

26 January 2023

TO: Dr Aaron Motsoaledi
Minister of Home Affairs

PER: (Email) Mamokolo.Sethosa@dha.gov.za

AND TO: Mr Mosa Chabane, Chairperson: PC on Home Affairs

PER: (Email) mchabane@parliament.gov.za

AND TO: Mr Eddy Mathonsi, Committee Secretary

PER: (Email) electoralact1@parliament.gov.za

Dear Mr Mosa Chabane

READVERTISEMENT OF THE ELECTORAL AMENDMENT BILL [B1B-2022] CALL FOR COMMENTARY

OUR REF: PG 1907 – 010

YOUR REF: Unknown

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 make written submissions on the proposed amendments from the National Council of Provinces to the Electoral Amendment Bill [B1B – 2022].
3. The National Council of Provinces have proposed material changes to the Bill [B1B-2022]. The Portfolio Committee on Home Affairs considered it important to re-advertise and ensure that stakeholders and interested parties have a chance to make comments on these new proposed amendments.
4. This submission represents the opinion of the Organisation Undoing Tax Abuse (OUTA).

ORGANISATION UNDOING TAX ABUSE NPC - Reg No.: 2012/064213/08

Directors: WL Duvenage (CEO), Adv. S Fick, **Non-Executive Directors:** W Modisapodi (Chair), P Majozi, LJJ Pauwen, T Pillay Van Graan, T Skweyiya, S Ndlovu, Z Mukwevho

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OUTA'S INTEREST IN THE BILL

5. 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*¹. 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.
6. On 28 February 2022 OUTA submitted its written comments on the Bill, followed by the oral presentation to the Portfolio Committee of Home Affairs on 1 March 2022.
7. On 16 September 2022 OUTA submitted its commentary in response to the Readvertisement of the Electoral Amendment Bill.
8. On 9 November 2022 OUTA submitted its commentary in response to the invitation by the National Council of Provinces (NCOP), directed to the members of the South African public to comment on the Electoral Amendment Bill [B 1B - 2022] (National Assembly – sec 75).
9. Since the submissions and oral presentation, OUTA has remained active in its endeavours to raise awareness on the Electoral Amendment Bill by engaging with the public and other Civil Society Organisations (CSOs).

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

10. As indicated in the submission and presentation of commentary on the Electoral Amendment Bill (B1-2022), OUTA remains concerned over the lack of public participation and education campaigns. Several requests from CSOs, which OUTA has endorsed, have

¹ CC case no: 110/19; WCHC case number: 17223/18

been directed to the Portfolio Committee. The requests were to collaborate on the concerns raised and to recommend changes that will be within the interest of the South Africans. The Portfolio Committee has not reciprocated these requests by extending an invitation, and have instead decided to ignore these calls.

11. Not attending to these requests for additional input between April and end of August 2022, have resulted in an amended version of the Electoral Amendment Bill that still fail to meet constitutional viability.

PROBLEMATIC ELEMENTS IDENTIFIED IN THE BILL

12. OUTA finds the following proposed problematic:

- 12.1. *An amendment to clause 3 of the Bill by proposing the inclusion of a further paragraph to section 27 of the Electoral Act, 1998, (which section is already being amended by the Bill). This proposed amendment will address the disparity between party candidates and independent candidates as the Bill currently only requires independent candidates to produce signatures supporting their candidature totalling 20% of the quota for a seat in the previous comparable election. The proposed amendment to this clause in the Bill now intends to provide that parties, who are registered but not represented in the National Assembly or provincial legislatures, will also have to produce the same amount of signatures in support of their party when intending to contest an election.*

- 12.2. *The inclusion of an entirely new clause 23 in the Bill (which will not form part of the Electoral Act) establishing an Electoral Reform Consultation Panel to investigate, consult on and make recommendations in respect of potential reforms of the electoral system. The following specifically refers:*

(3) The Panel must—

(a) prior to the 2024 elections, engage in research and consider the issues falling within its functions;

(b) after the 2024 elections, undertake a public participation process regarding the issues falling within its functions; and

(c) from the date of its establishment, submit a report to the Minister every three months on its progress.

(4)The Panel must, within 12 months of the date of the 2024 elections, submit a report to the Minister on the possible options for electoral reform for the election of the National Assembly and the election of the provincial legislatures which must include—

(a) reasons, potential advantages and disadvantages;

(b) legal and constitutional implications; and

(c) financial implications,

for each proposed electoral system or electoral reform identified by the Panel.

RATIONALE BEHIND PROBLEMATIC ELEMENTS IDENTIFIED IN THE BILL

13. The following concerns refer:

13.1. The concern here is regards to the signatures of voters who support the candidate, totalling at least 20% of the quota for a seat. This is a barrier to entry. To address the concerns on fairness, the amendment now inserts that these parties now need the same amount of signatures. This does not address the very high quota still required for an independent candidate. Parties may have greater reach, over multiple regions, to procure these signatures. OUTA maintains that the signature quota must be reduced more.

13.2. The requirements and responsibilities of the Electoral Reform Consultation Panel are very vague, open to manipulation and can lead to timeline constraints if not managed effectively. Waiting until the 2024 elections to commence with many of the tasks can potentially lead to delays in proper reform by the 2029 national and provincial elections. Specific areas of concern are elaborated on below:

13.2.1. Constituted four months after section commences [s 23(1)]

- 13.2.2. Nine-member panel [s 23(9)(b)]
- 13.2.3. Constitution of Panel: [s 23(9)(a)]
 - 13.2.3.1. Experience in administration or running of elections
 - 13.2.3.2. Expertise in electoral reform
 - 13.2.3.3. Constitutional expertise
- 13.2.4. Activities:
 - 13.2.4.1. Research before 2024 election [s 23(3)(a)]
 - 13.2.4.2. Public consultation after 2024 election [s 23(3)(b)]
- 13.2.5. Final Report to Parliament twelve months after 2024 election, with a potential extension of no more than six months [s 23(4)]

SPECIFIC RECOMMENDATIONS REGARDING THE ELECTORAL REFORM CONSULTATION PANEL

- 14. The available electoral systems are known. Parliament has already been advised at length, and we have already had a Ministerial Advisory Committee, to go with the various prior investigations. If we are to constitute yet another panel, there has to be a much more meaningful public engagement. For this to happen, it should not be a mere talk shop convened by experts as a box-ticking exercise, but rather a process whereby there is an informed public discussion surrounding electoral reform.
- 15. For a true public participation, the possible systems need to be put before the public, in order to allow informed public discussion of the different options. The panel must have the capacity to engage with the media, social media, and with communities, in a manner whereby the citizens of the country feel that they are part of the process of electoral reform.
- 16. The following recommendations are made towards addressing the concerns raised:
 - 16.1. The panel should be constituted:
 - 16.1.1. three months after,
 - 16.1.2. the Act commences (to avoid delays).
 - 16.2. The panel should be seven members (to save costs).

- 16.3. The panel should include a person or persons with expertise and experience in:
- 16.3.1. Democracy activism and advocacy; or,
- 16.3.2. Community engagement.
- 16.4. The activities of the panel should:
- 16.4.1. Include public education concerning different electoral systems; and,
- 16.4.2. Not have a timing constraint on public engagement. Public consultation should begin as soon as possible.
- 16.5. The Panel should submit the report within six months of the 2024 election, with a potential extension of no more than three months.

GENERAL RECOMMENDATIONS

17. In recognition of the foregoing considerations, OUTA recommends the following:
- 17.1. Seriously reconsider the signature requirement for independent candidates. It is still too high;
- 17.2. The Electoral Reform Consultation Panel must have members representing Civil Society Organisations. The Panel must ensure public participation takes place regularly and in an informed, inclusive and educational manner. The public's interests must be at the forefront of all reform considerations. The timelines and due dates set must be made very clear, together with repercussions and/ or penalties should the Panel and/ or the Minister and/ or Portfolio Committee of Home Affairs fail in their duty to conduct oversight and enact the responsibility to see adequate electoral reform. It is unfortunate that the first opportunity presented by ConCourt from June 2020 to June 2022 was not utilised to its full potential;
- 17.3. Visibly prioritise education campaigns informing the public of the content, timelines and implications of the amendments to the Electoral Act 73 of 1998;

- 17.4. Critically review the Bill in light of submitted public commentary and actively make changes based on sound principles and constitutional values;
- 17.5. Recognise the democratic rights of every citizen whose vote has a right to count; and,
- 17.6. 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.

CONCLUSION

18. 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. Together with this, every vote ought to count and not be wasted.
19. Should the Electoral Amendment Bill [B1B-2022] fail to meet constitutional muster, legally challenging it may become an option.
20. We trust these comments and recommendations are received with due consideration, and we look forward to receiving your response.

Yours Sincerely,



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