

21 February 2022

TO: Dr Aaron Motsoaledi  
Minister of Home Affairs  
c/o Ms Mahlatse Sethosa  
PER: Email ([Mamokolo.Sethosa@dha.gov.za](mailto:Mamokolo.Sethosa@dha.gov.za))

AND TO: Mr Eddy Mathonsi  
Committee Secretary  
PER: Email ([electoralact1@parliament.gov.za](mailto:electoralact1@parliament.gov.za))

CC Dr Cyril Ramaphosa  
The President  
c/o Ms Nokukhanya Cele  
PER: Email ([nokukhanya@presidency.gov.za](mailto:nokukhanya@presidency.gov.za))

Dear Honourable Minister Motsoaledi

**ELECTORAL AMENDMENT BILL (B1-2022)**

**OUR REF: PG 1907 – 010**

**YOUR REF:**

1. The Minister of Home Affairs has initiated the Electoral Amendment Bill B1 of 2022, which seeks to accommodate independent candidates in the existing electoral system with minimal changes to the governing legislation. The Electoral Amendment Bill (B1-2022) presented to Parliament, is in accordance with the minimalist option provided in the 9 July 2021 Report of the Ministerial Advisory Committee (MAC) on Electoral Reform.
2. This submission speaks to the invitation directed to the members of the South African public to comment on the Electoral Amendment Bill (B1-2022) as formally introduced to Parliament on 10 January 2022. This submission represents the opinion of the Organisation Undoing Tax Abuse (OUTA), as informed by counsel received contained in the Memorandum in respect of the Electoral Law Amendment Bill (attached hereto).
3. The OUTA seeks to:
  - 3.1. present its interest in the Electoral Amendment Bill (B1-2022);
  - 3.2. establish how the Electoral Amendment Bill (B1-2022) affects South African citizens

**ORGANISATION UNDOING TAX ABUSE NPC**

Reg No.: 2012/064213/08

**Directors:** W Duvenage (CEO), Adv. S Fick, G Gulston, Dr H Volmink

**Non-Executive Directors:** F Adam (Chair), P Majozi, W Modisapodi, LP Pauwen, T Pillay Van Graan

**ADDRESS:** O'KEEFFE & Swartz Building, 318 Oak Avenue, Randburg, Gauteng

**CONTACTS:** 087 170 0639 • [info@outa.co.za](mailto:info@outa.co.za) • [www.outa.co.za](http://www.outa.co.za)

- 3.3. convey problems identified in the Electoral Amendment Bill (B1-2022); and
- 3.4. recommend solutions as to how the Electoral Amendment Bill (B1-2022)<sup>1</sup> should be handled.

## OUTA'S INTEREST IN THE BILL

4. This submission is guided by Constitutional Court's declaration that the Electoral Act 73 of 1998 has been found to be unconstitutional. This judgment was made June 2020, in *New Nation Movement NPC v President of the Republic of South Africa*, wherein the Organisation Undoing Tax Abuse (OUTA) was *amicus curiae*<sup>2</sup>. OUTA supported the Applicants' argument that the Constitution requires the adoption of an electoral system, at the national and provincial level, that permits candidates to stand for public office independent of a political party. A constitutionally compliant electoral system, regardless of the form that it takes, must create room for Members to exercise these constitutional rights fully, in their individual and representative capacities. South Africa's current electoral system does not fully realise their right to do so because it provides for the election only of Members who are primarily representative of, and beholden to, the political party to which they belong. In addition, the Constitution entrenches the values of transparency and accountability. These constitutional values are only properly given effect to through an electoral system that permits some candidates to be directly elected, independently of any political party.
5. In this regard Section 19 of the Constitution must be emphasised:
  - (1) *Every citizen is free to make political choices, which includes the right—*
    - (a) *to form a political party;*
    - (b) *to participate in the activities of, or recruit members for, a political party; and*
    - (c) *to campaign for a political party or cause.*
  - (2) *Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.*
  - (3) *Every adult citizen has the right—*
    - a) *to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and*
    - (b) *to stand for public office and, if elected, to hold office.*
6. In lieu of the foregoing, the Constitutional Court provided Parliament with an opportunity to amend the bill towards addressing the declaration of unconstitutionality, which ought to come

---

<sup>1</sup> Henceforth to be known as "the Bill".

<sup>2</sup> CC case no: 110/19; WCHC case number: 17223/18

into operation in June 2022. This leaves four months in which to effectively engage with the public on the bill. As a non-profit civil action organisation, OUTA seeks to attend to two separate, but interconnected concerns regarding the Bill:

- 6.1. Short timelines to effectively encourage public participation and lack of attempts to ensure that the Bill is understood by the members of the public; and
  - 6.2. Problematic elements identified in the Bill.
7. OUTA's interest in this Bill aligns with the organisation's strategic objective, which is to challenge any policies, laws or conduct, that offends the Constitution. As such, it argues that the Bill is one such instance that fails to meet the threshold of what can be considered constitutionally compliant. OUTA submits that to be constitutionally compliant, the electoral system must promote transparency and public accountability of the Legislature, and of each member of parliament who serves as part of it. The processes surrounding the compilation and introduction of the Bill, as well as the content of the Bill, are deemed to be problematic.

## **THE IMPACT OF THE BILL ON THE PUBLIC AND LACK OF PUBLIC PARTICIPATION**

8. The Electoral Amendment Bill (B1-2022) was formally introduced to Parliament on Monday, 10 January 2022. The invitation to the public for commentary was made on Friday, 21 January 2022, with the deadline being set for 16h00/4:00 pm, Monday, 21 February 2022. This gave the public 31 days in which to better acquaint themselves with the content of the Bill, to procure counsel and to prepare their submissions.
9. In reference to the Portfolio Committee on Home Affairs' (National Assembly) meeting held on Tuesday, 8 February 2022, a briefing by the Minister of Home Affairs on the Bill, took place<sup>3</sup>. In this meeting it was stated that "much work has to be done to ensure that the Bill is understood by members of the public", which will require active efforts in making the Bill more intelligible and accessible to members of the public. This Minister unequivocally stated that the "finality of the Bill must and will be guided by public participation, as citizens must be able to criticise it".
10. In a response to the question why the MAC Minimalist Option (Option 1) was selected as opposed to the Majority Option (Option 2), Minister Motsoaledi on 8 February 2022 explained that this option would allow Parliament to meet the 2024 deadline, whereas Option 2 would require extensive changes to the electoral system. It can be inferred that extended public engagements, together with recommendations by National Assembly and the National Council of Provinces (NCOP), compounded by alignment with the Independent Electoral Commission (IEC) of South Africa's requirements in preparation of the national elections in 2024, will all further delay meeting the deadlines as put forward by the Constitutional Court. Deadlines ought not be prioritised above matters within the public's interest.

---

<sup>3</sup> As noted in the minutes of the Standing Committee's meeting on the matter, 8 February 2022.

11. On the matter of public participation, OUTA observes with dismay the explicit reference to reduce public participation such that deadlines can be met, as extracted from the published Z-list of 14 February 2022, in reference to the scheduled 1 and 2 March 2022 virtual public hearings from 09h00-15h00, page 8:

*Portfolio Committee on Home Affairs, (National Assembly), [Briefing by the Content Advisor on the summary of the public submissions on the Electoral Amendment Bill [B 1 –2022]. Public hearings on the Electoral Amendment Bill [B 1 – 2022] (These public hearings would take place virtually. **The public hearings in all nine provinces are discouraged to prevent further delay in the processing of the Bill**)]<sup>4</sup>.*

12. In addition, OUTA also seeks to acknowledge the Media Statement of 15 February 2022 wherein the Home Affairs Committee recommends that parliament request extension on the amendment to the Electoral Act<sup>5</sup>. Accordingly, the primary reason for the resolution was the need for the committee to undertake an extensive and meaningful public participation process. Notwithstanding the recommendation, the deadline for public commentary – 21 February 2022 – has not been extended to meet the requirement of informed public participation. Requesting an extension based on the public's interest, without actively including the public in one's processes, is a *contradictio in adjecto*.
13. OUTA has been monitoring news items, public events and parliamentary proceedings, and very little evidence has been found of active and widespread endeavours to inform, educate and engage with the public on the Bill. OUTA contends that the failure to actively engage with the citizenry, on a matter directly influencing their constitutional rights, is in fact an unconstitutional act in itself. OUTA is also concerned with the contradictory manner in which the Bill is being handled, which on the one hand seeks to rush the processing of the bill, and on the other hand, superficially appears to consider the public's interests.

## **PROBLEMATIC ELEMENTS IDENTIFIED IN THE BILL**

14. OUTA has procured legal counsel that the Bill is problematic in several regards<sup>6</sup>:

- 14.1. **Unequal Proportional Representation:**

The MAC produced a report setting out two options for electoral reform, which permitted independent candidates to run for national and provincial elections. The drafters of the Electoral Amendment Bill have then given effect to the minimalist

---

<sup>4</sup> Own emphasis

<sup>5</sup><https://www.parliament.gov.za/press-releases/media-statement-home-affairs-committee-recommends-parliament-request-extension-amendment-electoral-act>

<sup>6</sup> Please also refer to the Memorandum submitted together with the letter.

option set out in the MAC's report which seeks not to disrupt the current system and merely slot in independent candidates to adhere to the judgment. However, the practical impact of such a minimalist approach equally yields minimalist results in respect of the independent candidates. The MAC report describes the minimalist option as follows:

"this option entails modifying multi-member electoral system to accommodate independent candidates in the national and provincial elections without many changes in the legislation, including not interfering with the constitutional requirement relating to general proportionality".

It is submitted that the amendment sought is merely to accommodate independent candidates and not to the extent that it renders it possible for such candidates to hold office as they are empowered by section 19 (3)(b). Further the amendment interferes with the constitutional requirement relating to general proportionality. Independents are expected to jump over mathematical quota calculations only to retain a single seat, even if they receive a majority portion of the total votes by the electoral.

#### 14.2. **Contesting of seats:**

Independent candidates can only contest the 200 regional seats which makes up the other half of the 400-seat National Assembly. They can also only contest seats in one region. This limitation is not extended to political parties who can contest seats across all regions.

#### 14.3. **Wasted votes:**

Once an independent meets the relevant quota for a seat, they will be elected to the National Assembly. Once an independent candidate has secured a seat, any additional votes they receive will be discarded and a new quota will be used to determine the proportional representation of the political parties and the allocation of seats to them<sup>7</sup>. Such an approach wholly limits proportional representation by the discarding of votes in favour of the independent candidate which is in contrast to the wish of the electorate. Political parties' surplus votes<sup>8</sup> once they reach the relevant quota is not discarded, the equal playing field in rendering free and fair elections is then discarded along with the surplus votes for independents.

#### 14.4. **Inequality and impediment to human dignity:**

---

<sup>7</sup> See Sections 6 & 7 of Schedule 1A

<sup>8</sup> See Sections 8-14 of Schedule 1A

Discarding surplus votes impedes the notion that “every vote counts”. It is in direct contravention of the right of citizens’ votes to count equally, as well as the proportionality between vote share and seats. It is unconstitutional insofar the right to vote, as captured in section 19(3)(a) of the Constitution, which must be interpreted as a right to a vote that counts equally or is of equal value to the votes of others<sup>9</sup><sup>10</sup>. Failure to ensure representation according to votes cast and proportionality of votes received, not only fails to acknowledge the will of the citizens, but also undermines the value of these votes. This is unconstitutional.

15. In summary taking into consideration counsel’s advice:
  - 15.1. In paragraph [112] of the CC Judgment, the court concluded that in so far as it makes it impossible for candidates to stand for political office without being members of political parties, the Electoral Act limits the section 19 (3) (b) right.
  - 15.2. The impugned sections of the Electoral Act were based on party proportional representation system, which cannot survive the constitutional challenge to the Elections Act, in so far as it makes it impossible for candidates to stand for political office without being members of political parties.
  - 15.3. It is noteworthy that the Electoral Laws Second Amendment Bill (B34-2020) seeks to also amend Schedule 1A by substitution. It appears the proposed system of representation in national assembly and provincial legislation still favours the party proportional representation system to the prejudice of the independent candidate constituency. This is because it appears the independent candidate will always be allocated one seat regardless of having achieved a quota for more than one seat. This is apparent in item 15 of Schedule 1A, where the independent candidate is obliged to compile and submit a vote transfer list to the Commission.
  - 15.4. There is a discrepancy in requirements between independent candidates and political parties when contesting elections. If the understanding of Schedule 1A is correct, justification for the continuation of such a system, now giving independent candidate a seat, is not based on the proportion of the votes received. Independents may be recognized as the judgment demanded however, the right to contest elections without proper arrangements<sup>11</sup> for its exercise, renders it empty and useless.

---

<sup>9</sup> This is equally supported by international law whereby the principle of equality suffrage is enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights

<sup>10</sup> Herein it must be noted that the possibility of a surplus vote transfer as proposed in the Electoral Laws Second Amendment Bill B34 of 2022 (Private Member’s Bill as submitted by Mr MGP Lekota, MP), gives better effect to the principle that each citizen have an equally effective voice in the election of representatives to our legislatures and achieves a higher degree of proportionality between vote share and seats.

<sup>11</sup> Should an independent seek to contest an election, they need to meet two requirements 1) the signature requirement, and 2) the deposit requirement. The failure to comply to both requirements will result in the disqualification from contesting elections. It must be noted in this instance that in local government elections, as well as in national and provincial elections, political parties are required to pay

- 15.5. If Schedule 1A limits the seat of independent candidates to only one, the question is whether the limitation is reasonable and justifiable. The proposed new electoral system in terms of the Bill appears to distinguish between party, party candidate and independent candidate in so far as the allocation of seat is concerned.
- 15.6. Being free of the shackles of association to a political party makes independent candidates directly answerable to their constituencies and not to a political party. The amendment bill as it currently stands negates the possibility of maximum participation of independents in the National Assembly and Provincial Legislatures in line with votes they receive in totality, reflecting true and rational proportionality.
- 15.7. Unless independents assimilate to the structures of political parties, denying independents protection in line with the judgment and the Constitution, their ascension to stand for public is limited as the system continues to favour political parties and ultimately interferes with the constitutional requirement relating to general proportionality.

## RECOMMENDATIONS

16. In recognition of the foregoing considerations and in reflection of counsel's advice received, OUTA recommends the following:
  - 16.1. Visibly prioritise education campaigns informing the public of the content and implications of the amendments to the Electoral Act 73 of 1998;
  - 16.2. Actively engage with civil society organisations to promote awareness of citizens' right to vote, the reasons for voting, and to improve voter turnout and responsiveness;
  - 16.3. Critically review the Bill in light of submitted public commentary and actively make changes based on sound principles and constitutional values;
  - 16.4. Reconsider salient features of the Electoral Laws Second Amendment Bill (B34-2020), submitted by Mr MGP Lekota, MP, such as for example including the Single Transferrable Vote (STV), which means that excess votes are no longer discarded;
  - 16.5. Re-examine the Majority Option (Option 2), as stipulated in the MAC Report;
  - 16.6. Recognise the democratic rights of every citizen whose vote has a right to count, and

---


a deposit to contest the elections, but the signature requirement is not applicable. This is highly problematic since it imposes unfair and unequal requirements on an independent candidate which limits their constitutional right. This is in direct contradiction with political parties who do not need to meet the signature requirement, but who also have more organisation and financial support, particularly insofar as the Political Party Funding Act makes provision for funding of political parties but not to independents.

- 16.7. Respect the right of independent candidates on the basis of equality and fairness in proportional representation on the same constitutional terms afforded to political party candidates.
17. Finally, notwithstanding the necessity of these seven recommendations, OUTA firmly requests an engagement with the President, Honourable Dr Cyril Ramaphosa. As evinced by the Standing Committee's inability to uphold deadlines, delays in forming and presenting the Ministerial Advisory Committee and the Report, internal committee disputes as to the viability of the Bill, and extreme lack in mobilising public participation and public awareness campaigns, OUTA believes that only by engaging directly with the President will the interests of the public be attended to, with dignity and equality.

## CONCLUSION

18. The inevitable conclusion is that on a proper interpretation of Section 19(3) of the Constitution, every adult South African has the right to stand for public office and contest elections as an individual and if elected, to hold the office into which she or he is elected. South Africans are bearers of these rights individually just as they hold the right to vote.
19. Now is not the time to use deadlines, conservative options, and minimalist amendments as excuses to not effect change. This is a watershed moment in South Africa's history to take the opportunity afforded by the Constitutional Court to redesign the current party proportional representation system to include the equal participation of independent candidates in the National Assembly and Provincial Legislatures.
20. In support of this written submission, the Organisation Undoing Tax Abuse (OUTA) formally requests to make an oral submission during the public hearings scheduled for 1 and 2 March 2022, from 09h00 – 15h00.
21. We trust these comments and recommendations are received with due consideration, and we look forward to receiving your response.

Yours Sincerely,



Stefanie Fick

Executive Director of the Accountability and  
Public Governance Division

OUTA – Organisation Undoing Tax Abuse

Email: [stefanie.fick@outa.co.za](mailto:stefanie.fick@outa.co.za)