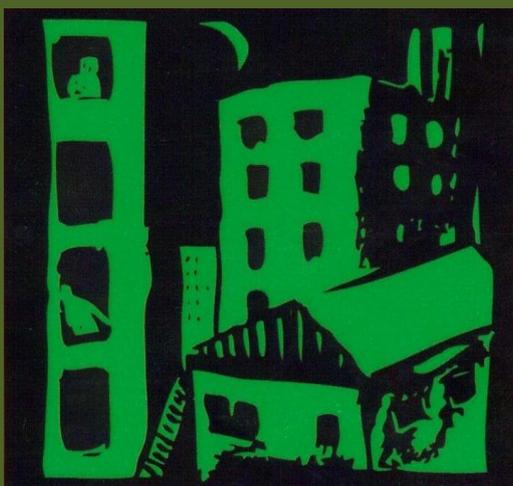


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## The state of civil society participation in Parliament

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### 1. INTRODUCTION

The South African Constitution requires that the National Assembly and provincial legislatures function in an open and transparent manner.<sup>2</sup> It is indeed a requirement that the National Assembly and provincial legislatures “must facilitate public involvement in the legislative and other processes”. Not only is this invitation applicable to the full sittings of the National Assembly or the legislature, as the case may be, but the public is also invited to the engine room, namely the meetings of committees. The Constitution is clear that neither the public nor the media may be excluded from a committee meeting unless it is reasonable and justifiable to do so in an open and democratic society. Access to the National Assembly and legislatures is only controlled to the extent that basic

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<sup>1</sup> The author would like to express his sincere gratitude to Ms Berber Hettinga for her assistance in the data analysis of public submissions to Parliament presented in this paper.

<sup>2</sup> Sections 59 and 118.

security requirements need to be met. With such a standing and constitutionally guaranteed invitation to South Africans, the question must be asked to what extent this has been utilised to embody participatory democracy.

This paper explores the extent of public participation in the legislative, oversight and accountability mandates of Parliament. The legislative mandate refers to the making, introducing and amending of laws. The Constitution requires that the executive must account to Parliament<sup>3</sup> for its actions, policies, expenditure etc. Corder *et al* explain it as follows: "Accountability can be said to require a person to explain and justify - against criteria of some kind - their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future."<sup>4</sup> Oversight has a broader meaning than accountability and includes a wide range of activities and initiatives aimed at monitoring the executive.<sup>5</sup> While accountability and oversight may differ in respect of scope and focus, it is also clear that the two are closely linked and mutually reinforcing. The last concept requiring clarification is "the public" within the sense of public participation. As will be shown below, the concept was used in an expansive manner and few restrictions were placed on the inclusion of individuals or organisations in the review undertaken. Some may argue that, for example, national human rights institutions, such as the South African Human Rights Commission (SAHRC), are state institutions and would thus not be part of "the public". On the other hand it can be argued that the SAHRC has a particular mandate to prevent and protect the public against excesses of the state and that this places it more closely aligned to the interests of the public than the state. In this paper the latter view was followed.

The first part of the paper presents data on the state of public participation in the work of Parliament from which a number of conclusions are drawn. Based on a sample of Portfolio Committees of Parliament the paper provides an assessment of the extent to which the South African public has utilised the provisions of the Constitution to interact with Parliament. A key conclusion is that the current state of public participation is almost exclusively focussed on the legislative mandate and that public participation in relation to the accountability and oversight mandates is extremely limited. The second part of the paper reviews the legal and regulatory framework of public participation in the work of Parliament. Particular attention is paid to recent case law that dealt with public participation in respect of the legislative mandate. Drawing on this, the third part of the paper explores the guidance provided by the courts in respect of public participation in the legislative mandate in relation to the oversight and accountability mandates.

## **2. THE NATURE AND PROFILE OF PUBLIC PARTICIPATION 2007 – JUNE 2010**

A quantitative review was undertaken of public participation in the National Parliament for the period 2007 to June 2010 based on information made available in the public

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<sup>3</sup> Section 55(2)

<sup>4</sup> Corder H *et al Report on Parliamentary Oversight and Accountability* Faculty of Law, University of Cape Town (1999) <http://www.pmg.org.za/bills/oversight&account.htm> Accessed 14 August 2010.

<sup>5</sup> *Ibid.*

domain by the Parliamentary Monitoring Group (PMG). The research was undertaken to coincide with the work of the Community Law Centre's Parliamentary Programme at the time. Even though other developments have taken place subsequently (e.g. the highly controversial Protection of State Information Bill) the general conclusions drawn from the data still holds. These instances of public participation were in the form of submissions made by individuals, groups and organisations in response to calls by particular parliamentary committees for public hearings on, for example, legislation or departmental annual reports. These interactions are regarded as a specific form of public participation on legislation and policy development as well as direct oversight, or supporting the oversight mandate of a parliamentary committee. As such these are probably the most formal type of interaction between parliament and the public on the day-to-day work of Parliament. It is acknowledged that other forms of public participation also exist, be they of a formal or informal nature, but the focus here is on formal engagements between parliament and civil society stakeholders. They are important because they provide the public with an avenue for direct in-put on specific issues. These formal interactions are also important because they are recorded and in the public domain. As such they are manifestations of adherence to the Constitutional requirement that Parliament must function in an open and transparent manner.

Admittedly, the methodology followed in this review has a number of limitations. Firstly, PMG may not have recorded all the inputs from the public civil society as some entities may only have made a written submission and not oral submissions. Furthermore, it is possible that written submissions may have been made subsequent to public hearings and such submissions would thus not be recorded as part of the public hearings. Thirdly, it is also the case that during committee deliberations on draft legislation that a committee may invite participatory discussions between representatives from the public and the committee whilst the committee is in session. The deliberation by the Portfolio Committee on Justice and Constitutional Development on the Child Justice Bill is an example of this.<sup>6</sup>

Whilst such interactions are healthy manifestations of participatory democracy, they are difficult to quantify and were thus excluded from the analysis below. Fourthly, the time period chosen, January 2007 to June 2010, was motivated by a new mechanism initiated by PMG to keep track of calls for public hearings and to make these calls available to the public. Prior to 2007 this system was not in place. In addition to tracking these calls, the meetings of the selected committees were also perused to verify if there were any additional instances of public participation. Fifthly, partially motivated by the scope of CLC's Parliamentary Programme<sup>7</sup>, only a sample of committees were included in the analysis. These are the Portfolio Committees on Justice and Constitutional Development; Health; Correctional Services; Women, Children, Youth and Persons with Disabilities; Social Development; Human Settlement (formerly Housing);

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<sup>6</sup> See for example the deliberations of the Portfolio Committee on Justice and Constitutional Development on the Child Justice Bill on 18 June 2008 where members of the public participated in the deliberations (e.g. Dr Gallinetti of the Child Justice Alliance): Parliamentary Monitoring Group Report, Portfolio Committee on Justice and Constitutional Development, Child Justice Bill: Further Deliberations, 18 June 2008 <http://www.pmg.org.za/report/20080618-child-justice-bill-further-deliberations> Accessed 14 August 2010.

<sup>7</sup> CLC's Parliamentary Programme focuses on using international law as a leverage to promote the greater realisation of constitutional rights domestically in respect of vulnerable groups. The programme pays particular attention to socio-economic rights, gender, children and people deprived of their liberty.

Basic Education (formerly Education) and Police. Five other committees were also included in the sample, being the Standing Committee on Social Services; the Ad Hoc Committee on Protection of Information Bill; Ad Hoc Committee on National Youth Development Agency Bill; Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill; and the Standing Committee on Security and Constitutional Development. Lastly, the paper aims to provide an overview of the nature and extent of public participation in the work of Parliament and does not attempt to assess the impact of public participation.

## 2.1 Submissions per committee

Table 1 below sets out the number of submissions made by the public to each of the surveyed committees per year. Given the large volume and often the controversiality of legislation that the Portfolio Committee on Justice had to deal with over the years, it is hardly surprising that during the period under review this Committee dealt with 140 submissions. The Health Committee also received a significant number of submissions; 86 in total. A further noticeable trend is the total number of submissions, which fluctuated from 114 in 2007 to 183 in 2008, but in 2009 dropped to 110. The decrease in 2009 can in all likelihood be ascribed to the general elections held in that year which shortened the parliamentary programme. It was also less likely that the outgoing Parliament would in an election year busy itself with extensive legislative and other processes. The first six months of 2010 saw comparatively few submissions made to the selected committees, although it is known that in July 2010 a number of submission were made to, for example, the Portfolio Committees on Police and Correctional Services.

**Table 1 Number of submissions made per committee**

Committee	2007	2008	2009	2010 (end June)	TOTAL
PC Justice	24	76	40		140
PC Health	44	32	5	5	86
PC Women, Children, Youth and Persons with Disabilities			34		34
PC Correctional Services	14	6	11		31
PC Social Development	14	11	1	5	31
Ad Hoc Committee on National Youth Development Agency Bill		28			28
PC Police		7	12	7	26
PC Human Settlement (previously Housing)	6	9		1	16
Ad Hoc Committee on Protection of Information Bill		10			10
PC Basic Education (previously Education)	9				9
Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill			7		7

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Committee	2007	2008	2009	2010 (end June)	TOTAL
SC Social Services		4			4
SC Security and Constitutional Development	3				3
<b>TOTAL</b>	<b>114</b>	<b>183</b>	<b>110</b>	<b>18</b>	<b>425</b>

### 2.2 Focal areas of submissions

The analysis of submissions also addressed the focus of the submissions and this is presented in Table 2. From the data it is clear that a small number of focal areas attracted significant public participation. The proposed closure of the Scorpions attracted the highest number of submissions (37 in total) followed by the National Youth Development Agency and the 11-Year Review of the Implementation of the Domestic Violence Act (28 each). More than 20 submissions were also received in respect of the Protection of Personal Information Bill [B9 - 2009]; the Medicines and Related Substances Amendment Bill [B44-2008]; and the Choice on Termination of Pregnancy Amendment Bill [B 21-2007]. Controversiality and overt politicisation of legislation and policy, and organised pressure groups (i.e. 11-Year Review of the Implementation of the Domestic Violence Act) are evidently strong drivers of public participation in the work of Parliament. A consequence of this may be that public participation may indeed be sporadic and opportunistic instead of more sustained. It is also clear that public involvement in Parliament has been primarily focused on the legislative mandate of Parliament compared to oversight and accountability mandates.

**Table 2 Focus of submissions for selected committees, 2007 to June 2010**

Focus of submission	Frequency
Scorpions Closure	37
National Youth Development Agency; 11 year Implementation of the Domestic Violence Act	28
Protection of Personal Information Bill [B9 - 2009]	26
Medicines and Related Substances Amendment Bill [B44-2008]	23
Choice on Termination of Pregnancy Amendment Bill [B 21-2007]	22
Traditional Courts Bill [B15-2008]; Criminal Law (Forensic Procedures) Amendment Bill [B2-2009]	19
Tobacco Products Control Amendment Bill [B24-2006]	17
Criminal Law (Sentencing) Amendment Bill [B15-2007]; Children's Amendment Bill [B19B-2006]	13
Child Justice Bill	12
Tobacco Control Amendment Bill [B7-2008]	11
Protection of Information Bill [B28-2008]	10

Focus of submission	Frequency
Cross-boundary Municipalities Laws Bill [B3-2009] & Constitution 16th Amendment Bill [B1-2009]	9
Constitution 13th Amendment Bill [24-2007]; Education Laws Amendment Bill [B33-2007]; Housing Development Agency Bill [B1-2008]; Correctional Services Amendment Bill	8
DCS Past Activities; Social Development Budget 2008/2009	6
Administrative Action Judicial Review Rules; DCS Budget 2007/2008; Parliamentary Research Unit & Auditor-General analysis; Prevention of and Treatment for Substance Abuse Bill [B12-2008]; Second-hand Goods Bill [B2 - 2008]	5
Traditional Health Practitioners Bill [B 20-2007]; Social Assistance Amendment Bill [B5 - 2010]; State of Academic Health Complexes: by Universities of Western Cape, Cape Town, Stellenbosch, Free State Health Faculties; Strategic Planning Workshop; Safety and security of farmers, farm workers and farm dwellers: stakeholders' briefings	4
Social Housing Amendment Bill [B29-2007]; Judicial Matters Amendment Bill [B48-2008]; Judicial Service Commission Amendment Bill; DCS Budget 2008/2009; Bonitas, Discovery Health, Fedhealth Medical Schemes on operations, services and charges: briefing	3
Jurisdiction of Regional Courts Bill [B48-2007]; Renaming of High Courts Bill [B5-2008]; General Laws Amendment Bill [B65-2008]; Medical Parole & Deaths in Prison; Children's Rights: UNICEF and Heinrich Boll Foundation: presentation; SAPS Budget 2010/2011; SAPS Budget 2008/2009	2
Other (see endnote 1) <sup>1</sup>	1

### 2.3 Category of interaction

The focus on the legislative mandate of Parliament is clearly illustrated in Table 3, with 335 (79%) of the 425 submissions made focussing on bills under consideration by Parliament. Submissions on budget votes totalled 29 (6.8%) and departmental annual reports 5 (1.2%).

**Table 3 Category of interaction**

Type of interaction	Frequency
Legislation	335
Departmental budget	29
Ad hoc (DVA 11-year review)	28
Expert Briefings	7
Departmental annual report	5
Ad hoc (State of Academic Health Complexes)	4
Ad hoc (Strategic Planning Workshop)	4
Ad hoc (Safety and security of farmers, farm workers and farm dwellers: stakeholders' briefings)	4

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Type of interaction	Frequency
Ad hoc (Bonitas, Discovery Health, Fedhealth Medical Schemes on operations, services and charges: briefing)	3
Ad hoc (Children's Rights: UNICEF and Heinrich Boll Foundation: presentation)	2
Ad hoc (Community Concerns About New Tsolo Hospital)	1
Ad hoc (Champions of a HIV free generation: briefing)	1
Ad hoc (Hospital Association of South Africa briefing)	1
Ad hoc (UNICEF's programmes & future work plan with Committee)	1
<b>Total</b>	<b>425</b>

Matching the committee to the type of interaction also showed that certain committees focussed exclusively on legislation (e.g. Portfolio Committee on Justice and the two Standing Committees). The Portfolio Committee on Correctional Services is the only committee that held public hearings on the annual reports of the department concerned. It is also noteworthy that during the period under review that the Portfolio Committee on Justice and Constitutional Development never held public hearings on the budget vote for its department. The Department of Women, Children, Youth and Persons with Disabilities came into being in May 2009 and it may therefore not have been possible or practical to hold public hearings on the budget vote and, further, as at the time of writing an annual report of this department had not been tabled. It is furthermore noteworthy that, compared to their counterparts in the National Assembly, the Standing Committees of the NCOP very seldom called for public hearings and when it was done, these all related to legislation as is required by their mandate.

**Table 4 Type of interaction per committee**

	Committee	Legis-lation	Annual Report	Budget	Ad hoc	Expert briefing	Total
Portfolio Committees	PC Justice	140					140
	PC Health	75			10	1	86
	PC Correctional Services	8	5	14		4	31
	PC Women, Children, Youth and Persons with Disabilities				34		34
	PC Social Development	22		7	1	1	31
	PC Human Settlement	13		3			16
	PC Basic Education (previously Education)	8		1			9
	PC Police	17		4	4	1	26
Standing Committees	SC Social Services	4					4
	SC Security and Constitutional Development	3					3

	<b>Committee</b>	<b>Legis- lation</b>	<b>Annual Report</b>	<b>Budget</b>	<b>Ad hoc</b>	<b>Expert briefing</b>	<b>Total</b>
Ad hoc committees	Ad Hoc Committee on Protection of Information Bill	10					10
	Ad Hoc Committee on National Youth Development Agency Bill	28					28
	Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill	7					7
	Total	290	5	29	49	7	380

## 2.4 Submissions by organisation type

The overwhelming majority of submissions to the selected committees were made by NGOs; a total of 181, followed by individuals (83); private sector groups (32) and industry bodies (28), as shown in Table 5 below. The relatively high number of submissions made by individuals does indicate that such submissions are indeed an avenue for public interaction with Parliament. NGOs make the most frequent use of this form of interaction, as indicated in Table 5.

**Table 5 Number of submissions per organisation type**

<b>Type</b>	<b>Frequency</b>
NGO	181
Individual	83
Private Sector	32
Industry body	28
Organised Labour	24
Academic Institution	17
Political Interest Group	14
Professional Body	11
NHRI	9
Intergovernmental agency	6
Youth Commission	6
Community representative	4
Traditional Council	2
Provincial Legislature	2

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Table 6 sets out the number of submissions per organisation or representative and provides additional detail to Table 5 above. Due to the high number of submissions in certain categories, these were grouped, namely: individuals; private sector; industry bodies; academic institutions; and professional bodies. The highest number of submissions were made by individuals (83), followed by private sector representatives (32); industry bodies (28); academic institutions (17); and professional bodies (10). At the level of individual organisations, a significant number of submissions were made by the Civil Society Prison Reform Initiative (9); SA Human Rights Commission (9); POPCRU (8); NICRO (6); UNICEF (6); Youth Commission (6); CSVR (5); Centre for Constitutional Rights (5); and the Public Servants Association of South Africa (5).

**Table 6 Number of submissions per representative**

Name	Number of submissions
Individual	83
Private Sector	32
Industry body	28
Academic Institution	17
Professional Body	10
Civil Society Prison Reform Initiative (CSPRI)	9
SA Human Rights Commission	9
Police and Prisons Civil Rights Union (POPCRU)	8
Intergovernmental agency; NICRO; UNICEF; Youth Commission	6
CSVr; Centre for Constitutional Rights (CFCR); Public Servants Association of South Africa (PSA)	5
Community representative; Women's Legal Centre; Open Democracy Advice Centre (ODAC)	4
Tshwaranang Legal Advocacy Centre; Legal Resource Centre; Children's Institute; Southern African Catholic Bishops' Conference (SACBC); Institute for Democracy in South Africa (IDASA); AIDS Law Project and Treatment Action Campaign Joint Submission; Business Against Crime; Congress of South African Trade Unions (COSATU); Institute for Security Studies (ISS); Black Sash	3
Traditional Council; South African Council of Churches; Association of Regional Magistrates; Southern African Catholic Bishops' Conference; Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Cape Town Association for the Physically Disabled; Justice Alliance South Africa (JASA); Doctors for Life International; Christian Action Network; Mosaic; Democratic Alliance (DA); ANC Youth League (ANCYL); The DNA Project; National Council Against Smoking; Khulisa; South African Police Union (SAPU)	2
Other (see endnote 2) <sup>2</sup>	1

## 2.5 Some observations

Even though there are some limitations to the data presented in the above, some trends are nonetheless clearly visible. It is firstly clear that the majority of instances of public involvement in the work of Parliament centres on the legislative mandate. Nearly 80% of the submissions made were in connection with legislation being considered by a Portfolio Committee, Standing Committee or Ad Hoc Committee. Submissions more closely related to the oversight mandate, such as on budget votes and annual reports, were indeed rare. In fact only one Portfolio Committee, Correctional Services, had public hearings on the annual report of its department. Public hearings on the budget votes were done more frequently, but it should be noted that neither the Justice nor Health Portfolio Committees had public hearings on the budget votes of their departments during the period under review. While the legislative task of Parliament is important and the extent of public consultation in this regard should be acknowledged, it is also true that maintaining oversight and holding the executive accountable are equally important tasks of Parliament. This issue will be discussed further in the following section.

It is also noteworthy that certain issues attracted significant public participation. In this regard the closure of the Scorpions; the National Youth Development Agency Bill; the 11-year Review of the Implementation of the Domestic Violence Act; the Protection of Personal Information Bill; the Medicines and Related Substances Amendment Bill; and the Choice on Termination of Pregnancy Amendment Bill stand out. In the case of the Scorpions closure and the Choice on Termination of Pregnancy Amendment Bill, highly controversial issues were being dealt with and the considerable amount of public involvement can be expected. The review of the implementation of the Implementation of the Domestic Violence Act resulted in the mobilisation of a well organised interest group which has spent a considerable amount of time and energy over the years to promote women's rights and to lobby the state for effective services for victims of domestic violence. The National Youth Development Agency Bill attracted submissions in particular from the youth wings of political parties and interest groups.

A consequence of the legislation-focussed instances of public involvement is that they are episodic; once the legislation is adopted, the process comes to an end. This may also explain the large number of NGOs (111 in total) that made only one submission during the period under review (see Table 6 above). The review of the Domestic Violence Act is the only instance where public in-puts were called for in respect of reviewing the implementation of legislation.

The focus on legislation not only draws attention away from the oversight and accountability mandates, but it also gives very specific foci to the involvement of the public in the processes of Parliament. It can thus be argued that if a particular problem or issue is not addressed in specific draft legislation, it is unlikely that it will come on the agenda for public hearings. By contrast, if a committee calls for public hearings on the annual report of a department, as the Portfolio Committee on Correctional services did, it enables members of the public to place nearly any issue related to the prison system on the agenda. In this manner the committee will receive a much wider exposure to the sentiments of the public.

It remains a relatively small number of public representatives that engage with Parliament on a consistent or even sporadic basis. During the period under review only nine organisations<sup>8</sup> made more than five submissions to any of the committees reviewed. It then appears that the perception by some Members of Parliament that it is frequently the same organisations making submissions<sup>9</sup> is not entirely without foundation. The organisations that fall in this category are also, in general, well-established and with sufficient resources. Of this group two are labour unions, two are oversight structures, one is a UN agency, and the remainder are well established NGOs.

In the discussion that follows the legal and regulatory framework is explored and particular attention is paid to the apparent neglect of Parliament's oversight mandate, and more particularly the public's involvement or lack thereof.

### 3. THE LEGAL AND REGULATORY FRAMEWORK GOVERNING PUBLIC PARTICIPATION IN THE LEGISLATIVE PROCESS

Participatory democracy should be seen as something more than casting one's vote in an election and the right to be a political candidate. This much is clear from article 25 of the International Covenant on Civil and Political Rights (ICCPR), which South Africa ratified in 1998, giving every citizen, in addition to the rights to vote and to be elected, the right "to take part in the conduct of public affairs, directly or through freely chosen representatives". Public participation in democratic processes thus goes beyond participation in elections and extends into other affairs of the democratic state. This much is made clear by the Human Rights Committee:

"The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws."<sup>10</sup>

How the public participates in public affairs and the particular modalities to achieve this should thus be described in domestic law.

The South African Constitution is clear on this and it is indeed a requirement that the National Assembly, National Council of Provinces (NCOP) and provincial legislatures "must facilitate public involvement in the legislative and other processes of the Assembly and its committees."<sup>11</sup> Not only is this invitation applicable to the full sittings of the National Assembly, but the public is also invited to the meetings of committees. Furthermore, no individual or the media may be excluded from a committee meeting

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<sup>8</sup> These are: Civil Society Prison Reform Initiative (CSPRI); SA Human Rights Commission; Police and Prisons Civil Rights Union (POPCRU); NICRO; UNICEF; Youth Commission; Centre for the Study of Violence and Reconciliation (CSVR); Centre for Constitutional Rights (CFCR); and the Public Servants Association of South Africa (PSA).

<sup>9</sup> The author has engaged actively with specifically the Portfolio Committee on Correctional Services since 2005 and this was a view expressed by a number of Committee Members in informal discussions as well as formal deliberations during committee sessions.

<sup>10</sup> UN Human Rights Committee *General Comment 25* CCPR/C/21/Rev.1/Add.7 (1996) para 5.

<sup>11</sup> Sections 59, 72, 118.

unless there are reasonable grounds to do so in an open and democratic society.<sup>12</sup> Parliament is also mandated to develop and make its own rules and procedures pertaining to its business, but “with due regard to representative and participatory democracy, accountability, transparency and public involvement”.<sup>13</sup> Parliament is therefore left with a considerable amount of discretion to determine how it will facilitate public participation.<sup>14</sup>

The Constitution is also clear that public participation should be facilitated in respect of the legislative and *other processes* of the National Assembly, NCOP and provincial legislatures. The “other processes” are not described in the Constitution, but can be inferred to mean at least the functions that the three institutions are mandated by the Constitution to fulfil. In respect of the National Assembly, NCOP and the provincial legislatures these are similar and relate to the consideration of tabled legislation as well as that it may initiate or prepare legislation, with the exception of money bills.<sup>15</sup> The National Assembly and the provincial legislatures have the additional responsibility to hold the executive accountable and exercise oversight over the national or provincial organs of state, as the case may be.<sup>16</sup> The “other processes” referred to in the Constitution must therefore be understood to mean at least the oversight and accountability mandates of the National Assembly and the provincial legislatures.

Two recent decisions from the Constitutional Court dealt with public participation in the legislative processes of Parliament and the provincial legislatures.<sup>17</sup> It is in particular in *Doctors for Life International v The Speaker of the National Assembly and Others* (hereafter *Doctors for Life*)<sup>18</sup> that the Constitutional Court dealt in detail with a

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<sup>12</sup> Section 59(2).

<sup>13</sup> Section 57(1)(b).

<sup>14</sup> *Doctors for Life International v The Speaker of the National Assembly and Others* (CCT 12/05) para 123 “Save in relation to the specific duty to allow the public and the media to attend the sittings of the committees, the Constitution has deliberately refrained from prescribing to Parliament and the provincial legislatures what method of public participation should be followed in a given case.”

<sup>15</sup> Sections 55, 68 and 114.

<sup>16</sup> Sections 55, 68 and 114.

<sup>17</sup> *Doctors for Life and Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC).

<sup>18</sup> In the *Doctors for Life International* (DFL) decision, DFL had applied directly to the Constitutional Court, challenging the constitutional validity of four Bills. DFL argued that Parliament failed to fulfil its constitutional obligation to facilitate public involvement when it passed four Bills, all of which related to health issues. These Bills were: the Sterilisation Amendment Bill; the Traditional Health Practitioners Bill; the Choice on Termination of Pregnancy Amendment Bill; and the Dental Technicians Amendment Bill. However, DFL’s complaint was confined to the process followed by the National Council of Provinces (NCOP). The Court had to consider four questions: first, whether the Constitutional Court is the only court which can hear a matter of this nature; second, whether it is competent for the Court to grant declaratory relief in respect of the proceedings of Parliament; third, the nature and scope of the constitutional obligation of a legislative organ of state to facilitate public involvement in the law-making process; and fourth, whether on the facts of the case the NCOP complied with that obligation when passing the health legislation under challenge, and, if it did not, the consequences of its failure.

Turning to the question whether the NCOP has complied with its duty to facilitate public involvement in relation to the Traditional Health Practitioners Act, and the Choice on Termination of Pregnancy Amendment Act, Ngcobo J, found that: a) these two Bills had generated great public interest at the NCOP as evidenced by requests for public hearings; b) in the light of these requests, the NCOP decided that public hearings would be held in the provinces and advised the interested groups of this fact; c) the nature of these Bills was such that public hearings should be held; d) a majority of the provinces did not hold hearings on these Bills because of insufficient time and this fact was drawn to the attention of the

number of critical issues relating to public participation in the legislative processes and it is necessary to dwell on this somewhat.

Given that Parliament has considerable discretion in complying with section 72(1)(a) of the Constitution, the Constitutional Court was quick to point out that whether or not Parliament has complied with the requirement of public participation will vary from case to case, but that Parliament must “act reasonably in carrying out its duty to facilitate public involvement in its processes”.<sup>19</sup> In *Doctors for Life*, Ngcobo J cites Sachs J approvingly from an earlier decision by the same court:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”<sup>20</sup>

To determine what is reasonable depends on the facts and circumstances of a particular case.<sup>21</sup> Reasonableness remains, however, an objective standard based on a number of factors and these are set out in the *Doctors for Life* decision. Firstly, the court attached particular importance to the nature and importance of the legislation as well as the intensity of its impact on the public. Secondly, consideration must be given to the practicalities of the law-making process, such as time and costs involved, but that saving time and money is not an excuse for limiting or diluting public participation. In short, consideration must be given to the legislation’s content, importance and urgency.<sup>22</sup> Ultimately, the court had to assess if Parliament fulfilled its duty to facilitate public involvement by, firstly providing meaningful opportunities for public participation in law-making and, secondly, whether measures were taken to ensure that people had the ability to take advantage of the opportunities provided.<sup>23</sup> The Constitutional Court therefore saw the right to political participation giving rise to the positive right to participate in political decision-making, but simultaneously imposing a duty on the State to facilitate public participation by ensuring this right to be realised.<sup>24</sup>

The Court proceeded to give further guidance on how Parliament should fulfil this duty and emphasised that merely “allowing” public participation, under the particular circumstances, is not enough, but that measures must be taken to facilitate public participation. Parliament must provide notice of and information about the legislation under consideration and the available opportunities for public participation. To this end it may be necessary to provide education to build capacity for public participation. The Court was, however, not prescriptive in respect of the specific actions to be taken and

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NCOP; and e) the NCOP did not hold public hearings. In the light of this, Ngcobo J held that the failure by the NCOP to hold public hearings in relation to the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act was unreasonable. He therefore concluded that the NCOP did not comply with its obligation to facilitate public involvement in relation to these two Acts as contemplated by section 72(1)(a) of the Constitution.

<sup>19</sup> *Doctors for Life* para 125.

<sup>20</sup> *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 111-3.

<sup>21</sup> *Doctors for Life* para 127.

<sup>22</sup> *Doctors for Life* para 128.

<sup>23</sup> *Doctors for Life* para 129.

<sup>24</sup> *Doctors for Life* para 129.

clearly said that public participation exists on a continuum that ranges from providing information and building awareness to partnering in decision-making.<sup>25</sup> In *King and Others v Attorneys Fidelity Fund Board of Control and Another* (hereafter *King case*)<sup>26</sup> the Supreme Court of Appeal (SCA) was even more descriptive of public involvement:

“Public involvement’ is necessarily an inexact concept, with many possible facets, and the duty to ‘facilitate’ it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become ‘involved’ in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it.”<sup>27</sup>

Based on these cases it can be concluded that Parliament has now been fortified with considerable guidance from the courts as to what is required from it to meet the requirements of public participation in the legislative process.

From the above it is plain that Parliament has a very clear duty to facilitate public involvement in its legislative and other processes and that it must provide the public with meaningful opportunities to exercise this right. Furthermore, Parliament has wide discretion in taking measures to meet this obligation. The Constitutional Court did, however, balance the right to public involvement in the processes of Parliament with

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<sup>25</sup> *Doctors for Life* para 129.

<sup>26</sup> In the *King* decision the appellants, disappointed investors, had unsuccessfully sought in a division of the High Court to challenge a statute of Parliament that precluded them from obtaining compensation for their losses from the Attorneys’ Fidelity Fund. They challenged the validity of the statute which amended the Attorneys Act 53 of 1979. They contended that section 59 of the Constitution had not been satisfied. That provision requires inter alia that “the National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees”. Appellants contended that there had been insufficient public consultation about the statute in question. Since Parliament had not involved the public sufficiently in the process of adopting the amending Act, it was contended, the statute was invalid. They appealed to the Supreme Court of Appeal. In 1998 Parliament amended the Attorneys Act 53 of 1979 to preclude recovery from the Attorneys Fidelity Fund of moneys deposited with an attorney not in the usual course of practice, but to invest on behalf of a client. In striking the case from the roll with costs, the Supreme Court of Appeal pointed out that in terms of section 167(4)(e) of the Constitution, only the Constitutional Court had jurisdiction to decide that Parliament had failed to fulfil a constitutional obligation.

While it was so that, subject to the Constitutional Court’s confirmation the Supreme Court of Appeal and the High Courts had jurisdiction to declare that a statute was constitutionally invalid, it had to be borne in mind that invalidity could result from different reasons. If it were contended that Act was invalid because Parliament had failed to comply with a procedural prerequisite in enacting it (for instance, if a Bill had not obtained a majority of votes), or because a statute as enacted violated a provision of the Bill of Rights, the Supreme Court of Appeal and the High Courts would have jurisdiction to grant an order declaring it invalid. But a statute might also be invalid because Parliament had so completely violated an obligation placed upon it by the Constitution that it ceased to be or to function as the body envisaged in the Constitution. In such an extreme case Parliament would lack the power to pass legislation under the Constitution. However, Appellants had not made out such a case. They admitted that there had been public involvement. They did not claim that Parliament had ceased to function entirely as the body entrusted with legislative capacity under the Constitution. Their claim therefore fell short of making out a case for legislative invalidity. Even if they had made out a sufficient case, only the Constitutional Court would have power to grant them the relief they sought.

<sup>27</sup> *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006(4) BCLR 462 (SCA) para 22

the need to respect parliamentary institutional autonomy.<sup>28</sup> Public involvement is therefore not intended to disrespect or dilute the fact that the public elected its representatives to form a parliament, but rather to strengthen it through respectful and active engagements and mutual sharing of information.

#### 4. THE OVERSIGHT MANDATE

The preceding section dealt with the legal framework and subsequent case law that focussed on public involvement in respect of the legislative mandate of Parliament. There is unfortunately no case law that has dealt with public involvement in respect of the “other processes” of Parliament and more specifically, the oversight and accountability mandates of Parliament. In view of this lacuna, if indeed one, the question must be asked if the guidance in respect of public involvement in the legislative processes of Parliament, as presented in the *Doctors for Life* and *King* cases, can be applied to the oversight mandate of Parliament. Following from this, it must then be asked what such guidelines may look like in respect of the oversight mandate, and what would be practical examples in this regard.

In *Doctors for Life* the Court emphasised the public’s right to be involved in the legislative and other processes of Parliament.<sup>29</sup> It is important to note that this right is not restricted to only the legislative mandate of Parliament but extends to any other matters that Parliament may deal with and specifically the oversight and accountability mandates. In *King* the SCA sketched the opposite of such a people’s parliament:

“Its antithesis is a body that separates itself from and excludes the public, is indifferent to their participation and interests, and conducts its business concealed from the public eye. Were that ever to occur it would negate one of the essential pillars of the Constitution, with fundamental implications not only for Parliament’s legitimacy, but for its legislative capacity.”<sup>30</sup>

The right to public involvement in the work of Parliament is what gives the South African Parliament its particular character.

In the discussion following below the emphasis will be placed on the oversight mandate of Parliament as this has been identified as a particular shortcoming in the above survey. Moreover, effective oversight and transparency are requirements for effective accountability. It also appears to be commonly accepted that since 1994 Parliament’s focus was indeed on its legislative mandate as described in 2007 by Ms Nomonde Keswa, Manager, Legislation and Oversight Division:

“There is a shift in emphasis from initiating, amending and passing legislation to increasing the effectiveness of Parliament’s oversight capacity. Parliament has developed an Oversight and Accountability Model, which provides for the strengthening of existing parliamentary oversight practices, as well as the establishment of new processes and structures to enhance this capacity.”<sup>31</sup>

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<sup>28</sup> *Doctors for Life* para 146.

<sup>29</sup> *Doctors for Life* 145.

<sup>30</sup> *Doctors for Life* para 20.

<sup>31</sup> *Parliament’s 2007 Reflections, December 16* Cape Town: Parliament of South Africa (2007) 9 [http://www.parliament.gov.za/content/Reflections\\_Final\\_12pg%209.pdf](http://www.parliament.gov.za/content/Reflections_Final_12pg%209.pdf) Accessed 14 August 2010.

It can thus be concluded that whilst Parliament is aware that its oversight mandate has been neglected, it will also require the setting up of new procedures and practices to develop this fully, and that the role of public involvement in this has not yet been developed.

At this point it is also relevant to make some comments about the constituency system in operation in South Africa. It may be argued that the public can also be involved in the work of Parliament through their individual constituency representatives. However, the proportional system in South Africa militates against this approach and the Electoral Task Team, appointed by President Mbeki in 2002, found evidence of considerable perceived distance between the electorate and individual elected representatives.<sup>32</sup> In view of this problem, the direct involvement of the public in the processes of Parliament becomes all the more important.

Given that oversight encompasses something more than accountability, the question then arises as to how Parliament can facilitate public participation in exercising oversight. In the final analysis what really matters is, as Sachs J pointed out above, whether the public had a reasonable opportunity to participate in respect of the oversight mandate. Since oversight is essentially aimed at monitoring the executive on a broad front, once off opportunities and events for public involvement may face challenges in meeting this requirement. For example, the NCOP's *Taking Parliament to the People Programme*, launched in 2002, has increasingly become "event-oriented", but more importantly, the information provided by the public to parliamentarians under this programme (and under the People's Parliament Programme) does not seem to find its way into the work of the portfolio committees.<sup>33</sup>

A further mechanism that the public can use is petitions as provided for in the Constitution.<sup>34</sup> Despite its potential, petitions appear to be fairly unknown and thus seldom utilised.<sup>35</sup> Petitions are also, by their nature, very specific and frequently problem-driven and, as such, may not be an effective monitoring tool unless it is used frequently and in a consistent manner. This will require a certain measure of coordination and political skill. It also appears that Parliament has not set up the necessary mechanism to deal with petitions.<sup>36</sup> It is thus, from the available literature, not clear what Parliament would do with petitions.

The task of oversight centres, in its crudest form, on monitoring the strategic priorities of the executive and the utilisation of resources allocated thereto with the aim to ensure that resources are being used effectively and efficiently to achieve the stated aims. In this regard two instruments stand out, namely the budget vote (read together with the department's strategic plan) and the departmental annual report. The budget vote and strategic plan, read together, set out a multi-year plan for the department concerned. Based on this, Parliament will approve, amend or reject the proposed budget for the year. In fulfilling this duty, the committees of Parliament are obligated, by virtue of the Money Bills Amendment Procedure and Related Matters Act (Act 9 of 2009), to assess the performance of each national department with reference to the following: the

<sup>32</sup> *Report of the Electoral Task Team* Cape Town: Electoral Task Team (2003) 18.

<sup>33</sup> *Report of the Independent Panel Assessment of Parliament* Cape Town: Parliament of South Africa (2009) 64.

<sup>34</sup> Sections 17 and 56(d).

<sup>35</sup> *Report of the Independent Panel Assessment of Parliament* (n 32 above) 63.

<sup>36</sup> *Report of the Independent Panel Assessment of Parliament* (n 32 above) 63.

medium term estimates of expenditure; its strategic priorities; measurable objectives; prevailing strategic plans; the expenditure report published by National Treasury; financial statements; annual report; the report from the Standing Committee on Public Accounts (SCOPA); and any other information presented to or requested by any house of Parliament.<sup>37</sup> While Parliament may undertake other activities to exercise its oversight mandate, such as inspection visits to government facilities (e.g. prisons, hospitals and police stations), the duties imposed by the Money Bills Amendment Procedure and Related Matters Act are a very clear and tangible operationalisation of the oversight mandate.

While section 5 of the Money Bills Amendment Procedure and Related Matters Act does not require Parliament to hold public hearings in respect of the departmental budget votes, section 10(8) of the same Act requires that the Standing Rules of Parliament must provide for the Committee on Appropriations to hold public hearings in respect of appropriation bills. Apart from this provision, the portfolio committees are entitled to consider any other information presented to or requested by it. Facilitating public involvement in the Portfolio Committees' assessment of the budget appears to be of great importance for a number of reasons.

It will firstly give a real sense of participatory democracy by involving the public in the budget assessment process as set out in section 5 of the Money Bills Amendment Procedure and Related Matters Act, as described above. Facilitating public involvement at this level gives real meaning to participation in political decision-making as described by the Human Rights Committee in General Comment 25<sup>38</sup> and in the *King* case where Sachs J refers specifically to the public "participating directly in those processes."<sup>39</sup> Secondly, the substance of the issue being dealt with, namely the allocation of public funds and the monitoring of their utilisation, is of great public importance and intensity because it has a direct impact on the public. A variable the Constitutional Court attached great prominence to in *Doctors for Life* (para 128), is assessing whether the public had a reasonable opportunity for participation in the law-making process.

The same principle applies here: the allocation of funds and their utilisation has high "intensity of impact" and the public should thus be given a reasonable opportunity to "say its say". The strategic plans of government departments, the reporting on the use of funds in the past and the reports from other oversight institutions (e.g. SCOPA and the Auditor General) are extremely valuable sets of information not only to the portfolio committees but also to the public for the simple reason that they reflect whether the current government is living up to its election promises. Engaging the public on these issues is critical for assessing the veracity of the reports government submits to Parliament, but also to scrutinise the future plans of the government in power. Parliament should also accept that, if it is to exercise oversight effectively, it cannot rely only on the information supplied by government departments and other institutions of state, but that its information base will be greatly enriched by engaging the public in respect of its oversight mandate.

In the preceding analysis of public participation in selected committees, the evidence showed that nearly 80% of the engagements were focused on law-making and that

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<sup>37</sup> Section 5 of the Money Bills Amendment Procedure and Related Matters Act, No 9 of 2009.

<sup>38</sup> See footnote 11.

<sup>39</sup> *King and Others* para 22.

these instances were very specialised and focussed. The conclusion was drawn that this shaped the agenda for Parliament-public interactions in a particular manner that limited the flow of information. Therefore, and as a third reason, by engaging the public on the strategic direction, budget and performance of departments, the portfolio committees will open themselves up to a much broader range of issues. In effect this will democratise the agenda for interactions between Parliament and the public, with the possible consequence that the portfolio committees' interactions with their relevant departments may change in substance to reflect (more accurately) the issues raised by the public. The value here lies not only in that a citizen has a right to engage Parliament, but that he or she has a right to engage on a subject of their choosing. Facilitating public involvement in the oversight mandate enables this and thus counters an inherent limitation in respect of the legislative mandate.

Public involvement in the oversight mandate is important for a fourth reason: it provides Parliament with a view from below; a view that is seldom found in departmental annual reports and as such represents an alternative or shadow "report". The public is ultimately in the best position to state whether services are being rendered and infrastructure being erected or not in a particular area.

## 5. CONCLUSION

The review presented here that public participation in the work of Parliament has firstly been limited by and large to law reform and, further, that the greatest intensity of public involvement occurred when Parliament dealt with particularly controversial legislation. Within specific sectors it is also apparent that a relatively small number of organisations engage regularly with Parliament on a number of issues and the majority of interactions are once-off and related to specific pieces of legislation.

Defining a new legal order for South Africa based on the Constitution after 1994 required Parliament to finalise hundreds of pieces of legislation in a relatively short period of time. In completing this momentous task, the oversight mandate of Parliament was neglected and consequently public involvement in respect of Parliament's oversight mandate. However, the lessons learnt and jurisprudence that has emerged from the 15-year focus on legislation has proven to provide valuable guidelines in deepening participatory democracy in South Africa although these cases dealt with public participation and the legislative mandate. The right to public participation in the work of Parliament has now been consolidated based on the *Doctors for Life* and *King* decisions. The next challenge is for the public to utilise this right in order to support and strengthen the manner in which Parliament fulfils its oversight mandate.

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<sup>2</sup> Advice Desk for the Abused; African Christian Democratic Party (ACDP); African National Congress (ANC); Aids and Rights Alliance for Southern Africa (ARASA); AIDS Law Project; Azanian People's Organisation

(AZAPO) [Youth Desk]; Campaign for Tobacco-Free Kids; Cancer Association of South Africa (CANSAs); Cape Bar Council; Centre for Child Law; Centre for Conflict Resolution; Centre for the Aids Programme of Research in South Africa (CAPRISA); Champions of a Human Immunodeficiency Virus (HIV) Free Generation; Child Justice Alliance; Child Welfare South Africa; Childline; Childsafe South Africa; Christian Lawyers Association of South Africa; Christian View Network; Community Law Centre; Congress of the People Youth (COY); Consultation of Christian Churches; CSIR Crime Prevention Research Group (CPRG); Democratic Alliance Merafong; Democratic Alliance Youth League of Mpumalanga; Democratic Nursing Organisation of South Africa; Disabled People South Africa; Drug Free Africa; DSO Concerned Group; Eastern Cape PL; Embalini Child and Youth Centre (Embalini); Ethnomedicine Practitioners Association of South Africa (EPASA); Federation of Governing Bodies of South Africa (FEDSAs); Fire Protection Association of South Africa; Food and Allied Workers Union (FAWU); Free Market Foundation (FMF); Freedom Front Plus Youth (FF+Y); Freedom of Expression Institute (FXI); Gender Advocacy Programme (GAP); Global Security Limited; Governing Body Foundation; Governors' Alliance; Gun Free Society; Health Systems Trust; Heart and Stroke Foundation of South Africa (HSFSA); Heart and Stroke Foundation of South Africa (HSFSA) and Youth for Health (Y4H); Heinrich Boll Foundation; Helen Suzman Foundation; Independent Democrats (ID); Inkatha Freedom Party (IFP); Inkatha Youth Brigade (IYB) and South African Democratic Student Movement (Sadesmo); Ipas South Africa; Konrad Adenauer Stiftung; Kwazulu-Natal Rural Women's Movement; KZN PL; Legal Resource Centre (LRC) and People Opposing Women Abuse (POWA) Joint Submission; Life Enrichment Ministries; Makuleke Property Association; Matatiele / Maluti Mass Action Committee; Medical Rights Advocacy Network (MERAN); Muslim Judicial Council (MJC); Mzanzi Youth Business in Coalition on Opportunities (MYBICO); National Association of Child and Youth Care Workers (NACCW); National Association of People Living with HIV/AIDS; National Association of Social Housing Organisations (NASHO); National Coordinating Committee for African Traditional Health Practitioners of South Africa (NCC); National Education, Health & Allied Workers Union (Nehawu); National Professional Teachers' Organisation of South Africa; National Welfare, Social Service and Development Forum (NWSSDF); Nelson Mandela Foundation and South African History Archive Joint Submission; Nutrition Society of South Africa and the Association for Dietetics in South Africa (NSSA); OSF-SA; Planned Parenthood Association of South Africa; Projects Abroad Human Rights Office (PAHRO); Public Service Accountability Monitor (PSAM); REACH; Restorative Justice Centre; Rural Development Network (RUDNET); Saartjie Baartman Centre (SBC); Society For State Advocates; Soul City Institute for Health and Development Communication; South African Civil Organisation (SACO); South African Communist Party (SACP); South African Congress for Early Childhood Development AND Early Learning Resource Unit; South African Constitutional Property Rights Foundation (SACPRIF); South African Council of Churches Youth Forum (SACCYF); South African Democratic Teachers Union (SADTU); South African Disability Alliance; South African Gun Owners Society; South African History Archive (SAHA) and the Nelson Mandela Foundation (NMF); South African Media and Gender Institute (SAMGI); South African Medical Association; South African National Editors' Forum (Sanef); South African Prisoners Organisation for Human Rights (SAPOHR); South African Society for the Prevention of Child Abuse and Neglect (SASPCAN); Substance Misuse Advocacy Research Training (SMART); Suid-Afrikaanse Onderwysersunie (SAOU); The Shelter Focus Group; The South African Blind Youth Organisation (SABY); The South African Youth Chamber of Commerce (SAYCC); The South African Youth Council (SAYC); Thoyando Victim Empowerment (TVE); Traditional Chinese Healers Association; Treatment Action Campaign; Umkonto We Sizwe Military Veterans Association (MKMVA); Umsobomvu Youth Fund; Uniting Presbyterian Churches of Southern Africa; Western Cape Networking AIDS Community of South Africa; Women in Action; Women on Farms Project; Women's Health Research Unit; Young Communist League (YCL)