

The role of the NCOP in Intergovernmental Relations

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Context

→ **public engagement** by members of the NCOP

→ understanding of the role of the NCOP

1. History

2. Functions of NCOP (+ review of practice)

History

- Senate 1910-1983 – House of Lords model
- Unitary state before 1994 → no specific provincial interests
- Function to review legislation but without power to veto legislation: “a second and sober review of legislation”
- Total alignment of political parties in National Assembly and Senate

Senate under Interim Constitution

Hybrid function:

- (a) pass all legislation but not money bills (budget)
 - could not veto legislation, only delay
- (b) veto legislation affecting provincial boundaries and powers of provinces

Practice:

- (a) Senate a mirror image of NA – political parties nominated senators – no independent voice
- (b) Limited value-add

NCOP under 1996 Constitution

Competing models:

- Senate (Canada)
- US Senate
- German *Bundesrat*

Senate – (Canada)

- appointed by Governor-General on recommendation by Prime Minister
- all provinces represented (proportionally)
- reviews legislation, all laws must be passed by Senate
- practice: technical enhancements

Response:

- “**too weak**, lacked provincial focus, little value in the past”

US Senate

- equal representation of states
- direct elections
- co-determination of legislation
- supremacy in foreign relations – confirming treaties

Response:

- “**too strong** – primary site of democracy should be National Assembly, not NCOP”

German *Bundesrat*

- provincial executives voting as blocs
- proportional representation of provinces
- co-determining matters affecting provinces

Response:

- “brings provinces and **provincial interests to the centre**, but will bureaucrats from provinces not be too powerful?”

NCOP combines 3 models, but *Bundesrat* dominant

- equality of representation – delegation of 10 for each province (US)
- 4/10 provincial executives (Germany)
- 6/10 indirectly elected by provincial legislatures with right of recall
- 10 non-voting members of organised local government

Function

Section 42(4) Constitution

“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.**”

NCOP's powers

- making **laws**
 - consider, pass, amend, propose or reject amendments to legislation brought to it
 - initiate legislation in Schedule 4 (but no money bills)
- **review** acts of national executive
- **oversight**
- **appointment** - e.g. 4 members of JSC

NCOP's law making powers

- national legislation **affecting provinces** (s 76)
 - co-determine but NA can override with 2/3
 - vote as provincial blocs (*Bundesrat*)
 - impasse: Mediation Committee
- national legislation **not affecting provinces** (s 75)
 - delaying power
 - vote as individuals (Senate)
- amending the **Constitution**
 - 6/9 province approve
- **money** bills (s 77)
 - since 2009 NCOP may make amendments to money bills

Does Bill affect provinces? - tagging

- Whether s 75 or 76 route?
- ConCourt: Any Bill that “**substantially affect[s]** the interests of provinces””
- **NB!** impact ≠ with provincial authority
- consequence: “... failure to comply ... renders the ... legislation **invalid.**”
- Examples: CLARA & Municipal Systems Amendment Act

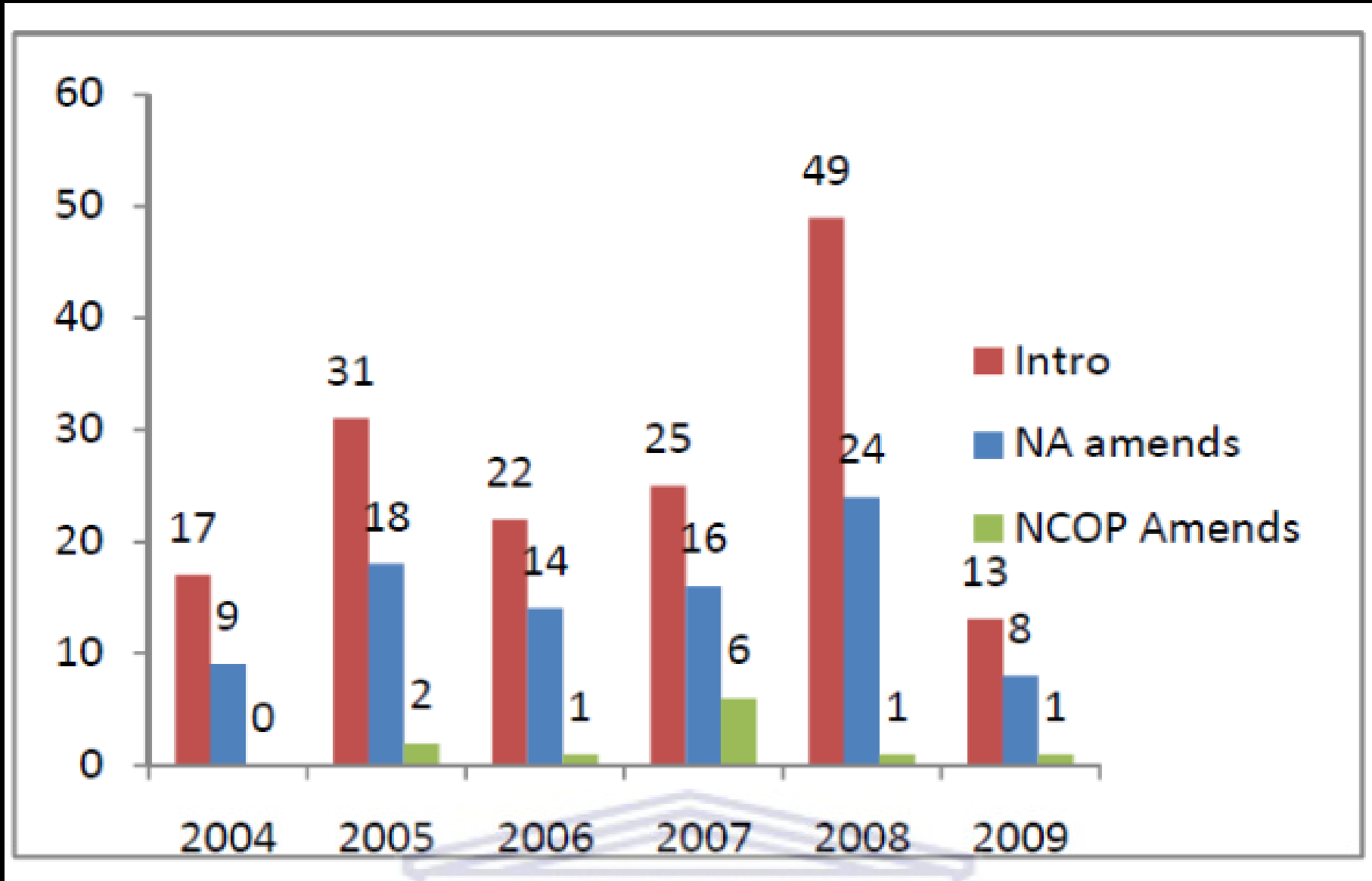
Practice of NCOP engagement with Bills

- Research into processing of Bills by 3rd Parliament (2004-2009) (Mafilika 2013)

230 Bills				
Procedure	S 75	S 76	S 77	S 74
%	69%	17%	12%	2%

- Assessing the NCOP engagement with Bills
 - indicator: amendments

S 75 Bills: *who* makes amendments?



- **nature** of amendments
 - mostly technical, grammatical
 - often at initiative of department
- NA **accepted** most amendments

Bills affecting provinces '04-'09

Where are they introduced?

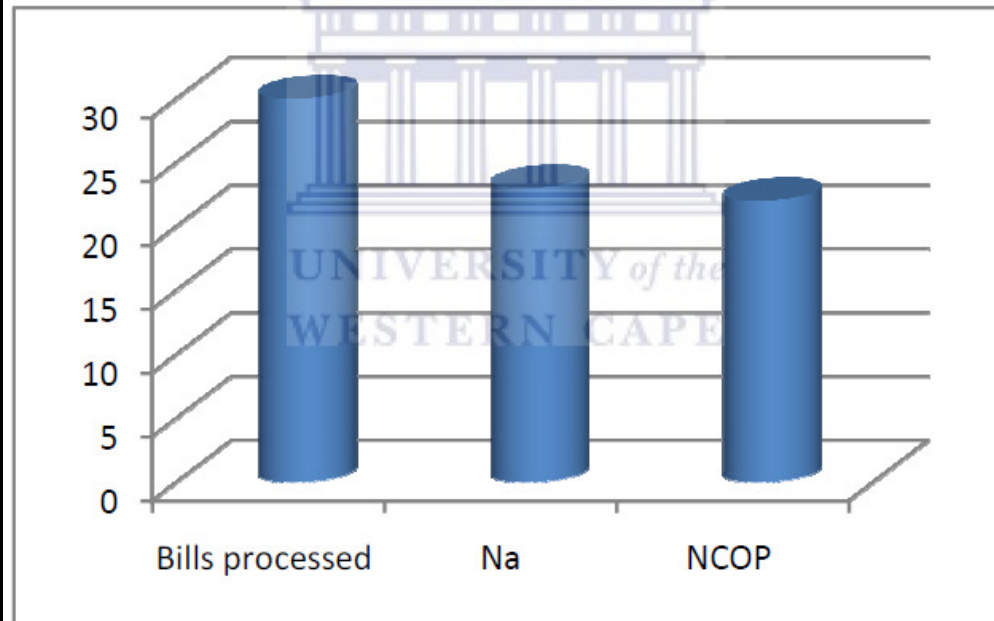
	percentage
Introduced in NCOP	9 out of 38 (23%)
Introduced in NA	29 out of 38 (77%)

Who makes amendments?

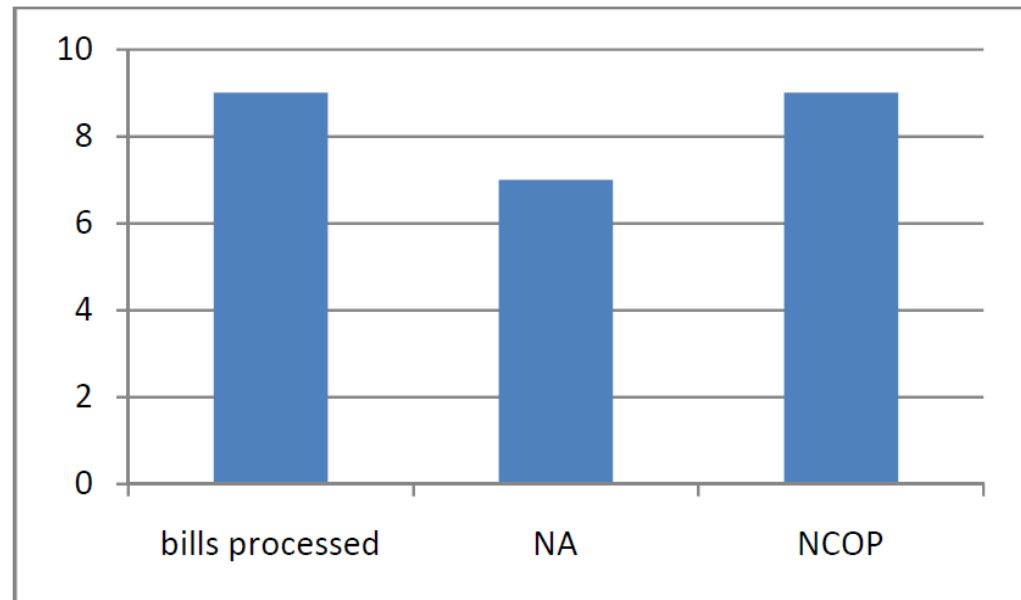
nature of amendments:
more substantial
often based on extensive
consultation in provinces

mostly **accepted**
(very few to
Mediation Com)

Amendments to section 76 bills introduced in the NA



Amendments to bills introduced in the NCOP



- 5 Bills amending the Constitution:
- NCOP made amendments to all

→ NCOP has greatest impact on **s 76 Bills**
introduced **in NCOP**

→ **guidelines** for when s 76 bills should be
introduced in ncop?

→ ncop's power to **initiate** legislation?

→ monitoring **delegated** legislation?

Review of national executive

- NCOP co-ratifies **treaties** (US)
 - practice: provincial interests in international agreements?
- co-approves state of **national defence**
 - practice: not yet necessary
- approves + reviews national **intervention in a province**
- approves + reviews provincial **intervention in a municipality**
 - but not financial interventions
- co-approves **stopping** of funds

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Role of NCOP in reviewing interventions

- NCOP as guardian of effective IGR
 - protect **institutional integrity** of province/municipality
 - not at the expense good **governance & service delivery**
 - recognise that **there is** power to supervise

→ not purely partisan...
- power to
 - set conditions
 - partial approval
 - end intervention
- **regular review** of intervention
- important role for organised LG in NCOP
- NB! In practice, timelines not always kept

Oversight

- oversight over national government
- no **specific** constitutional provision on oversight but:
 - S 92 Cabinet Members accountable to “**Parliament**”
 - S 42 Constitution: “**national forum for public consideration** of issues affecting the provinces”
 - S 69 C: “power to **summon** any person, including institutions, to give evidence, submit reports or make presentations”
 - s 125 C: “Any dispute concerning the administrative **capacity of a province** in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.”

- challenge: repeat of NA, but (1) with fewer resources and (2) more uncertain political base to do so?

→ greater focus on provincial interests?

e.g. 2009 Independent Panel Assessment:

- “**provincial and local impact** must therefore be the primary focus of [NCOP] debates”
- “respect the oversight roles of both the **provincial legislatures** and the National Assembly”
- “communication between provinces and national government”

Public engagement

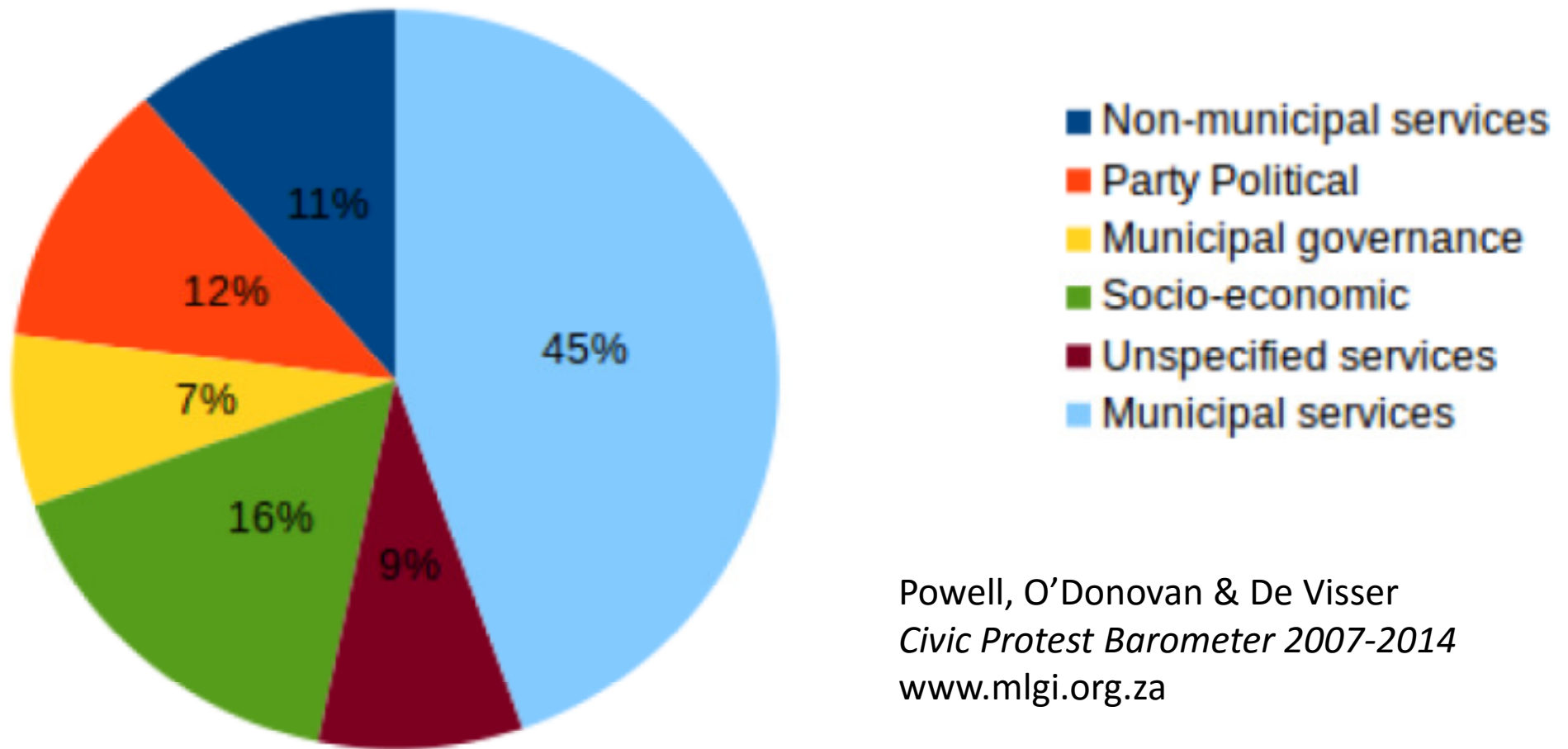
What is being said about NCOP

- “NCOP does not adequately **represent** provincial interests”
- “focuses on **national** issues & national politics”
- provincial issues are **resolved before** Bill comes to NCOP – role of IGR structures
MinMecs
- strong political caucus: **party line** eclipses provincial interests
- “too much work for **too few members**”
- **time** pressures make impact difficult

- understanding & awareness about **how government works**
- importance of **IGR** for success in **service delivery**
 - national, provincial & local are ‘interdependent’
- importance of **implementation** (by provinces and local government → IGR)

Grievance categories cited by protesters

2012:2014



Powell, O'Donovan & De Visser
Civic Protest Barometer 2007-2014
www.mlgi.org.za

- 27% of grievances cited not within LG mandate

- importance of **IGR**
 - national, provincial & local are ‘interdependent’
- importance of **implementation** (by provinces and local government → IGR)
- provinces **underappreciated, under-researched**
 - 2011/2012 90% of expenditure on health in provinces
 - majority of education funding to provinces
 - etc.

emphasising importance of IGR

- Questions such as:
 - importance of **adequately funded** provinces and municipalities
 - monitoring impact of national policy **on provinces**
 - will this provincial takeover of a municipality help?
 - impact of international agreements on provinces?
 - will it work? does the province have capacity to implement this new law?
 - what is the impact of this bill, policy or initiative on municipalities?
 - Etc.

Thank you

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