

EASTERN CAPE CIVIL SOCIETY -

SUBMISSION TO THE SELECT COMMITTEE ON SECURITY AND JUSTICE

09 November 2022

Submitted through: Ms. S Shaikh, MP, Chairperson of the Select Committee on Security and Justice

We, the undersigned organisations, hereby make this submission to the above-mentioned committee, on the Electoral Amendment Bill, as adopted by the National Assembly on the 20th October 2022 and currently before the NCOP.

1. CONTEXTUAL BACKGROUND

The 1996 Constitution of the Republic of South Africa states that South Africa is one sovereign, democratic state founded on the following values, to mention a few;

- (a) human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Supremacy of the Constitution and the rule of law;
- (c) universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The above-mentioned values are important for our democracy and are relevant for the whole discussion on electoral reform for South Africa, more specifically the Electoral Amendment Bill, which the NCOP is seized with at the moment.

It is important to acknowledge first, that the Bill comes as a result of the indefatigable efforts of the New Nation Movement which sought to ensure that people of different political, social, and cultural groups are represented in legislatures across all spheres of government in South Africa, and that citizens were empowered in law to elect representatives of their own choice to represent them in legislatures. The limitation towards this goal has always been the electoral system which provided for public representatives at provincial and national legislatures to emerge only through political parties.

It is also enshrined in the Constitution that South Africa has a representative democracy, meaning that the people govern through those they elect and through participating in decision-making processes and mechanisms that the government makes available for such. Limitations with government-initiated mechanisms for public participation have been documented widely over the years. Core in the limitation of public participation mechanisms is limited opportunities or mechanisms by which citizens are able to hold elected representatives to account. Currently, the right of recall of public representatives (in between elections) rests only with political parties. Numerous events in recent years have highlighted the dangers associated with an overreliance on political party dominated public accountability mechanisms. Integral in the call for independent representatives in provincial and national legislatures is an effort to strengthen social accountability.

It has become clear in recent years that many of the representatives in legislatures across the country, including the national legislature, do not have the best interest of the South African populace at heart, instead they serve the narrow political interests of whichever dominant faction of a political party that they are positioned within. Rarely are elected representatives encouraged by their party to vote in accordance with their conscience. There have been numerous instances where public representatives appear to be acting contrary to the oath they took to uphold the Constitution. It has therefore become clear that the hopes and aspirations of South Africans cannot rest on political parties alone and that there is a need to strengthen accountability across all sectors of society including the legislatures.

2. PROCEDURAL ISSUES ARISING FROM THE DRAFT BILL

In its current form, the Electoral Amendment Bill (herein after referred to as the draft Bill) has failed to introduce appropriate reforms that will give proper and meaningful effect to the Constitutional Court judgement. The draft Bill does not adequately address imbalances between political parties and independent candidates, instead it has reinforced the dominance of political parties. The draft Bill will not bring about overdue reforms to ensure that elected representatives are held accountable and that every vote in fact counts.

In its current form the draft Bill accommodates independent candidates as 'invited guests' to a political party-dominated game. It cannot be overstated that the political party-dominated system of public accountability has failed to produce a culture of accountability and good governance in South Africa, hence the social and economic crisis of the nature the country is battling to emerge out of. In keeping the status quo in place, the draft Bill misses an opportunity to contribute to strengthening public accountability.

We note that a number of civil society organisations made submissions to the Ministerial Advisory Committee (MAC) and that a number of these submissions found support within the majority proposal of the MAC. However, those proposals were inexplicably discarded by the Home Affairs Minister who chose to commit to the proposed Bill based of the minority view in the MAC. We also note that various civil society organisations participated, in various ways, in the Parliamentary processes regarding the Electoral Amendment Bill and commented on the manner in which it has been processed. Our view, supported by that of several independent legal opinions, is that in its current form, the draft Bill will not stand the test of constitutional compliance.

It is equally important to reflect on the shortness of the timeframes within which this draft Bill was made available for public comment. The draft Bill is extremely important to the citizenry of South Africa as it is core to addressing the challenges arising from political party dominance in national and provincial legislatures. Among the challenges are weak oversight, personality politics and factional battles that have a weakening effect on state institutions and poor economic growth. The Constitutional Court judgement in the case brought by the New Nation Movement which gave rise to the drafting of this Bill was handed down in June 2020. The government only started public consultations in January 2022. This is due to weak accountability by politicians and public officials to the public.

The dominance of political parties in parliament leads them to treat the South African citizenry with disrespect as shown in this draft Bill. Furthermore, the drafting of the Bill also highlights the parliamentary political party's attitude toward public input and participation in law-making. The processing of this draft Bill and the timeframes

allowed for public commentary were yet another indication of the posture of political parties in parliament towards the South African public.

Consequently, parliament has failed to establish mechanisms of empowering and educating the public on what the electoral amendment bill was about in order to enable their meaningful participation. This is in a country in which 4.4 million adults are illiterate (Khuluvhe, 2022). This is about 48% of all adults on the voter's roll currently (IEC, 2022). If parliament does not see it as its role to facilitate inclusive participation in law-making, and if it intended to leave no one behind, it would have facilitated public participation on this draft Bill differently.

It has been stated in Constitutional Court judgement in a case brought to it by Doctors for Life that 'Parliament and the provincial legislatures have an obligation to provide notice of and information about legislation under consideration and the opportunities arising therein for public participation. For this to be achieved, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens.'¹

Moreover, the African Charter on Human and People's Rights imposes an obligation on African States to promote and ensure through teaching, education, and publication "the right to political participation."² It must be remembered that South Africa is amongst the countries that have signed and ratified this Charter. In its processing of the draft Bill therefore, parliament failed dismally to walk with the South African public.

3. SUBSTANTIVE ISSUES ARISING FROM THE DRAFT BILL

As stated earlier, the draft Bill seeks to 'include' independent candidates in a system in which **political party dominance is guaranteed**. The draft Bill undermines directives of the Constitutional Court and all those advocating for a transformative electoral system. For instance, there is an expectation for independent candidates to secure double the number of votes for a seat in parliament than political parties.

¹ Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) 2006 ZACC 11

² Article 25 of the African Charter on human and People's Rights, 1981

In an event an independent candidate vacates a seat, the draft Bill does not provide for a by-election where voters are offered another chance to decide who they want to represent them. Instead, the Bill provides for recalculation which could see seats going to political parties. However, if a representative from a political party vacates a seat, a political party is allowed to deploy someone else to fill the vacant seat without any recalculation of votes.

Section 19(3) of the Constitution gives a right to every adult citizen to vote in elections for any legislative body established in terms of the Constitution and to stand for public office, and if elected to hold office. The draft Bill, in particular its section 21(1), seeks to enable independent candidates to contest for positions in the National Assembly insofar as they do not contest for more than 200 seats (which translates to half of the seats in the national assembly). This Bill reserves half of the seats in the National Assembly for political parties and thus ensuring their continued dominance. This provision of the Bill is unconstitutional and must be amended to allow for contestation of all seats in the National Assembly by both political parties and independent candidates. The robustness of our democracy lies in every candidate, including political parties, earning public office through the will of the electorate and not through safeguarded mechanisms established through legislation.

The draft Bill **further weakens public accountability**. The Bill views the whole country as one ward at a national level and a province as a ward at a provincial level. The implications of this are that political party representatives will no longer be compelled or motivated to consult or account to their constituents anymore as their votes will now emerge out of what the Bill views as a ward. The role of and importance of sending constituents has been minimized (and written out) in this draft Bill.

One major shortcoming in the Electoral Act, and in the draft Bill is that the South African public does not have a right to recall public representatives where they no longer serve in the interest of the public. While it has to be questioned if people who did not elect or deploy public representatives even have the right to recall those that they did not elect in the first place. The judgement mandated lawmakers to amend the Electoral Act such that it addresses the question of public representation. The draft Bill would be amiss if it did not address the question of accountability at the same time. If the public is being empowered through the draft Bill, to elect to legislatures

independent candidates, then the public must be empowered through the same Bill to hold those elected representatives to account.

Trust in public institutions and in public representatives is at an all-time low in the country because mechanisms for accountability have been inadequate, not transparent or are ineffective. Stories of delinquent public representatives that many a community have been trying to get rid of abound, and in many instances communities fail. It is impossible to build social cohesion in a country where there are declining levels of trust in public institutions as research has been pointing to in the last decade. The draft Bill has an opportunity to deal with this major weakness in public governance.

CONCLUSION

Parliament and the NCOP, have an opportunity with the Electoral Amendment Bill, to meaningfully reform the electoral system in South Africa and to make it fit for strengthening of democracy. This is necessary because our country needs it at this moment. Unfortunately, such efforts cannot be achieved through an electoral system that is dominated by political parties with superficial mechanisms to accommodate independent candidates so long as they can climb the many mountains the Bill lays on their way. South Africa requires a hybrid electoral system that intentionally facilitates public representation by independent, ethical, and good standing citizens as well as a vibrant multi-party system. In its current form, the draft Bill fails dismally to achieve this.

Parliament and the NCOP also have an opportunity with this Electoral Amendment Bill, to strengthen public and social accountability and to rebuild a relationship of trust between the public and public institutions. It is common knowledge that trust in political parties has declined significantly, throwing the country in what many have called the era of coalition politics. This is because no one political party enjoys public trust anymore, nor do the public institutions in which politicians serve. The Electoral Amendment Bill provides a moment and an opportunity to rebuild public trust and social cohesion. In its current form it is unfortunately missing this important goal.

In this submission, **we are asking the NCOP to not adopt this draft Bill**, but rather refer the bill to the National Assembly for reconsideration. We are asking the NCOP to recognise that this draft Bill is not constitutionally compliant and needs to be further revised to strengthen democracy and accountability by elected representatives. This we argue, is the NCOP's duty to South Africa. **DO NOT ADOPT THE BILL.**

Submission made and endorsed by:

1. Afesis-corplan
2. Godly Governance Network
3. Hewu Rural Communities Forum
4. Independent Komani Residents Association (IKORA)
5. Inyanda National Land Movement
6. Public Service Accountability Monitor (PSAM)
7. Sterkspruit Civic Association
8. Trust for Community Outreach and Education (TCOE)

For any enquiries regarding the contents of this submission feel free to contact Ms. Nontando Ngamlana at nontando@afesis.org.za or by telephone at 0437433830