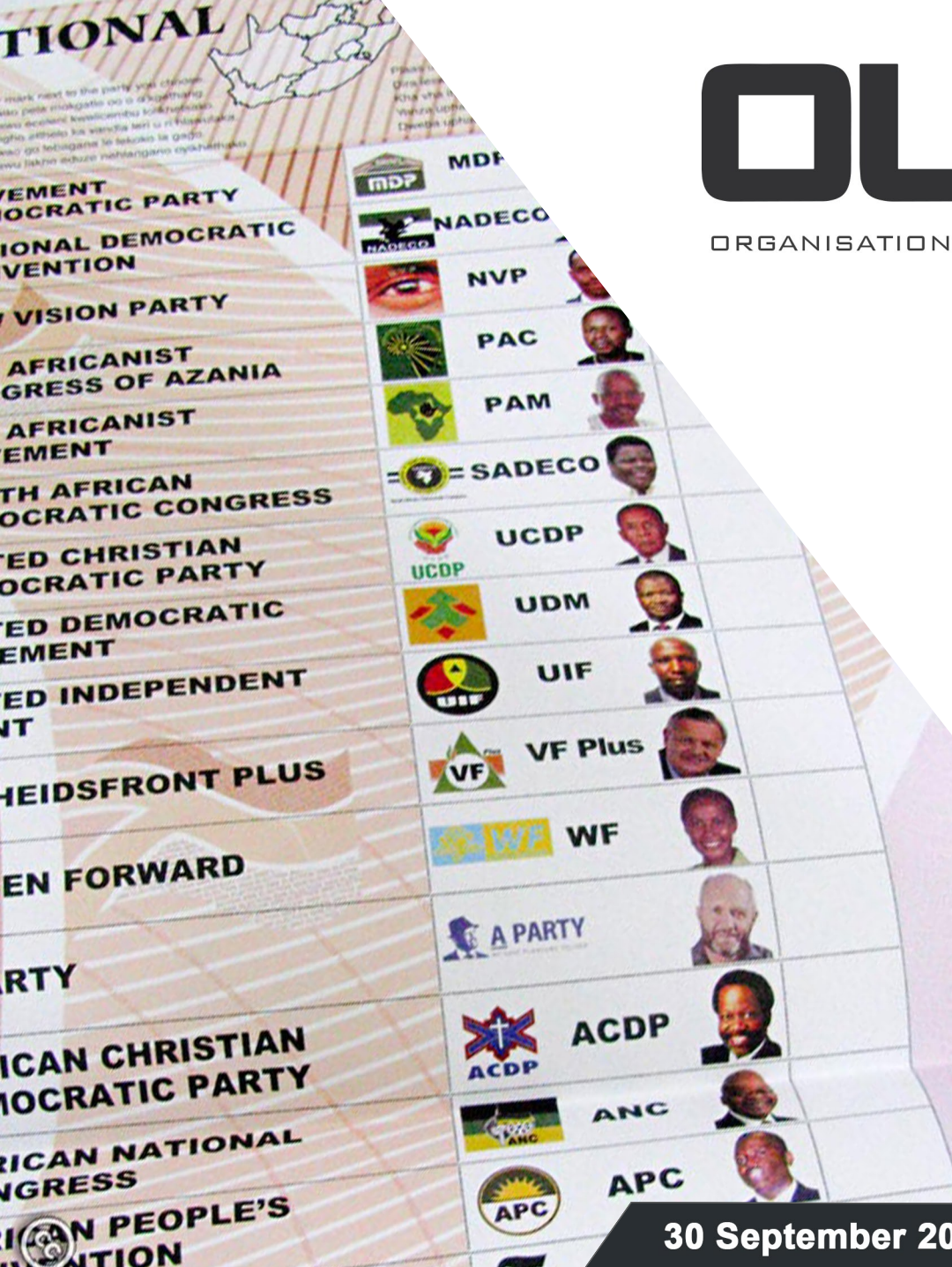


OUTA

ORGANISATION UNDOING TAX ABUSE



30 September 2020

OUTA COMMENT ON NOTICE OF INTENTION TO INTRODUCE A PRIVATE MEMBER'S BILL AND INVITATION FOR COMMENT ON THE DRAFT ELECTORAL LAWS AMENDMENT BILL, 2020

Submission to the Speaker of the National Assembly

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Introduction and Context

The Organisation Undoing Tax Abuse (OUTA) welcomed the Constitutional Court's judgment in the case of the New Nation Movement and others, declaring sections of the Electoral Act unconstitutional. This judgement ordered amendments to the Electoral Act, which could reduce the problem of Members of Parliament (MPs) and political leaders placing political party interests ahead of those of citizens and the country.

OUTA joined this case as an *amicus curiae* (a friend of the court), calling for much-needed electoral reform that will enable South Africans to elect credible leaders as MPs, as opposed to candidates who suit hidden agendas from the backrooms of political parties. We were pleased to hear during the judgment that the court acknowledged and agreed with our input.

This ruling gives impetus to a new electoral system that improves transparency and the accountability of people elected to be Members of Parliament (MPs). Parliament is where meaningful oversight ought to take place. OUTA is not associated with and holds no brief for the original applicants or any political party, but regarded this case as a matter worthy of intervention due to the importance of electoral reform aimed at holding politicians to account. The Electoral Act needs to be urgently amended to allow for individuals to stand as independent candidates in national and provincial elections, as opposed to the current system which allows only political party candidates.

Citizens should have the right to hold their public representatives to account. The current electoral system is compromised by the lack of moral courage to challenge dubious instructions from the political seniors, to whom MPs are very often beholden. This in turn circumvents public accountability. The current system very often results in MPs and MPLs who are primarily representative of and beholden to the political party to which they belong, irrespective of whether their decisions are genuinely in the best interest of the electorate or not, thereby placing party loyalty above citizens and election promises.

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

Parallel Processes and Time

Whilst we support the principles contained in the notice of intention to introduce the Private Member's Bill in question, there is a real concern that it would detract from the mainstream process that is underway in the Portfolio Committee on Home Affairs in the National Assembly. Clarity is needed on how these concurrent processes will enhance one another, rather than delaying outcomes.

On 25 June 2020, the Electoral Commission of South Africa (IEC) briefed the Portfolio Committee on Home Affairs on the impact of the Constitutional Court ruling that declared sections of the Electoral Act 73 of 1998 unconstitutional. The Commission said that the whole spectrum of electoral modalities would be affected. I.e. a new electoral system will re-construct the whole electoral edifice. The Chair of the IEC, Mr. Mashinini, said that the IEC was only able to provide technical assistance. Parliament is the body responsible for the legal reform of the electoral system.

Meanwhile, the Portfolio Committee on Home Affairs has called for an integrated roadmap outlining a clear framework on how to comply with the Constitutional Court ruling on remedying the Electoral Act. Stakeholders contributing to developing the roadmap will include the Minister of Home Affairs (representing the Executive) and Parliament, with the Electoral Commission of South Africa (IEC) offering technical expertise. OUTA cautions against politicization of the amendment process, and urges against time wasting considerations such as constitutional amendments. We are concerned that the proposed introduction of a Private Member's Bill to amend Electoral Laws will create a political battlefield in Parliament that could delay implementation of the Constitutional Court order.

On 21 July 2020, the IEC presented its views of the norms and standards for electoral systems. The Portfolio Committee considered the implications of the Constitutional Court judgment that demands the enactment of an electoral system wherein independent candidates will be able stand for national and provincial elections. The presentation from the IEC was therefore about options based on existing electoral systems in the global village. The Commission highlighted two electoral systems. These are the proportional and pluralist or majoritarian systems, also known as single-winner systems or multi-winner systems. The system used for South African local government elections is the mixed-member proportional system. In it, each voter gets two votes: one for a candidate in a constituency and another for a party.

The Commission said that a decision would have to be made about whether the country moved to a 'presidential system' or remained with the Westminster system. The merits of either system should be tested against public opinion polls or other inclusive mechanisms that do not solely hinge on political determinations and interests. OUTA strongly agrees with the IEC in this regard.

The Minister of Home Affairs stated that the current electoral system and Constitution was formed by everything that had been happening elsewhere in the world. For the past 26 years, elections had happened in the country and so there was now experience of such things and the electoral system and the Constitution should be looked at in that light. OUTA strongly disagrees with considerations of Constitutional amendment as this may be a delay tactic detracting from a straight forward mandate. It is also important to note that the Constitutional Court Judgement was an interpretation of the current Constitution which pointed out that the Electoral Act needs to be amended, not the Constitution.

The Minister continued to state that Parliament should also examine the Constitution, not to take away the right for independents to stand for election, but because ever since the court judgement had come to the fore, people were seeing all the challenges in the legislation of the country, so Parliament had to address that. This is vague and arbitrary. The Portfolio Committee's collective view was that the amendment process will require extensive consultation with all South Africans to reach a generally acceptable option. OUTA welcomes this participative determination by the Committee and advises against the Minister's suggestions that the Constitution must be critically reviewed.

As these deliberations suggest, the amendment process will be heavily debated and time consuming. Therefore, OUTA requests that the proposed Private Member's Bill should only be introduced and pursued if it is poised to accelerate, rather than slow down, the ultimate amendment process within the deadline of June 2022.

Content of Intended Amendment

This section addresses prospective content of the intended Electoral Laws Amendment. Drawing from the High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change:

On 20 March 2002, Cabinet resolved that an Electoral Task Team (ETT) should be established to 'draft the new electoral legislation required by the Constitution'. The ETT, led by Dr F Van Zyl Slabbert, submitted a majority and minority view on reform of the electoral system. The majority felt that electoral reform was necessary to ensure 'multi-member constituencies together electing 300 members of the National Assembly and a compensatory closed national list providing 100 members (giving a total of 400 members)'. In terms of this proposal, there would be 69 multi-member constituencies. The number of representatives to be elected in a constituency would vary, depending on the number of voters, from three to seven for a national election, and 300 of the 400 members of the National Assembly would be elected, initially, from closed constituency lists in this way. The remaining 100 representatives would be allocated from closed national lists in order to restore overall proportionality.

OUTA concurs with the High Level Panel in their observation that one of the major challenges with the current electoral system is the weakness of the PR system in holding politicians accountable. Members of Parliament are appointed not directly by voters, but rather by their party, based on candidate lists submitted to the Electoral Commission ahead of the elections. This makes them beholden to the party and its leadership rather than voters and places party politics and loyalties ahead of effectiveness and delivery. By contrast, a constituency system will hold politicians more directly accountable to the voters and will better ensure that election promises are kept for fear of being voted out. Such a system will serve to limit the power of individual party leaders and encourage MPs to vote in accordance with the needs and desires of their constituencies rather than only following party lines.

The suggestion that “*South Africa’s current fifty-two districts could, as per their population size, serve as a larger or smaller multi-member constituency which could be contested by individuals as well as political parties through an “open list” proportional representation system*” in the Notice of Intention begs questions of local government financing models as they stand. What is the proposed source of their operational resources considering fiscal constraints today?

Further to the growing concerns of poor accountability and transparency, OUTA aims to promote electoral integrity. After electing an independent candidate or political party, citizens must be able to hold their elected candidate accountable. Voters deserve to know whether government spending achieves intended outcomes whilst being handled in accordance with laws and regulations, and whether electoral entities are operating objectively, economically, and effectively. Critical questions for the new electoral system include the following:

- Through which mechanisms (other than voting) will an independent candidate be held accountable for the decisions made during his/her tenure?
- How will consequences of those decisions be managed?
- What is the minimum threshold or requirements for an independent candidate to qualify for elections?

All candidates need to meet the required threshold and should comply with all the laws and regulations and follow the standard norms. It is a trend in South Africa for candidates to fill crucial vacancies in senior public offices without meeting the minimum requirements or threshold, therefore, this element needs to be carefully considered.

In the prospective amendment(s), it needs to be articulated how an independent candidate will be removed from power in the event that he/she is found to be unable to perform expected roles and responsibilities as stipulated in the regulations. It needs to specify:

- Who will have the power and authority to remove an independent candidate from power, and under what circumstances? OUTA recommends that civil society should be at the heart of the answer to this question.
- How exactly will that process or procedure be followed and executed?

In addition, there is increasing evidence that corruption and unregulated donations are exercising undue influence on politics and undermining the integrity of elections. Here and elsewhere, the proceedings of organized crime have infiltrated political discourse to gain control over elected officials and public institutions. The proposed amendments must therefore make reference to, and be integrated with, the provisions of the Political Parties Funding Act, No. 6 of 2018.

The open and transparent funding of parties and candidates is crucial in the fight against corruption and to gain and maintain citizens' trust in politics. This need for transparency in electoral funding has been recognized internationally through the United Nations Convention against Corruption (UNCAC), which states that countries should consider taking appropriate legislative and administrative measure to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties and independent candidates. Among other things, transparency helps level the playing field by exposing and punishing undue influence over politicians, protects against the infiltration of illicit money into politics, and encourages parties and candidates to adhere to the rules.

There is also a concern that the intergovernmental coordination of service delivery and sharing resources amongst the various spheres of government, which according to the National Development Plan (NDP) is seen as a challenge created by poor administration and management structures, needs to be institutionalized and strengthened. The Department of Cooperative Governance and Traditional Affairs (CoGTA) has proven inadequate in this regard. It is important to understand that the possibility of implementing a single public service might not address the current issue of lacking coordination amongst the different spheres of government or result in a uniformed system across national, provincial and local government.

We note the lack of effective oversight in Parliament, and the crucial role of civil society groups and the media in enhancing transparency and accountability in the electoral process, especially around political funding. Given the lack of reliable financial reports from political parties and candidates, it is crucial that civil society and Parliament carefully monitor the financial flows in the electoral process.

In various countries, civil society organisations have monitored electoral processes covering a range of issues, but few such projects have been focused on tracing money in the electoral process. OUTA recommends that the oversight role needs to be carefully crafted in the new electoral system by providing civil society with:

- a) cooperative oversight functions as independent bodies monitoring campaign finance
- b) a due diligence function on vetting independent candidates to ensure that all candidates comply with the minimum threshold for candidates to be elected

Final Recommendation(s)

OUTA supports the principles underpinning the Notice of Intention in question. For example, we recommend that measures must indeed be taken to realise the Freedom Charter's maxim of government by the people for the people. Citizens want to be closer to Parliament and to creatures of statute in general. However, it is unclear how the proposed Private Member's Bill from a Member of an opposition party will effectively make this a reality in light of the political powers that be.

Therefore, we recommend that the prospective Private Member's Bill should only be introduced if it can enhance the mainstream process that is getting underway in the Portfolio Committee on Home Affairs. Our opposition against or support for the Private Member's Bill hinges entirely on this uncertainty. The political landscape in South Africa today is also uncertain and adds fuel to the fire of poor governance, maladministration and corruption. Any new legislative *process* should itself be sensitive to these known flaws and weaknesses.

We note that the only Private Member's Bill brought by a Member of any opposition party (the ACDP in this case) was passed by the National Assembly and ultimately enacted by the President in 2018. This was the Labour Laws Amendment Bill, which aimed to provide fathers with the opportunity to take parental leave. This is a politically neutral issue, whilst fundamental reform of the electoral system in South Africa is a politically charged issue. Therefore we caution against the possibility of unintended consequences resulting from the introduction of this Private Member's Bill in a politically unstable National Assembly today.

OUTA is most interested to see what mechanisms will be proposed to ensure that there is real accountability and transparency for the performance and spending of both independent candidates and political parties. More detailed comment and recommendations in this regard will be submitted as and when appropriate opportunities for substantive participation arise.