



09 November 2022

Hon Ms S Shaikh
Chairperson
Select Committee on Security and Justice

Per email: sshaikh@parliament.gov.za

RE: MY VOTE COUNTS' SUBMISSION ON THE ELECTORAL AMENDMENT BILL [B 1B-2022]

We write to you in response to the Select Committee on Security and Justice's call for written submissions on the **Electoral Amendment Bill [B 1B-2022]**. The current Bill is flawed, proposes an electoral system that does not exist anywhere else in the world and does not address the fundamental issues raised by members of the public. Fundamentally, the Bill does not provide for meaningful participation of independent candidates and therefore, if passed in its current form, risks being constitutionally non-compliant.

This submission will be divided into two parts. It will first, briefly, unpack the major flaws in the Bill's process. Secondly, it will recommend remedies to ensure that the Bill meets constitutional muster.

The process of the Electoral Amendment Bill

Here, we briefly reiterate the flaws in the process leading up to the National Assembly adopting the Bill:

1. The public participation was inadequate
 - Public consultations were limited. The Portfolio Committee on Home Affairs did not give the required notice to the public for its public hearings.
 - Further, the Committee did not provide sufficient information for the public to properly understand the purpose of the process and the complexities of the electoral system.
2. Incorrect tagging of Bill
 - The Bill was proposed by the Minister of Home Affairs as a Section 76 bill, which is an ordinary bill that affects the provinces (and therefore must be considered by both the National Assembly and the National Council of Provinces). The Bill was later tagged as a Section 75 bill by the Joint Tagging Mechanism in Parliament. This means that the Bill is an ordinary bill that does not affect the provinces, and removes substantive powers from the NCOP.
 - The explanation for the tagging of the Bill under Section 75 instead of 76 is unclear. The Bill relates to the election of Provincial Legislatures, so it does affect the affect the provinces.

Remedying the Electoral Amendment Bill

Although we do believe that the South African electoral system needs fundamental change, we recognize the scope and limitations on the National Council of Provinces, in particular, and Parliament, broadly, in making fundamental changes to the Bill at this stage. This is considering the Constitutional Court deadline on 10 December and the proximity of the 2024 General Elections. Therefore, at this stage, My Vote Counts maintains that:

1. Parliament should, as a priority, ensure the credibility and integrity of the 2024 General Elections. This can only be done by ensuring that the Bill does, at a minimum, meet constitutional muster. The Bill in its current form will likely not pass constitutional muster and risks legal action if adopted in its current form. This will disrupt, already constrained planning processes toward the 2024 General Elections, and is likely to compromise the credibility and integrity of the elections.
2. Parliament should commit to a more substantial electoral reform process, that centers public participation at its core.

Flaws in the Electoral Amendment Bill

We recognize two major flaws in the Bill that, if adopted without being remedied, would likely not meet constitutional muster:

1. Schedule 1A: Forcing competition between unlike units

According to Schedule 1A of the Electoral Amendment Bill (B 1B-2022), individuals and political parties will contest seats under the same system of Proportional Representation (PR), and provinces are treated as distinct constituencies (called regions). This contradicts the spirit and meaning of the Constitutional Court's ruling as it discriminates against independent candidates and does not allow for the meaningful participation of all candidates in the electoral process (*New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [\[2020\] ZACC 11](#)).

The Schedule forces individuals to contest against parties, made up of many individuals, under the same system. In the system, political parties can contest elections in multiple regions and all the votes they receive can be aggregated for them to win seats for multiple individuals to occupy those seats. On the other hand, even if an individual contests the election in multiple regions, they can only occupy one seat.

The forcing of competition between unlike units brings to the fore three additional material flaws in the Bill, all of which have already been contested by members of the public:

- Independent candidates are only able to contest 200 out of the 400 seats in the National Assembly (NA);
- When independent candidates win votes that go beyond the quota to secure a single seat, the additional votes are wasted; and
- When a seat becomes vacant, the results need to be recalculated.

Recommendation on Schedule 1A

Importantly, elections are all about numbers - how to convert votes into seats. In this case, insufficient consideration has been given to the mathematical consequences of the amendments. This poses a direct threat to the credibility of the electoral system.

The calculations for seats in the NA use the regional ballots (with votes of independent candidates removed) added to the PR ballots. The numerical distortions found in the regional ballots are then partially carried over to the PR calculations. The calculations of regional ballots and PR ballots need to be reworked to limit distortions.

Parliament must remedy this by relying on credible numerical modeling.

2. Clause 31B: Unequal signature thresholds

Clause 31B of the Bill places a requirement on individuals to have a higher threshold of signatures than parties if they are to register as a candidate. Individuals are required to obtain 20% of the quota for a seat. This means that if the requirement for a seat in the NA is 45,000 votes, then an independent candidate must submit 9,000 signatures to be able to contest the election. On the other hand, political parties, upon initial registration, are only required to obtain 1000 signatures. This, too, contradicts the Constitutional Court ruling. The Constitutional Court ruled that the Electoral Act must be consistent with the Constitution in the equality of political association meaning that independent candidates and parties must be treated equally.

Recommendation on Clause 31B

The threshold of signatures for independent candidates must be lowered to that of political parties to create equal levels of entry.

Towards substantive electoral reform

The process towards electoral reform sits at the heart of South African democracy. A substantive process, therefore, requires several years with meaningful public participation at its centre. Therefore, we recommend that after remedying the major flaws in the Bill, Parliament adds a sunset clause. The clause should consider the Bill transitional, to simply ensure that the 2024 General Elections are credible and not delegitimized. Further, the clause could compel Parliament to embark on a more substantial and public-centred electoral reform process following the 2024 General Elections.

[ENDS]