

OUTA

ORGANISATION UNDOING TAX ABUSE



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Achieving meaningful electoral reform

Comprehensive report for the electoral reform consultation panel

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1. Executive Summary

This report aims to situate recent research conducted by the Organisation Undoing Tax Abuse (OUTA) on electoral reform within the current call of public participation extended by the Electoral Reform Consultation Panel (ERCP). It evaluates key documents, including the 2003 Frederik Van Zyl Slabbert Electoral Task Team (ETT) Report, the 2021 Ministerial Advisory Committee (MAC) Report on Electoral Systems Reform, and the 2022 Mbete Report by Sithembile Mbete, alongside various media reports reflecting public concerns about electoral reform. This assessment responds to the call from the electoral reform Consultation Panel (ERCP) for recommendations on electoral systems for the National Assembly and Provincial Legislatures.

This submission does not make its own propositions about different electoral systems. Instead, it seeks to encourage the ERCP to critically consider what has been done before, evaluate the recommendations made during past panels, and deliberate on what the best electoral system will be for South Africa, 30 years into democracy.

The Cabinet established the Electoral Task Team in 2002, chaired by Frederik van Zyl Slabbert (FVZS), to draft new electoral legislation in line with constitutional requirements. Although the team's report was released in January 2003, its recommendations were not implemented, and new legislation was instead drafted by Parliament.

Recent discussions, including those during the FVZS Institute's Honorary Lecture in March 2021, have questioned whether restructuring the electoral system would enhance accountability. Key issues identified include the accountability of Members of Parliament (MPs), engagement with constituencies and the effectiveness of current electoral structures. Reports, including those by OUTA, have highlighted MPs' failure to hold the Executive accountable. Questions persist about whether electoral reform could improve constituency representation and overall accountability in government or not. Challenges include low citizen responsiveness, limited youth participation and MPs' alignment with party politics rather than their constituencies. Media coverage has also underscored the need for balanced representation and increased public engagement.

Global trends reveal a shift towards prioritising citizen needs over party politics. This shift is crucial for ensuring that citizens, rather than political parties, are the primary focus of electoral reforms. Effective deliberative democracy requires transparent and accountable political discourse, free from the constraints of dominant party agendas.

Recommendations from this report lay emphasis on:

- Encouraging active citizen engagement to foster a vibrant civil society.
- Ensuring MPs are accountable to their constituencies rather than party directives.
- Enhancing the role of local community representatives in improving public service delivery.

These recommendations should be considered, particularly following the Constitutional Court’s ruling in the New Nation Movement case. This would help address the diversity and voter disengagement issues seen in recent elections. The report critiques Parliament’s handling of electoral reform, noting delays and inadequate public participation. The preference for the government’s bill over alternative proposals, such as the Lekota Bill, raises concerns about transparency and responsiveness. Civil society organisations have been pivotal in raising public awareness and promoting engagement through various media and educational initiatives.

The Electoral Amendment Act of 2023, ratified in April 2023 and effective from June 2023, remains a point of concern for OUTA. While OUTA did not pursue legal action, it continued to scrutinise the Act’s implications for electoral fairness, transparency, and accountability. The ERCP, established in May 2024, is expected to address these concerns through public participation processes, with a call for submissions on whether the current system should be reformed or replaced. OUTA stresses the importance of an unbiased panel and meaningful consideration of public and civil society input to ensure the Act’s effectiveness in enhancing democratic governance.

This submission seeks to showcase the breadth and depth of research conducted on electoral reform over more than two decades. This research has resulted from numerous panels, civil society submission and media releases. The ERCP is not starting from ground zero and can, and should, reflect on findings and recommendations arising from numerous critical engagements.

2. Introduction

The aim of this report is to situate research specifically in electoral reform within the current mandate of the Organisation Undoing Tax Abuse (OUTA). This research considers a variety of reports, ranging from the *Frederik Van Zyl Slabbert ETT Report* in 2003, the *Report of the Ministerial Advisory Committee on Electoral Systems Reform* (2021), and the *Mbete Report on Electoral reform in South Africa prepared by Sithembile Mbete* (2022). Together with this, various media reports are also considered, being indicative of public concerns and considerations related to electoral reform. This report is a response to the call by the electoral reform Consultation Panel (ERCP) regarding an electoral system for the National Assembly and Provincial Legislatures.

This submission does not make its own propositions about different electoral systems. Instead, it seeks to encourage the ERCP to critically consider what has been done before, evaluate the recommendations made during past panels, and deliberate on what the best electoral system will be for South Africa, 30 years into democracy.

The Cabinet appointed the Electoral Task Team in 2002, which was chaired by Frederik van Zyl Slabbert (FVZS). Its task was to “draft the new electoral legislation required by the Constitution”¹. It published its report in January

¹ <https://citizen.co.za/news/south-africa/elections/2302232/electoral-reform-time-to-dust-off-the-van-zyl-slabbert-report/>

2003, but Parliament did not implement its recommendations and drafted new legislation. Demands are now being raised to challenge the current electoral structure, calling for reform. But during a recent FVZS Honorary Lecture and 10th year celebration of the FVZS Institute², held on Monday 29 March 2021, the question arose whether such restructuring would improve accountability? The FVZS Institute and presenters sought to address it during discussions on the topic, *Electoral reform: How democratic responsiveness facilitates responsible governance*.

Issues that arose were (the lack of) accountability of Members of Parliament (MPs) as well as constituency engagement and representation. Many reports including those by OUTA have shown that MPs have failed to hold the Executive to account. Could electoral reform improve the outcomes of such engagements with representation of constituencies, and will it improve overall accountability and transparency in both the Executive and Parliament? Obstacles towards achieving these – notwithstanding the current status quo within government – includes the lack of responsiveness among South African citizens, low youth participation rates, and MPs being instruments of their political party affiliations. Unresponsive citizens – or even disinterestedness – extends to the role played by the media and by citizens within the media. Traditional and modern forms of media should ensure greater visibility, but also balanced representation, of all political parties. Together with this, multiplicity should be addressed in whichever way deemed most suitable, for the rising “cancel culture”³ is seen as being destructive to open and critical debates. In any deliberative society a certain level of intolerance is required when recognising Freedom of Expression (see the Bill of Rights Section 16) for a healthy democracy, bearing in mind that equality and accessible participation must be paramount.

There are a few noteworthy trends across the board in global electoral discourse, such as the opaque future of political parties in their current format, a decline in citizen confidence and the emerging imperative to prioritise the needs of citizens over party politics and the roles politicians play. Citizens must be the primary targets to be served and the original change agents, rather than parties themselves. Therefore, not only in South Africa but also internationally, there must be political realignment, underscored by political and cultural discourses. In essence, deliberative democracy in practice which can contribute to enriching cultural discourses. Any attempt by an individual or collective parliamentary representative to become an agent of the dominant party (a party that has been elected to govern a country for consecutive terms), must be rejected, since it stifles transparent discourse and accountability. OUTA showcased, in an affidavit, how a captured Parliament effectively condoned state capture by failing to address it as it blatantly unfolded and compiled a report assessing the current modus operandi in Parliament which finds and discusses serious underperformance.

No proposed system will be perfect. Nonetheless, a vigorous parliamentary and constituency system is undeniably necessary to enhance accountability and electoral representation. This can be achieved by a system that ensures

² <https://www.youtube.com/watch?v=yxyjCGPIIS8&t=29s> and <http://www.sun.ac.za/english/learning-teaching/student-affairs/student-leadership/fvzs>

³ Definition of Cancel Culture: the practice or tendency of engaging in mass cancelling as a way of expressing disapproval and exerting social pressure. Merriam-Webster Dictionary: <https://www.merriam-webster.com/dictionary/cancel%20culture>.

proportionality distributed amongst political parties and independent candidates. Such proportionality should provide for substantive decision-making power outside party political structures. Allowing independents to stand – following a single member constituency system (SMC) – will allow voters to hold their candidates to account pre- and post-election. It is currently questionable whether and to what extent Parliament can hold its own MPs to account. This is, admittedly, also a result of an apparent lack of political will (or conflict of interest) to utilise existing mechanisms and resources to do so. Still, enhanced checks and balances are required throughout the electoral life-cycle, and by including independent candidates the dominance of political parties and majority representation will be challenged.

Key recommendations include:

- Responsive and politically active citizens must be motivated to ensure a vibrant and engaged civil society. Accountability of MPs is paramount and therefore constituency responsiveness should be incentivised.
- MPs should develop their own identity and conscience pursuant to their duty as constituency servants, as opposed to taking their policymaking and oversight priorities from political party directives.
- Institutionalise and incentivise active governance roles for local community representatives, as guided by the elected MP, who can improve spending outcomes in areas such as education, waste & recycling, roads & public transport etc.

These recommendations should be given force through a maximal interpretation of the Constitution Court judgement *New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020)* in Parliament's amendment of the Electoral Act of 1998 (as amended)⁴. The constituency system, deepened in this manner, would reflect the diversity of South Africa – where a significant proportion of the population have withdrawn from political life as evidenced by the remarkably low voter turnout in the 2021 Local Government Elections (LGE). Currently, South Africa's "constituencies" are the nine provinces, which is a vast area to effectively hold representatives to account. South Africa has a PR electoral system (elaborated below in Section 3), and not a hybrid electoral system of PR and Constituency-based, meaning that even though our local government is demarcated according to wards (a current total of 4468 according to the 2021 LGE), Nationally and Provincially we are not. Essentially, we do not have a constituency system, which is further complicated due to National Parliament having constituency days and leave.

Therefore, we cannot only rely on an electoral system alone to achieve the recommendations listed above. It follows that, when reflecting on the number of reports dealt with in this submission, that the following values underpin progressive discourse consistently:

- Fairness, inclusiveness, simplicity, and accountability (Report of the Electoral Task Team: Frederik van Zyl Slabbert)

⁴ See Section 3.2 for more elaboration on the court case.

- Accountability, transparency, responsiveness and incentivising the public and civil society are core components when it comes to electoral reform (Working Democracy Report: Christi van der Westhuizen)
- Inclusivity which enhances representativity, accountability, and transparency (ISI electoral reform Report: Roelf Meyer)

It is recommended that Parliament reflects carefully on foundational characteristics which could better imbed principles in a system that can never be perfect, but which may provide for a democratic and accountable South African parliamentary and electoral system. These encompass decisiveness, effectiveness, stability, representivity, proportionality, as well as the crucial and supreme principle of accountability.

3. Brief background to OUTA's contribution to electoral reform

OUTA would like an electoral system that strengthens the voters' ability to hold politicians to account. We support calls for the law to be updated to allow for independent candidates⁵. OUTA supports the 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 (Affidavit, July 2019)⁶.

Members of the Provincial and National Legislatures ("Members") are bearers of the rights to freedom of association, conscience, expression, and political choice. They exercise these rights – and the right to make political choices – in the discharge of their parliamentary functions, both in their own right but also on behalf of the electorate that they represent.

A constitutionally compliant electoral system, regardless of the form that it takes, must create room for MPs to exercise these constitutional rights fully, in their individual and representative capacities. Our 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. South Africa has a closed list-Proportional Representation electoral system, which means that the placing of MPs on these lists can be highly competitive and lead to political manoeuvring for better spots, only further entrenching allegiance to party/ party power holders instead of the voting public. Dr Mbete⁷ (2022) explains what a PR electoral system is, as well as the selection of this electoral system in the Interim Constitution. This implies that the current system was never meant to be the long-term system, and that it should be reviewed:

Proportional Representation: The main constraint, for whatever system is chosen, is that it 'results, in general, in proportional representation'. This is set out in the three sections in the Constitution which deal with the election of members of legislatures: 46(d) on the election of the National Assembly, Section 105(d) on the election of

⁵ <https://www.oua.co.za/projects/special-projects/electoral-reform>

⁶ See OUTA application CC case no: 110/19 and WCHC case number: 17223/18.

⁷ <https://www.oua.co.za/web/content/232269>

provincial legislatures and Section 156 (3) on the election of municipal councils. This constitutional requirement precludes the adoption of a plurality-majority electoral system.

The drafters of the Interim Constitution agreed that a closed-list PR system would result in a parliament that mirrored the electorate, allowing a diversity of political groups to be represented.

In addition, the Constitution entrenches the values of transparency and accountability. OUTA's position is that these constitutional values are only properly given effect through an electoral system that permits some candidates to be directly elected to the National and Provincial Legislatures, independently of any political party. The fundamental question that we seek to answer is: what does it mean and why does it matter to ordinary people?

Pursuant to an answer, it was decided that another contribution to voluminous discourse on what exactly the new electoral system would look like should be beyond the scope of this report. This is because *a new mix of proportional representation and constituency-based system*, and very similar technical proposals, have been forthcoming from authoritative bodies, often commissioned by central government itself, since 2002. These proposals are detailed in Section 6 of this report. It is argued here that these eliminate the need to re-propose a detailed, technical vision of future electoral arrangements since such an exercise would be a wasteful duplication.

Emphasis on accountability and transparency underpins OUTA's position on electoral reform because these principles (or rather, their absence) are at the heart of widespread tax abuse in South Africa. Poor economic growth and a rapidly growing population has resulted in alarmingly high unemployment, poverty and inequality. Due to irreversible fiscal policy decisions taken in the past, a large portion of the South African population has become directly dependent on frugal and effective public financial management for their subsistence. Yet, public funds have been wasted, misspent and stolen on a grand scale and these errors were made with impunity. Parliament failed to contain this crisis, and the legislature itself has failed to account to The People for its failure. Therefore, the need for substantive electoral reform is herein argued to be directly related to the perennial mismanagement of public finances in all spheres of government, as well as to Parliament's failure to change this.

However, liability for breakdowns in transparency, responsiveness and accountability does not lie solely in government. South African public discourse – whether it be consensual or dissenting, expert or ordinary, formal or informal – has always been the cornerstone of our democracy and its development. It is such public energy and mobilisation that led to the abolition of apartheid. Yet, public interest and engagement in political discourse has dwindled due to growing trust deficits and despondency in an increasingly disillusioned and disenfranchised electorate. Hence, civil society must mobilise the public, engage with donors, as well as develop and implement digital tools which will enfranchise constituencies to engage with authorities and promote civic responsiveness.

Electoral reform will, therefore, serve to enhance the effectiveness and inclusiveness of parliamentary oversight by linking it directly with empirical evidence of spending outcomes and public service delivery performance in constituencies, through both traditional and technologically novel channels. This should complement Parliament's inadequate application of existing accountability mechanisms, such as its power and responsibility to scrutinise budgets that are tabled annually by all government departments and public entities, including local governments.

3.1. OUTA'S interest in electoral reform

OUTA's engagement 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*⁸. 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.

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.*

⁸ CC case no: 110/19; WCHC case number: 17223/18

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 have come into operation in June 2022. This deadline was repeatedly extended. Another concern is the short timelines available to effectively encourage public participation and lack of attempts to ensure that the Act is understood by the members of the public.

OUTA's interest in electoral reform 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 Act 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 Act, as well as the content of the Act, are deemed to be problematic.

On 17 April 2023 the Bill was ratified to become the Electoral Amendment Act of 2023, and it officially took effect on 19 June 2023. This is nearly an entire year overdue, compounded by the delayed establishment of the Electoral Reform Consultation Panel (ERCP). OUTA believes that this Act affects the fairness, transparency and accountability of the electoral system. The concerns OUTA have raised could have significant implications for the outcome of elections and representation in legislatures for citizens. These concerns ought to be addressed by the ERCP, which has been established in May 2024. On 26 August 2024 the ERCP extended a call for public participation, indicating that submissions must address why, how and whether the current South African electoral system should be reformed, changed or even replaced. The invitation for submissions is made as part of the panel's duty to undertake a public participation process regarding the issues falling within its functions.

OUTA once again strongly emphasises that the panel must be unbiased and have expertise in this field and it is also important that the voices of the public and civil society organisations are considered meaningfully by the panel, due to the impact this amended Act will have on citizens.

3.2. The ConCourt case (2019)

In July 2019, OUTA applied to the Constitutional Court for permission to join a case calling for electoral reform. OUTA applied to be an *amicus curia* (a friend of the court) in the matter; this application was granted. On 11 June 2020, the ConCourt ruled that sections of the Electoral Act were unconstitutional and overturned them. The declaration of invalidity was suspended for two years, to give Parliament time to rewrite this law, to allow independent candidates to stand for election.

The case (CCT110/19) was brought by the New Nation Movement NPC and others against the president and others. It revolved around whether the Electoral Act of 1998 is unconstitutional because it prevents independent candidates from standing in a national or provincial election. OUTA is not associated with and holds no brief for the original applicants, but regarded this case as a matter worthy of intervention due to the public importance of electoral reform for holding politicians to account. OUTA wants the law to be amended to allow individuals to

stand as independent candidates in national and provincial elections, rather than the current system which allows only party candidates.

Independent candidates are more answerable to their voters as they face a real likelihood of being voted out if they fail to honour election promises. A system which allows for independent candidates will help mitigate the threats to accountability of the party list system.

3.3. Reforming the law: Avoiding real change and running late

In February 2021, OUTA made a submission on the Electoral Amendment Bill to Parliament's portfolio committee on Home Affairs, which was strongly critical of the bill. In this submission, OUTA pointed out that the ConCourt had given Parliament until June 2022 to update the law, which left Parliament with just four months to engage with the public on the Bill. "OUTA observes with dismay the explicit reference to reduce public participation such that deadlines can be met," said OUTA's submission, pointing to a parliamentary document which says public hearings in all nine provinces are "discouraged" to prevent further delay. Parliament's delay had caused the process to be rushed. OUTA was concerned that the public participation process limited the discussions to the Electoral Amendment Bill, as the committee had abandoned the alternative Electoral Laws Second Amendment Bill. This effectively disabled critical public deliberation on a variety of options. See OUTA's comments on this [here](#)⁹.

3.4. The impact of the bill on the public and lack of public participation

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.

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 place¹⁰. 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".

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

⁹ <https://www.outa.co.za/blog/newsroom-1/post/parliament-fails-again-putting-party-ahead-of-country-in-electoral-reform-bill-1142>

¹⁰ As noted in the minutes of the Standing Committee's meeting on the matter, 8 February 2022.

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.

On the matter of public participation, OUTA observed 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**)]¹¹.*

In addition, OUTA also seeks to acknowledge the media statement of 15 February 2022 wherein the Home Affairs Committee recommends that Parliament requests an extension on the amendment to the Electoral Act¹². 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 – was not 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*.

The options for deliberative public participation were also restricted, since only one bill was shared for input, not two, which could have allowed for critical comparison. The draft bills that should normally circulate for public comments were not circulated. Indeed, a motion of desirability was passed AGAINST the only other viable option, the Electoral Laws Second Amendment Bill (B34-2020), submitted as a Private Members Bill by Mr Lekota, MP. Only circulating one bill defeats the purpose of public participation. Not giving the public options to deliberate on, or even failing to inform them of public participation opportunities, is a failed attempt by Parliament.

The pace and the manner at how Parliament have been handling this matter is rather concerning. This is because the court gave Parliament a period of 24 months and they only started to be active only in February 2022 and was left with only 6 months to wrap up everything as per the court's order. Parliament's deadline was extended to December 2022, and then again to February 2023 so as to engage in public participation following the NCOP changes. Despite these rounds of engagement, the updated Bill did not transpire in a piece of legislation embracing the opportunity provided to significantly alter the current electoral system.

¹¹ Own emphasis

¹²<https://www.parliament.gov.za/press-releases/media-statement-home-affairs-committee-recommends-parliament-request-extension-amendment-electoral-act>

Parliament has not been truly honest with the public in terms of the bills proposed as they only brought forward the government's bill and asked the people if they are in favour or not. The disregarding of the Lekota Bill is concerning as it is not considered especially if it embraces the full electoral reform. The reasoning behind all this is that Parliament have pointed out that the Lekota Bill is too broad and due to the time constraints, they will not be able to look at and therefore they are continuing with the bill proposed by the Ministerial Advisory Committee (MAC). It seems as if Government only pushes for the bill that favours political parties more which is the Government's bill, other than the Lekota Bill that embraces the full electoral reform system as per ConCourt's ruling.

It appears that the work of notifying and educating the public has been left in the hands of the civil society organisations that are interested in the electoral reform. OUTA together with other interested civil organisations like OSA, ISI and others have gone above and beyond in order to get the public involved in the amendment of Electoral Bill. These organisations have elected to act as monitoring groups on electoral reform. These organisations have been communicating with the public through media articles, webinars and on social media. This kind of communication has been conducted as means of awareness and education. OUTA has hosted webinars including panellists who are passionate and knowledgeable about electoral reform, who also want to see a change in the electoral system. Looking at how the public hearings have been conducted, it is no doubt that there has been little or no education on why there has to be an amendment of legislature and why public participation is needed and how the amendment of the bill is going to contribute into the future and the public's lives.

3.5. Problematic elements identified in the Bill

OUTA has procured legal counsel that the Bill is problematic in several regards¹³:

3.5.1 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 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".

¹³ Please also refer to the Memorandum submitted together with the letter.

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.

3.5.2 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.

3.5.3 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 them¹⁴. 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 votes¹⁵ 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.

3.5.4 Inequality and impediment to human dignity:

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^{16,17}. 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 and undergirds OUTA's involvement.

4. Literature Review

4.1. Background to the Electoral reform Debate in South Africa (1997)¹⁸

In the past few decades, the variety of both majority representation and proportional representation systems widened considerably. Some of the more complex electoral systems combine highly proportional outcomes with

¹⁴ See Sections 6 & 7 of Schedule 1A

¹⁵ See Sections 8-14 of Schedule 1A

¹⁶ 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

¹⁷ 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.

¹⁸ <https://www.jstor.org/stable/43110496?seq=1>

the personalisation of the vote through single-member constituencies or through open party lists. The issues surrounding the relationship between voters and representatives (constituency representation) also plays a prominent role in the South African electoral reform debate, rekindled within the Constitution-writing process (1994-1996). In South Africa's first democratic elections (1994), a pure proportional system was applied. On the academic as well as on the political level, consensus exists with regard to the evaluation of the strong and weak points of the existing electoral system (namely high representativeness versus lack of constituency representation), the objectives of possible electoral reform (improvement of the voter-representative relationship within the principle of proportional representation) and the spectrum of technical means in order to reach these objectives (introduction of stronger constituency elements).

However, reform proposals supporting the individual accountability of the members of Parliament and constituency representation without giving up the widely accepted principle of proportional representation have failed. The strongest argument for maintaining the pure PR system was the time factor. Very importantly, that within the rather short Constitution-writing process the decision on the electoral system was a political one under time-pressure. In order not to precipitate the decision and not to incur the risk of undesired side effects of electoral reform, the two major political parties maintained the existing electoral system – at least, for the 1999 election.

The deficit in accountability found within South Africa's electoral system has weakened key institutions and has enabled the emergence of a one-party dominant system and, more importantly, the dominance of party executives¹⁹. Three organising principles are provided by Fakir²⁰ to promote voter responsiveness, greater accountability, and oversight over elected MPs. These principles are:

1. Democratic Representation
 - Representativity
 - Proportionality
 - Inclusivity
 - Diversity
2. Democratic Governance, and the ability to ensure:
 - Oversight
 - Accountability
 - Responsiveness and Responsibility
 - Fairness
3. Citizen Agency
 - Participation
 - Voice
 - Choice

¹⁹<https://issafrica.org/iss-today/can-changing-the-electoral-system-increase-political-accountability>

²⁰ <https://www.polity.org.za/article/why-we-need-electoral-reform-and-what-it-might-look-like-2021-05-04>

If South Africa is to further consolidate its democracy, greater accountability between the electorate and political parties is key. This may well also lead to and be facilitated by a more responsive Parliament²¹. Issues such as the democratic and inclusive culture within the political parties, and the transparency of funding to political parties, need to be more closely scrutinised and reformed²². Deliberative democracy ought to be promoted amongst citizens and civil society²³.

The following section is a systematic approach towards the literature on the topic. Due to the depth of research conducted by these entities, it must be noted that the literature review contains direct extracts from the various reports.

4.2. Zyl Slabbert Report and Commission Findings (2003)

In March 2002, the South African Cabinet established an Electoral Task Team (ETT) to draft new electoral legislation, as required by the Constitution, ahead of the National and Provincial elections scheduled for 2004. Chaired by Dr. Frederik van Zyl Slabbert, the ETT was formally launched by the then Minister of Home Affairs, Dr. Mangosuthu Buthelezi, on 9 May 2002. Its mandate was to formulate the parameters of new electoral legislation and, if necessary, prepare for an earlier election.

The ETT's work included extensive consultations with political parties and civil society. These engagements culminated in two opposing views about whether the electoral system should be changed. The minority view supported the retention of the current closed-list proportional representation (PR) system, while the majority recommended introducing greater constituency representation. The central question was whether the benefits of changing the system outweighed the disadvantages of retaining it, and vice versa.

Key Issues Discussed in the Van Zyl Slabbert Report (2003)

Research presented at a round-table conference in 2002 highlighted several critical topics:

- Advantages of the current electoral system, including fairness, inclusiveness, and simplicity;
- The need for greater accountability in democratic politics and the potential role of electoral systems in achieving this;
- Differing perspectives on the importance of electoral systems in promoting accountability, ranging from no role to an essential role.

The findings demonstrated the tensions between maintaining proportional representation and addressing the issue of accountability. The report also underscored accountability's central role, particularly in relation to:

²¹<https://issafrica.org/iss-today/can-changing-the-electoral-system-increase-political-accountability>

²²https://www.up.ac.za/faculty-of-law/news/post_2337922-possibility-of-electoral-systems-reform-in-south-africa-discussed-

²³ <http://www.politics.uct.ac.za/news/deliberation-day-electoral-reform-south-africa>

- Internal party discipline;
- The role of Parliament;
- Party funding;
- Rural and urban differences;
- The separation of powers;
- The relationship between political parties and their support base.

The distinction between collective and individual accountability was notably unclear, which complicated discussions about single-member constituencies, multi-member constituencies, and the inclusion of independent candidates. Despite these complexities, research indicated that South African voters were generally satisfied with the current system. For instance, 74% were satisfied with how they elected the government, 81% felt that the system ensured diverse representation in Parliament, and 68% believed it helped hold parties accountable. However, there was a clear desire for closer interaction between voters and their representatives: 71% of respondents expressed a preference for voting for candidates from their local area, and 64% felt MPs should live near the communities they represent.

Electoral Proposals: Majority and Minority Views

The task team's discussions ultimately led to two distinct views. The majority view called for a mixed-member proportional representation system with constituency representation, while the minority preferred retaining the existing closed-list PR system.

The majority's proposal rested on the idea that the current system already functioned as a mixed proportional system. Half of the National Assembly's representatives were elected from nine regional (provincial) lists, with the remaining 200 members selected from compensatory national lists to restore proportionality. The majority recommended expanding the number of multi-member constituencies from nine to 69, based on population distribution in municipalities, while maintaining overall proportionality through compensatory lists. This system would provide a greater level of constituency representation, but with the simplicity of a single ballot paper, bearing party names, emblems, and leaders' photographs.

The minority, on the other hand, did not see the need for such changes and advocated for the continuation of the current PR system. The minority's proposal was eventually adopted by Parliament²⁴, reinforcing the existing system of collective accountability through periodic elections.

Implications and Recommendations

The task team recognised that, regardless of the system chosen, electoral reforms must adhere to core principles: fairness, inclusiveness, simplicity, and accountability. The FVZS report outlined two key approaches for reform.

²⁴ Ndletyana, M. (2020). Constitutional Court ruling heralds changes to South Africa's electoral system. In *The Conversation*. Available: <https://theconversation.com/constitutional-court-ruling-heralds-changes-to-south-africas-electoral-system-140668>

The majority's proposal involved single-member constituencies and a compensatory national list, as detailed in Chapter 4 of the report (pp.19-31), while the minority's vision for a multi-member constituency system was outlined in Chapter 5. Both included draft legislation frameworks.

Although the report presented a comprehensive review of the electoral system, its recommendations were not implemented, and it was shelved by the Cabinet in January 2003 without further public discussion. Nonetheless, the ETT hoped that the findings would stimulate ongoing debate about the adequacy of South Africa's electoral system.

Continued Debate on Electoral Reform

The 2021 Inclusive Society Institute (ISI) report argued that the Van Zyl Slabbert Report should be used as a baseline for developing a new electoral model. The report suggested that electoral reforms should aim to strengthen political accountability in South Africa's democracy. OUTA has also expressed support for the majority view, which would introduce adjustments to the current system while fostering public discourse and participation. Dr. Slabbert's ETT acknowledged that a single-member constituency system might not fully address the issue of accountability, as voters might hesitate to vote against the incumbent party. Therefore, the gradual introduction of a multi-member constituency system, where voters could select candidates from within parties, was proposed. This would increase competition among candidates based on voters' needs, not party leadership demands, while fostering more direct engagement between MPs and their constituencies.

While the report's recommendations were not implemented, they remain a valuable contribution to South Africa's electoral discourse and a reminder of the need for ongoing reflection on the country's democratic processes.

4.3. The Report of the Independent Panel Assessment of Parliament (2006)

The chair of the panel presenting the report was Pregs Govender. In the foreword, she states that: "To ensure a strong independent Parliament, requires strong, independent Parliamentarians and Committees who act to safeguard their integrity and the integrity of Parliament. Submissions from a wide range of organisations in civil society were critical in highlighting the difficulties civil society experiences in engaging parliamentarians and committees. An important role of Parliament is to ensure that those directly affected by legislation are consulted on the potential negative impact. Unfortunately, the majority of those who participate in public hearings in Parliament remain those who are well resourced. Adequate communication strategies, timeframes and subsidised transport costs to change this situation is imperative if Parliament is to meet its vision of becoming a 'People's Parliament'.

The initial plan for assessing Parliament was part of South Africa's engagement with the African Peer Review Mechanism (APRM). The APRM's questionnaire on democracy and good political governance necessitated an evaluation of Parliament. The Joint Coordinating Committee on the APRM determined that an independent panel

would be best suited for this task. However, due to time constraints, this evaluation could not be completed in time for the APRM process. As a result, the final APRM report highlighted the need to prioritise an assessment of Parliament's independence, efficiency, and effectiveness. Consequently, an independent panel was appointed by Parliament's Presiding Officers in December 2006 to address this priority.

The independent panel was tasked with investigating, reporting and providing recommendations on how Parliament is evolving to fulfil its constitutional role in promoting and entrenching democracy. The panel's findings were derived from a comprehensive literature review and a public hearing process involving both Parliament insiders and civil society participants. The research led to several recommendations, particularly concerning Parliament's independence from the Executive and the extent to which the members of parliament represent and are accountable to their constituents.

The panel deliberations assessed the extent to which Parliament is evolving to meet the expectations outlined in the Constitution and to assess the experience and role of parliament in promoting and entrenching democracy. The panel grappled with questions such as: Is Parliament truly expressing its vision of being a "people's parliament", and what does this concept mean in practice? Though the members of Parliament are elected representatives of the public, to what extent are they effectively fulfilling the role of representing the concerns of the public? Is Parliament promoting and entrenching key democratic principles such as accountability, responsiveness and openness, both within other organs of state and within the institution itself? In posing these questions the panel sought to avoid speaking in general terms of the role parliaments play in governance structures and rather focused the discussion on the particular case of South Africa with its unique historical and socio-economic context.

This report reveals that significant challenges remain for Parliament to realise its vision of becoming a people's parliament. This relates specifically to the link between the electorate and parliament. Surveys show that there is generally a very poor understanding among the public of parliamentary procedures and opportunities for participation in parliamentary processes. While South Africa does not have a constituency-based electoral system, constituency offices have been established and periods allocated for the members of parliament to conduct constituency work. This report reveals, however, that there are notable challenges with this system.

It has been argued that the perceived lack of accountability of the members of parliament to the public, as well as the poor link between the public and Parliament in general, can be ascribed to South Africa's party-list electoral system. The panel deliberated at length on the impact of the party-list electoral system on various aspects of Parliament's work. It was noted that the party-list system tends to promote accountability of the members of parliament to their political parties rather than to the electorate. The power of political parties to remove their members from Parliament also tends to discourage the expression of individual viewpoints as opposed to party political views. The panel however recognised that alternative electoral systems also have drawbacks.

The panel strongly recommends that Parliament debates the relative merits of various electoral systems and considers the impact of these systems on the institution's ability to give expression to its Constitutional mandate. The view of the panel is that the current electoral system should be replaced by a mixed system which attempts to capture the benefits of both the constituency-based and proportional representation electoral systems.

In recommending that Parliament considers the impact of the electoral system on the work of Parliament, the panel does not wish to reduce the debates around public participation, accountability and responsiveness to the matter of electoral reform. It is strongly felt that, even in the absence of electoral reform, Parliament should undertake various initiatives to improve the manner in which it fulfils its Constitutional mandate. The manner in which constituency work is structured, for example, may be improved through a number of practical interventions that do not require electoral reform. In this regard, the panel recommends that Parliament conducts a comprehensive review of the manner in which constituency work is structured.

4.4. Electoral reform and South Africa – The Journal of the Helen Suzman Foundation (2014)

Wim Louw, from the Helen Suzman Foundation, has written several contributions reflecting on electoral reform²⁵. The one specific contribution in Issue 74, November 2014, situates the context very well (preceding the 2014 elections), and summarises the historic and present configuration of South Africa's electoral system. He sketches the overview of the 1948 parliamentary elections that represented Single Member Plurality (SMP) system together with Single Member Districts (SMD). This was like a constituency-based system inspired by a Westminster-style, which also effectively excluded most South African inhabitants. Comparatively, since 1994 to counter the systems of apartheid, a Proportional Representation (PR) system was preferred. Such a PR system acknowledges the racial, ethnic, political and socio-economic diversities of a present-day South Africa.

He summarises the national elections, wherein: "citizens cast a vote for a single party of their choice; the country is divided into 10 large multi-member district regions: 9 corresponding to the 9 provinces (with a total magnitude of 200 seats, ranging from 5 to 48 seats in each region 19, and 1 national district for the country (with a magnitude of 200 seats). Seats on the National Assembly are allocated in direct proportion to the number of votes a party received" (p.21). In the subsequent discussion direct references are made to the Van Zyl Slabbert report.

What is of particular interest in this contribution, is the proposed design when choosing or modifying an existing electoral system. Louw summarises several considerations that must precede the modification of a system. This is slightly different to the other approaches from contributors who propose what the changes should look like. Instead, pondering foundational characteristics might better imbed principles in a system that can never be perfect, albeit more suitable for a democratic and accountable South African parliamentary and electoral system.

²⁵ <https://hsf.org.za/publications/hsf-briefs/the-south-african-electoral-system>

These proposed considerations are (p.22):

- “Decisiveness – does the system produce a clear winner, relative to other competitors?;
- Effectivity – does the system empower winners to make decisions once elected?;
- Stability – will the result be considered legitimate by a large enough majority?
- Does it take into account inter-religious or ethnic conflict?;
- Representivity – does the system ensure that minorities are included? Does the system promote a demographically representative assembly? Does the system ensure that all regions are represented?;
- Proportionality – is the result ‘fair’? Do the electoral rules enable a result that corresponds to vote share?; and
- Accountability – to what extent can voters influence the composition of assemblies? What is the reach of their veto power?”

Louw then continues to elaborate on the three broad dimensions according to which electoral systems can be modified: 1) the ballot structure, 2) the district structure and 3) the electoral formula. When critically considering current and future electoral systems, it must be noted that – as supported by the Helen Suzman Foundation – that “There is no perfect or un-biased electoral system; there are always trade-offs to be made in modifying, for instance, the ballot structure, or the electoral formula. The question is: Which biases are we, as a society, willing to live with?”.

4.5. Fakir on Hybrid Parallel Electoral Model combining majority First Past-The Post (2021)

Ebrahim Fakir, Director of Programmes: Auwal Socio-Economic Research Institute (ASRI) to the Inclusive Society Institute (ISI) expert panel on electoral reform, published a position paper focussing on models suggested to achieve meaningful electoral reform. The paper, titled “Hybrid Parallel Electoral Model Combining Majority First Past-The-Post with Closed List Proportional Representation,” was published on 26 November 2020. Fakir's paper introduces a hybrid electoral model that integrates a majority First Past-The-Post (FPTP) system with closed list Proportional Representation (PR). This proposal responds to a Constitutional Court ruling which deemed the current Electoral Act unconstitutional for restricting the right to stand for public office to party members. The paper advocates for a comprehensive overhaul of South Africa's governance framework, focusing on voter and citizen concerns.

Fakir's proposal outlines a system with two distinct components: FPTP and closed party list PR. The FPTP component would require a candidate to secure a 50%+1 majority to win a seat in 350 or 400 single-member constituencies, while concurrently, there would be 250 or 200 seats allocated via closed party list PR. This hybrid model aims to blend the advantages of proportional representation with single-member constituency representation. The model reflects constitutional principles such as accountability, responsiveness, transparency, human dignity, equality, freedom, effective choice, and maximised representation. It also aligns with democratic values like inclusivity, diversity, representativity, proportionality, oversight, simplicity, and transparency.

Implementing this model would necessitate amendments to the Electoral Act, including revisions to section 46(1) to establish the number of National Assembly members and incorporate proportional representation elements. The proposal also considers the potential for a unicameral parliament with a single national assembly, possibly reducing or eliminating the National Council of Provinces (NCOP).

This hybrid model seeks to balance proportional and constituency representation, aiming to enhance responsiveness and accountability while improving the alignment between constituencies and their elected representatives. Although political parties will continue to play a significant role, the model empowers voters with greater influence and aims to foster behavioural and cultural changes in politics over time. Additionally, it seeks to promote local social and economic development and strengthen oversight of government activities.

In summary, Fakir's proposed hybrid parallel electoral model combines FPTP and closed list PR systems, addressing voter and citizen concerns by enhancing responsiveness and accountability. It strives to balance proportional and constituency representation while encouraging systemic reforms, local development, and improved government oversight.

4.6. Inclusive Society Institute on Proposed Electoral Model for South Africa (2021)

This is also known as the Roelf Meyer report, who convened the panel following the Inclusive Society Institute (ISI) that embarked on a process to design a potential new electoral model²⁶. The mandate was to undertake the work to design an electoral model that will meaningfully give effect to the judgement, respect the boundaries set out in the Constitution, retain proportionality as a basis for representation in that it best promotes inclusivity, and which enhances representativity, accountability, and transparency²⁷.

Options that are considered in this report include:

- A minimalist approach (p.14)
- Multiple modelling approaches regarding multi-member constituencies and PR balancing lists (p.15/ see also the FVZS report on majority recommendations)
- Hybrid parallel electoral model combining majority "first past the post" with closed list of proportional representation (p.17/ this is also discussed in the FVZS report)

These options are derived from reflection and comparison of other models. It should be noted that the ISI used a few other reports and models to inform their analyses and ultimate recommendations. These include:

- The Van Zyl Slabbert Commission
- Danish Electoral Model
- German Mixed Member Proportional (MMP) System: Presented by Professor Michael Krennerich, University of Erlangen-Nürnberg

²⁶ <https://www.polity.org.za/article/proposed-electoral-model-for-south-africa-2021-02-24>

²⁷ https://issuu.com/inclusivesocietyinstitute/docs/2021.02.24_electoral_reform_report

- The Irish System – Proportional Representation by the Single Transferable Vote: Presented by Professor David Farrell, University College Dublin
- Spanish Electoral Model: Presented by Professor Ignacio Lago, Universitat Pompeu Fabra, Barcelona
- Turkish Electoral Model: Presented by Professor Ali Çarkoğlu, Koç University, Istanbul Turkey

In evaluating these various models, the ISI report captures the following additional proposals to reform the current electoral system (p.20):

- “The Van Zyl Slabbert Commission on electoral reform (the Electoral Task Team [ETT]) report should be used as a baseline for developing a new electoral model (see section on FVZS)
- Specific affirmative proposals should be made to ensure gender representation, as the introduction of multi-member constituencies could potentially have an adverse effect on gender representation.
- The current closed list system does not necessarily have to be immediately abolished as political parties could in the interim choose to introduce a system of primaries for their own candidates. Once the electorate has become accustomed to the new system, further reform could allow for the opening up of the lists”.

Based on the foregoing the panel proposed a new electoral system for South Africa, in Chapter 3. Below is an extract of the criteria to guide the design (pp.22-32):

- *“accommodates independent candidates*
- *adheres to the constitutional prescript requiring the composition of the legislature to reflect, in general, proportional representation*
- *requires no or minimalistic amendments to the constitution*
- *be simple for the Independent Electoral Commission to implement and for the voters to understand*
- *promotes gender parity within the legislature*
- *promotes demographic and geographic inclusiveness*
- *promotes representativity*
- *promotes, to a certain extent, accountability.*

In essence, the panel needed to decide between three broad approaches:

- *A winner take all, pure constituency approach*
- *A simplistic proportional representation model*
- *A hybrid model that accommodated constituencies together with a compensatory proportional list allowing for overall proportionality to be established”.*

To support these criteria and subsequent proposed reform, the panel also formulates 6 questions and corresponding answers to better understand the proposed system (p.33). The report then also continues to discuss the relevance of other reports listed earlier.

4.7. Report of the Ministerial Advisory Committee on Electoral Systems Reform (2021)

This report was released in June 2021. This is the *Report of the Ministerial Advisory Committee on Electoral Systems Reform*, presented to the Honourable Minister of Home Affairs, by the Ministerial Advisory Committee on electoral reform. Two options have been proposed, but it should be noted the Ministerial Advisory Committee could not decide or agree on the two proposed options. It should be strongly emphasised that **OUTA is in support of Option 2** since it advocates for change to the current electoral system. A proportional vote allows for the independent candidates to stand and to form coalitions.

Below is an extract from the report on the two options:

- **Option 1: The slightly modified multi-member constituency (MMC), which stakeholders referred to as the minimalist option.**

This option entails modifying the existing multi-member electoral system to accommodate independent candidates in the national and provincial elections without many changes in the legislation. Those in favour of this option believe that it does not interfere with the constitutionally required general proportionality and is the best option for ensuring inclusiveness, gender representation, simplicity and fairness for independents.

- **Option 2: The mixed-member model incorporating single-member constituencies (SMC)**

This option entails combining the first-past-the-post and proportional representation, making it a mixed-member proportional (MMP) system resembling the current local government electoral system, albeit with some improvements. It involves electing MPs from 200 single-member constituencies and the remainder from a single national multi-member constituency. Thus, voters would vote for a single MP to represent them in single-member constituencies (their first vote) and for a party to represent them in the single national multi-member constituency based on competing for closed party lists (their second vote). Those in favour of this option believe that it does not interfere with the constitutionally required general proportionality and is the best option for ensuring inclusiveness, gender representation, simplicity and fairness for independents.

OUTA, in collaboration with other like-minded entities (such as those whose contributions have been reflected on), can best promote Option 2 and be vocal proponents for change, inclusivity, youth participation and incentivising public responsiveness. Instead of following a “divide and conquer” strategy, an integrated approach will best contribute to a substantial and coordinated campaign. Option 1 does not require many changes in the legislation, including not interfering with the constitutionally required general proportionality. Option 2 then – unlike the former – does advocate for changes to the legislation especially since it has been deemed unconstitutional. Option 2 argues in line with the ConCourt ruling that the current Electoral Act does not provide for people who are not affiliated with a political party to stand as independent candidates in national and provincial elections. It seeks to address this issue by introducing single-member constituencies, with proportionality secured via party lists. Option 1 merely recommends inserting independents into the existing electoral system. It is noted herein that the Electoral Amendment Act 2023 generally follows the Option 1 recommendations.

4.8. Report on electoral reform in South Africa prepared by Sithembile Mbete (2022)

In November 2022, and with the support of the Konrad Adenauer Stiftung (KAS), OUTA campaigned with My Vote Counts (MVC) to increase public awareness on the reform process and the implications on South Africa's election system. As part of the deliverables of the funded project, OUTA published a research report on electoral reform, which was compiled by Dr Sithembile Mbete for OUTA and MVC²⁸. Dr Mbete is a senior lecturer in the Department of Political Sciences at the University of Pretoria, director of programmes at Futurelect, and Member of the Ministerial Advisory Committee (MAC). Based on her experience and research, she is perfectly positioned to explain the intricacies of electoral systems. She captured the history of South Africa's journey on electoral reform since 1994, including the recommendations of the Van Zyl Slabbert report of 2003 and the MAC report of 2021. It also includes her keen observations on how the Portfolio Committee on Home Affairs handled the bill this year.

Mbete's report calls for an active large-scale civic movement on electoral reform. "We must see this Bill as the beginning of the process rather than the end," says the report. It calls for a survey on citizen attitudes to the electoral system and calls for academics to "think creatively about how to comprehensively redesign our electoral system for the long term" and how constituencies should be demarcated. It also calls for youth involvement. "Any effort to reform the electoral system must have people under 35 at its centre as these changes will affect them the most," says the report.

In the realm of democratic governance, electoral systems play a pivotal role in ensuring fair representation and preserving the voice of the people. This research report embarks on a comprehensive exploration of the electoral reform process that has unfolded in South Africa since 2020. Divided into several sections, this document delves into the key milestones, deliberations and recommendations that have shaped the nation's electoral landscape. The report contains six sections, together with recommendations in the conclusion.

- Section 1: The New Nation Case and the Constitutional Court's Judgment: The report commences with an overview of the groundbreaking New Nation case and the consequential judgment delivered by the Constitutional Court. This section illuminates the pivotal role that this case played in stimulating discussions on electoral reform, inspiring further examination of the existing system's strengths and limitations.
- Section 2: An Overview of Electoral Systems: Continuing the narrative, the second section offers a comprehensive survey of various electoral systems, meticulously analysing their respective advantages and disadvantages. By examining different models employed globally, the report sets the stage for informed deliberations regarding potential improvements to South Africa's electoral system.
- Section 3: Unveiling South Africa's Electoral System: Delving deeper into the subject matter, the third section embarks on a historical journey, recounting the process through which South Africa's current

²⁸ <https://www.oua.co.za/web/content/232269>

electoral system was chosen. Additionally, it elucidates the structural intricacies of the current system while shedding light on previous endeavours to initiate electoral reform. Notably, the report highlights the Electoral Task Team (ETT) Report of 2003, emphasising its significance in shaping the discourse surrounding reform efforts.

- Section 4: The Ministerial Advisory Committee's Report: Building on previous sections, the report proceeds to explore the findings and recommendations put forth by the Ministerial Advisory Committee on electoral reform. This section presents an in-depth analysis of the two reform options proposed to Minister Aaron Motsoaledi, providing valuable insights into the potential avenues for enhancing South Africa's electoral framework.
- Section 5: The Electoral Amendment Bill and Deliberations: Advancing the narrative, the fifth section centres on the Electoral Amendment Bill [B1 – 2022] and delves into the deliberations conducted by the Portfolio Committee on Home Affairs. By examining the key provisions and implications of the bill, the report brings attention to the legislative measures being taken to promote electoral reform.

As the report draws to a close, it underscores the significance of civil society mobilisation in driving the momentum for electoral reform. By articulating a series of recommendations, the report urges individuals and organisations to actively engage in advocacy efforts, fostering a vibrant democratic culture and propelling South Africa towards a more inclusive and representative electoral system. South Africa urgently requires a proactive and large-scale civic movement dedicated to electoral reform. Rather than perceiving the current Bill as the ultimate solution, it should be viewed as the initial step in a broader process. The recent electoral reform in Lesotho serves as an example, illustrating how altering the electoral system can empower citizens and enhance their agency. Conducting a survey on citizen attitudes towards the electoral system should be prioritised, as the last comprehensive study was commissioned by the Van Zyl Slabbert Commission in 2002.

Academics must adopt a creative mindset to undertake a comprehensive redesign of South Africa's electoral system for the long term. Concerns regarding the challenges of demarcating national constituencies in a geographically large country with varying population densities and racially defined settlements are valid. Careful consideration is necessary to prevent distortion of electoral results. Additionally, there has been insufficient exploration of different mathematical formulas used to calculate results and their impact on the system. Researchers need to engage with these important questions. Any endeavour to reform the electoral system must centre around the interests of individuals under the age of 35, as they will be most affected by these changes. With a population of 20.58 million individuals between the ages of 15 and 34, South Africa is a youthful nation. This demographic, however, exhibits significant disillusionment with electoral politics and must have a substantial voice in designing the country's future electoral system.

In essence, this report captures the journey of electoral reform in South Africa, highlighting significant milestones, deliberations, and recommendations that have shaped the nation's democratic landscape. Through these efforts,

South Africa must continue in its commitment to the fundamental principles of democracy and equitable representation, and this can be achieved through comprehensive electoral reform.

4.9. A review of media articles related to electoral reform (2004-2023)

Media review from 2004 to 2029

The media review on electoral reform in South Africa (2004–2019) highlights recurring themes related to accountability, voter engagement and the limitations of the current proportional representation (PR) system.

A central concern across the media is the lack of accountability within the existing electoral system. Articles such as those by Southall²⁹ (2019) and Bar³⁰ (2018) stress that the PR system, where parliamentarians are more accountable to party structures than to voters, has fostered a sense of "arrogance of power" within the African National Congress (ANC) and weakened democratic institutions. This is reflected in the ANC's decreasing electoral dominance, as evidenced by its poor performance in the 2016 municipal elections (Siegle, 2019³¹). Several writers point to the party's internal dysfunction and the broader systemic issues of corruption and mistrust (Signe, 2019³²). In evidence of these issues and its effect on voter dissatisfaction, the 2024 national election saw the ANC slip below a 50 percent majority, a first since 1994. The party's former political dominance was dealt a heavy blow by voters who sought out newer and smaller parties in which to put their faith. This resulted in the ANC having a lower percentage of votes in all nine provinces compared with the 2019 Elections, obtaining less than 50 percent in two provinces (Northern Cape and Gauteng) and losing majority in KwaZulu Natal to the newly established uMkhonto we Sizwe.

Voters have consistently begun to show dissatisfaction with the former dominant party and this electoral shift should also be met with a more robust electoral system that meets the needs of this electorate. In the lead up to the 2024 national election the Human Sciences Research Council (HSRC), at the behest of the Independent Electoral Commission³³ (IEC), conducted research into youth voter apathy. The results were startling and showed a high degree of discontent with democratic leadership coupled with exceptionally low levels of trust in core political institutions³⁴. It is not only the youth³⁵ of South Africa that expressed apathy at voting, with overall voter turnout declining from 89.3% in 1999 to a record low of 58.6% in the 2024 general elections³⁶. The HSRC in its findings confirmed that the trend of discontent and disillusionment with the current political situation as the main driving force for voter abstention, consistent with their previous research.

²⁹ <https://theconversation.com/electoral-systems-need-urgent-reform-south-africa-is-no-exception-115482>

³⁰ https://www.news24.com/news24/columnists/serjeant_at_the_bar/time-to-reconsider-van-zyl-slabbert-electoral-reforms-20180914

³¹ <https://africacenter.org/spotlight/an-overview-of-africas-2019-elections/>

³² <https://www.brookings.edu/blog/africa-in-focus/2019/06/12/recommendations-for-south-africa-after-its-elections/>

³³ <https://groundup.org.za/article/elections-2024-low-voter-turnout-must-be-fixed/>

³⁴ <https://www.ijr.org.za/2024/05/unresponsive-governance-and-the-voter-turnout-stew/>

³⁵ <https://www.gga.org/enhancing-youth-engagement-and-voter-participation-in-south-africas-2024-polls/>

³⁶ <https://www.dailymaverick.co.za/article/2024-06-07-the-big-no-vote-over-11-million-registered-voters-did-not-cast-ballots-in-2024-polls/>

Calls for reform have focused on introducing mechanisms that increase individual accountability to voters. This includes proposals for a mixed-member proportional representation system (Krennerich, 1997³⁷; Southall, 2004³⁸), which would combine proportional representation with constituency-based elements, thereby creating a direct link between representatives and their constituencies. The report of the Electoral Task Team, chaired by Dr. Frederik van Zyl Slabbert (Bar, 2018³⁹), had advocated for such changes as far back as 2003, but these proposals were largely ignored.

Voter apathy and low turnout have emerged as critical issues. A significant number of eligible South Africans, particularly young people, have chosen not to register or participate in elections (Chutel, 2019⁴⁰). This disengagement reflects a broader dissatisfaction with the political system, where elections are increasingly seen as disconnected from meaningful change (Runji, 2014⁴¹). Efforts to reform the system also include discussions about allowing independent candidates to run for office without being tied to political parties, as suggested by former MP Dr Michael Louis (Hogg, 2018⁴²). This represents a move towards diversifying political participation and empowering individuals outside the established party structures.

The media's coverage, from 2004 to 2021, of electoral reform in South Africa consistently calls for a system that fosters greater accountability, transparency and voter participation. The entrenched power of party leadership, particularly within the ANC, and the failure to address systemic corruption remain ongoing concerns that fuel calls for change. However, actual reform has been slow, hampered by political resistance and a lack of consensus on how best to implement these changes.

From 2020 to 2023, South Africa's electoral reform process has been marked by significant legal rulings, debates over the electoral system, and growing concerns about fairness and accountability.

2020: Constitutional Court Ruling and PR System Critique

The discourse on electoral reform began with a pivotal Constitutional Court ruling on July 15, 2020, in the case of *New Nation Movement NPC and Others v. President of the Republic of South Africa*. The Court declared the Electoral Act unconstitutional, as it barred independent candidates from running for office unless they were affiliated with political parties (Abdullah, 2020⁴³). This landmark decision opened the door for independent candidates, challenging the entrenched party-dominated system.

³⁷ <https://www.jstor.org/stable/43110496?seq=1>

³⁸ https://www.researchgate.net/publication/314193873_Postelection_South_Africa_The_Continuing_Case_for_Electoral_Reform

³⁹ https://www.news24.com/news24/columnists/serjeant_at_the_bar/time-to-reconsider-van-zyl-slabbert-electoral-reforms-20180914

⁴⁰ <https://qz.com/africa/1614389/south-africa-election-young-voters-stay-away-from-polls/>

⁴¹ <https://ewn.co.za/2015/07/16/its-it-time-for-SA-to-review-its-electoral-system>

⁴² <https://www.biznews.com/leadership/2018/11/09/fix-sa-democracy-fresh-electoral-reform>

⁴³ <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-alert-15-july-Electoral-Reform-Individually-or-collectively-you-can-stand.html>

The ruling was seen as a potential catalyst for increasing individual political representation. Mcebisi Ndletyana⁴⁴ (2020) highlighted its implications for reshaping political participation in South Africa by recognizing the right of individuals to stand for election independently. However, the proportional representation (PR) system came under scrutiny from William Gumede⁴⁵ (2020), who criticised it for failing to ensure accountability. He noted that the system's closed party lists often led MPs to be more loyal to their parties than to their constituencies, thus undermining participatory democracy.

2021: Debates on Reform Options and Legislative Challenges

In 2021, the focus shifted to the implementation of reforms in response to the Constitutional Court ruling. On July 9, 2021, Roelf Meyer and the Ministerial Advisory Committee (MAC), led by Valli Moosa, outlined two reform approaches: a minimalist option allowing independent candidates and a more comprehensive approach introducing constituencies into the system (Day, 2021⁴⁶). This debate highlighted the growing call for reforms to enhance accountability.

Concerns about the disconnect between voters and their representatives were raised by Zukiswa Pikoli and Sithembile Mbete. They argued that the current system's focus on party loyalty over constituency service had led to disengaged MPs and concentrated party power (Pikoli, 2021⁴⁷). Ebrahim Fakir⁴⁸ (2021) stressed the need for reforms that promote democratic representation, governance, and citizen engagement.

Legislative challenges also emerged, with Letlhogonolo Letsele⁴⁹ (2021) expressing concerns about Parliament's ability to meet the Constitutional Court's deadline for reforms. The late tabling of the electoral amendment by Home Affairs Minister Aaron Motsoaledi further complicated the process (Merten, 2021⁵⁰).

2022: Delays, Public Participation, and Fairness Issues

The year 2022 was marked by delays and criticisms of the government's handling of electoral reform. Acting Justice David Unterhalter appraised the slow response to the Constitutional Court's ruling and the rushed public participation process, which was deemed constitutionally non-compliant (Unterhalter, 2022⁵¹).

The proposed Electoral Amendment Bill faced significant criticism regarding its impact on independent candidates. Issues such as signature requirements, deposit demands and restrictive conditions on seat contests

⁴⁴ <https://theconversation.com/constitutional-court-ruling-heralds-changes-to-south-africas-electoral-system-140668>

⁴⁵ <https://democracyworks.org.za/south-africa-needs-electoral-system-overhaul/>

⁴⁶ <https://www.businesslive.co.za/bd/politics/2021-07-09-electoral-reform-can-we-build-a-better-democracy/>

⁴⁷ <https://www.dailymaverick.co.za/article/2021-07-30-is-electoral-reform-the-best-way-to-build-a-better-south-african-democracy/>

⁴⁸ <https://www.polity.org.za/article/why-we-need-electoral-reform-and-what-it-might-look-like-2021-05-04>

⁴⁹ <https://myvotecounts.org.za/where-are-we-with-electoral-reform/>

⁵⁰ <https://www.dailymaverick.co.za/article/2021-12-31-sa-parliament-set-for-a-roller-coaster-ride-in-2022-as-election-legislation-amendments-deadline-and-state-capture-report-loom-large/>

⁵¹ <https://www.dailymaverick.co.za/article/2022-07-25-let-the-people-speak-electoral-amendment-bill-is-a-golden-opportunity-for-election-system-reform/>

were seen as creating barriers for independents (Louis, 2022⁵²; Halley, 2022⁵³). Additionally, civil society organisations criticised Parliament for inadequate public consultation and rushed hearings, arguing that the process failed to meet constitutional standards (OSA, 2022⁵⁴).

Calls for a more comprehensive electoral reform continued, with critics arguing that the amendments favoured larger political parties over independents and that the proposed changes were insufficient for ensuring a fair electoral system (Naidoo, 2022⁵⁵). Parliament's requests for extensions further fuelled scepticism about the timely passage and effectiveness of the reforms.

2023: Ongoing Debates and Legal Challenges

In 2023, the Electoral Amendment Act continued to spark heated debates. Civil society organisations, including the One South Africa Movement (OSA) and My Vote Counts, challenged the Act, arguing that it disproportionately disadvantaged independent candidates. The signature requirement and the limitations on seat allocation were particularly contentious (OSA, 2023⁵⁶).

Concerns about the proportionality and fairness of the new electoral system emerged, with critics arguing that the three-ballot system and restrictions on independents could skew electoral outcomes in favour of political parties (My Vote Counts, 2023⁵⁷). The lack of sufficient public consultation was also a recurring issue, with critics pointing to the rushed and opaque nature of the reform process (Clarke & Letshele, 2023⁵⁸).

As the 2024 elections approached, worries about the potential disruption caused by ongoing legal challenges and unresolved issues grew. The Independent Electoral Commission (IEC) warned that prolonged uncertainty could undermine the quality of the elections (IEC, 2023⁵⁹). Despite some confidence from the President, many feared that unresolved issues might lead to a constitutional crisis if election results were contested.

In summary, the period from 2020 to 2023 saw intense scrutiny and debate over South Africa's electoral reform. Key themes included the impact of the Constitutional Court ruling, the challenges of implementing reforms, the fairness of the electoral system and the adequacy of public participation. These discussions underscored the need for a more equitable and transparent electoral process as the country prepared for the 2024 elections.

⁵² <https://www.news24.com/news24/columnists/guestcolumn/opinion-michael-louis-the-electoral-bill-remains-deeply-unconstitutional-20220707>

⁵³ <https://www.citizen.co.za/news/south-africa/elections/3149124/electoral-amendment-bill-requirements-debate/>

⁵⁴ <https://www.news24.com/news24/southafrica/news/electoral-amendment-bill-osa-considers-options-after-parliament-asks-concourt-for-extension-20220428>

⁵⁵ <https://mg.co.za/politics/2022-06-10-concourt-gives-parliament-until-december-to-amend-electoral-act/>

⁵⁶ <https://www.news24.com/news24/opinions/analysis/analysis-anton-van-dalsen-we-wont-see-any-reform-with-proposed-amendments-to-electoral-bill-20220916>

⁵⁷ <https://myvotecounts.org.za/civil-society-to-challenge-new-electoral-law-in-concourt/>

⁵⁸ <https://www.iol.co.za/mercury/news/civil-society-groups-point-out-flaws-in-electoral-amendment-act-say-its-unfair-to-independent-candidates-87c000b8-bd3b-487f-9605-eb74510f265d>

⁵⁹ <https://www.sowetanlive.co.za/news/south-africa/2023-04-18-amended-electoral-law-is-the-missing-puzzle-iec-head/>

In 2024 the public's attention was captured by the National and Provincial Elections, which took place on 29 May 2024. Other matters, potentially deemed of lower priority than the elections, seemed to have fallen by the wayside. This included the establishment of the electoral reform Consultation Panel in May 2024, right before the elections. In May and again in July 2024, OUTA was one of the 22 organisations that voiced their concerns over the panel's composition. Notwithstanding the problem areas identified, it remains imperative that the work which the ERCP is to undertake, is done thoroughly, impartially and in the best interests of the public. The work of the Van Zyl Slabbert task team and the MAC should not be merely replicated, with recommendations for meaningful reform made, and then be put aside. Earnest efforts towards achieving meaningful electoral reform means all options must be equally evaluated and considered. Not to be mistaken, effecting real change will come with immense complexities – with legal and demarcation considerations – impacting society at all levels. This will be a costly exercise, in time, human and financial resources. But ultimately, one must ask what the best for South Africa will be, where politicians will act with integrity, and be held accountable by the public who knows and chooses them specifically. Not a mere face on a poster and promises made – and dashed – every five years.

5. Conclusion

In 2020 the ConCourt ordered that Parliament must amend the Electoral Act to allow for independent candidates to stand for national and provincial elections. On 11 June 2020, the ConCourt ruled that the Electoral Act is inconsistent with the Constitution because it does not provide for people who are not affiliated with a political party to stand as independent candidates in national and provincial elections.

The ConCourt gave Parliament 24 months to fix the faulty law. And this target has been repeatedly missed. Excuses for delays have included the impact of Covid-19 on Home Affairs in general and on the functioning of parliamentary committee schedules (although other bills have taken virtual input from the public and been passed, such as the Appropriations Bill).

Several deadlines were given to Parliament by the ConCourt to deal with electoral reform. The lagging attempts to engage with the public, by the Portfolio Committee, had put pressure the 2024 National and Provincial Elections. To be clear, no system of government is perfect. Still, there is always room for improvement and, by no stretch of the imagination can South Africa be seen as the exception. Effective, conscientious parliamentary oversight and constituency engagement is absolutely required.

In recognition of the foregoing considerations, OUTA recommends the following:

- i. Visibly prioritise education campaigns informing the public of the content and implications of the amendments to the Electoral Act 73 of 1998;
- ii. 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;
- iii. Critically review the Act in light of submitted public commentary and actively make changes based on sound principles and constitutional values;

- iv. 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;
- v. Re-examine the findings and recommendations of the Frederik van Zyl Slabbert ETT;
- vi. Re-examine the Majority Option (Option 2), as stipulated in the MAC Report;
- vii. Recognise the democratic rights of every citizen whose vote has a right to count, and
- viii. 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.

Meaningful and substantial electoral reform 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.

On 17 April 2023 the Bill was ratified to become the Electoral Amendment Act of 2023, and it officially took effect on 19 June 2023. OUTA believes that this Act affects the fairness, transparency and accountability of the electoral system. The concerns OUTA and others have raised could have significant implications for the outcome of elections and representation in legislatures for citizens. This was already seen during the 2024 National and Provincial Elections, where the electorate were not adequately educated, and prepared, for the third ballot paper, causing widespread confusion. In addition, these elections saw independent candidates pitched in direct competition with political parties, while placed at a serious disadvantage. At least the inclusion of independent candidates brings about hope that there will be some accountability, but there is still a very long way to go for them to really engage in a fair playing field. No independent candidate was elected to Parliament, despite much public awareness campaigns. One can ask again whether the public was suitably educated on these changes and what the implications are?

These concerns will have to be taken up by the electoral reform Consultation Panel, which has been established in May 2024. OUTA once again strongly emphasises that the panel must be unbiased and have expertise in this field, and it is also important that the voices of the public and civil society organisations are considered meaningfully by the panel, due to the impact this amended Act will have on citizens.

This submission does not make its own propositions about different electoral systems. Instead, it seeks to encourage the ERCP to critically consider what has been done before, evaluate the recommendations made during past panels, and deliberate on what the best electoral system will be for South Africa, 30 years into democracy.