



Report into Public participation in the Electoral Amendment Bill process

Introduction

This report looks into public participation in the Electoral Amendment Bill process. On 10 January 2022, the Minister of Home Affairs introduced the [Electoral Amendment Bill](#) in Parliament. The purpose of the Bill is to amend the [Electoral Act 73 of 1998](#) to allow for independent candidates to contest for seats in the national Assembly and provincial legislatures as individuals following the Constitutional Court judgement in [New Nation Movement NPC & others v President of the Republic of South Africa & others \[2020\] ZACC 11](#). The introduction of the Bill started the Electoral Amendment Bill process.

Background

The Constitutional Court in its judgement in the *New Nation Movement NPC & Others* case, ruled on 11 June 2020 that the Electoral Act is unconstitutional to the extent that it prevents adult citizens from standing for, and being elected to, the National Assembly and provincial legislatures as independent candidates. The Court in its ruling ordered Parliament to fix the defects in the Electoral Act to allow for adult citizens to contest national and provincial elections. Parliament was given 24 months from the day of the ruling to amend the legislation which means the deadline is June 2022.

In response to the ruling of the unconstitutionality of the Electoral Act, the Minister of Home Affairs established the [Ministerial Advisory Committee on the Electoral System](#) in February 2021. The purpose of the Committee was to engage with relevant stakeholders to get views on how the electoral system should change to strengthen democracy and comply with the judgement. The Committee compiled a [report](#) in June 2021 that included potential options to change the electoral system. The Minister was furnished with the report and presented it to Cabinet for approval. Cabinet approved the report in November 2021.

Legislative Framework

The national legislative process regarding Bills is governed by sections 73 to 77 of the Constitution which prescribes the different procedures to be followed when enacting legislation. The Electoral Amendment Bill is a section 76 Bill which means that it is an ordinary Bill that affects provinces. The Electoral Amendment Bill was introduced in the National Assembly and will also be considered by the National Council of Provinces.

Public participation in the Electoral Amendment Bill

The minister of Home Affairs introduced the Electoral Amendment Bill to Parliament's Portfolio Committee on Home Affairs in January 2022. On 8 February 2022, the Portfolio Committee on Home Affairs invited interested individuals and organizations to submit written comments on the Bill by 21 February 2022. The committee heard public comments from 01 March to 23 March 2022.

According to the committee, in [total](#) there were 107 written submissions of which 40 were substantial (more than one page and up to 62 pages). Of the 40 substantial submissions, there were 13 organisations that made oral presentations to the committee.

The committee called for South Africans to make themselves available to share their views with the committee on how they would like to change the electoral system to strengthen democracy and enhance accountability. In doing so, the committee adopted a nationwide public participation programme where committee members visited three districts in every province to consult the people about the Bill.

The Committee received submissions from the public and civil society organisations on the determination of the Bill.

Key issues in public participation in the Electoral Amendment Bill

Public participation in the Electoral Amendment Bill process is flawed. [Sections 59\(1\)\(a\), 72\(1\)\(a\) and 118\(1\)\(a\)](#) of the Constitution compels, "Parliament to undertake meaningful public participation when executing their legislative process". However, the committee did not properly educate the public on the Amendment Bill and the purpose of the public participation process. A [group of civil society organisations](#) believe that many of the submissions made in favour or against the inclusion of independent candidates, which was settled by the Constitutional Court two years ago, when the hearings should have been about the best system that would include independent candidates.

The group further noted that the committee expected the public to comment on a high-level report, shared with the minister and committee, on the options to change the electoral system. The expectation for ordinary South Africans to express opinion on the report not provided for public participation was strange and confusing. Therefore, did not add value to the process.

Moreover, the committee did not give notice to the public before the hearings. The committee gave notice to the public on 3 March 2022 that hearings for the Bill would commence on 7 March 2022. Public participation cannot be meaningful if people are not given enough time to study the bill, consider their position and formulate their opinions to be made.

Some political parties 'bussed' people across the country to attend the hearings and regurgitate the same points: that they want or do not independent candidates to be equal to political parties. Again, this was not the actual purpose of the public participation. Therefore, not helpful to the process.

If anything, the constitutional requirements for public participation that have been set out by the Constitutional Court in judgements have not been met. The Constitutional Court in its judgement in the *New Nation Movement NPC & Others* case at paragraph 206 reads "The democratic government contemplated by the Constitution is one that is accountable, responsive and transparent, and that makes provision for public participation by way of public access to and involvement in the legislative and other processes at national, provincial and local government level". Therefore, the process has arguably been unconstitutional.

Parliament has requested an extension for the finalisation of the Electoral Amendment Bill. The Bill was introduced to the national assembly in January 2022 –leaving parliament with only five months- to process a Bill of public significance and interest. Essentially, parliament did not give itself time to meaningfully process the Bill. The process was rushed, and the committee set deadlines that did not allow for meaningful participation.

Challenges of Public Participation in law making

Parliament is constitutionally obligated to increase public involvement and participation in its activities. However, a recent [study](#) shows parliament’s public education initiatives are not enough to reach the public due to limited capacity. Much more is required to educate and empower the public about active citizenship in a democracy and for members of the public to be able to contribute meaningfully to various democratic structures such as parliament.

There are no detailed procedural requirements that apply to public hearings, this is evidenced by inadequacies with respect to the scheduling of public hearings by parliament. There needs to be some process to be followed in the organizing of public hearings. Because of the laxity, public hearings become a ‘tick-box’ exercise without proper engagement.

Parliament does not make use of the parliamentary constituency offices to encourage public participation. Constituency offices are meant to provide the public with information from Parliament. As the first point contact for ordinary South Africans, constituency offices should facilitate public participation in parliament activities.

People are not able to attend and follow portfolio committee meetings. Because of the digital divide, some people can follow portfolio committee meetings online while others cannot. This has an impact on public participation because not everyone has access to the meetings.

What can be done to improve the public participation process in the Electoral Amendment Bill?

The following could be done to improve public participation process in the Electoral Amendment Bill:

- Parliament needs to demonstrate how it is going to remedy the defects in the public participation process in the Electoral Amendment Bill. Should the extension be granted, which is likely, the portfolio committee can make use of this period to have meaningful participation.
- Parliament needs to make sure that the public participation complies with the judgement in the *New Nation Movement NPC & Others* and Constitutional judgements.
- The public needs to be given enough notice before the hearings so that their views are formulated
- Parliament needs to properly educate the public about the Amendment Bill and the purpose of the public participation, this includes providing people with the relevant information such as the report and the Amendment Bill.
- Parliament needs to have a public participation unit.
- Civil society could play an important role in encouraging South Africans to participate in this important process.
- Political parties could provide information on the Amendment Bill to the public.
- Other stakeholders and interested persons could amplify the importance of this Bill and make sure it reaches ordinary South Africans.

Conclusion

A change to the electoral system is a very important change in a democracy. The Electoral Amendment Bill gives South Africans an opportunity to have a say in a new system that will elect representatives to the national assembly and provincial legislatures. However, public participation in the Electoral Amendment Bill was flawed. People were not provided with the relevant information therefore; the hearings were not helpful. The process was rushed and therefore did not allow for meaningful engagements with the contents of Bill. To an extent, the public participation process did not add value to how the Bill has been processed. Should the extension be granted, which is likely, parliament needs to make sure that public participation is meaningful. The Constitution requires of this.