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

22 September 2020

To: SPEAKER OF THE NATIONAL ASSEMBLY
New Assembly Building, Parliament Street, Cape Town
Email: speaker@parliament.gov.za; and
mlekota@parliament.gov.za

1. INTRODUCTION

DearSA, a registered national not-for-profit company and civil rights organisation.

DearSA acts in the interest of its supporters as well as in the interest of the public through active participation and advocacy.

DearSA has through its online public participation platform, facilitated (as of 22 September 2020) more than 5500 submissions by South African citizens regarding the intention to introduce a private member's bill and invitation for comment on the draft electoral laws amendment bill, 2020. The comments facilitated by DearSA include both support and opposition to the proposed amendment.

These submissions are made on behalf of DearSA and its supporters but do not formally adopt any position regarding the proposed amendment but rather aim to contribute to the discussions and aim to provide nuanced and particular comment on the tremendously important question of electoral reform in South Africa.

This submission is based and prepared based on comments received from active citizens and through legal opinions obtained by DearSA. This submission will make particular reference to the 'Policy Paper an Opportunity for Meaningful Electoral Reform in South Africa' as well as Notice 457 of 2020.

The submission will be structured as follows:

1. Introduction;
2. Background;
3. Constitutional and legal analysis;
4. Practical analysis;
5. Ad seriatim comments;
6. Conclusion.

2. BACKGROUND

The question of electoral reform in South Africa has had a protracted history and has been presented in a myriad of different forms. A mere three years after the adoption of the South African Constitution in 1996 the discussions about possible electoral reform came about. Famously in 2003 the Van Zyl Slabbert Commission on Electoral Reform published the 'Report of the Electoral Task Team' which suggested amendments to the current South African electoral framework.

However, the background that has given rise to this particular proposed amendment is undoubtedly the case of New Nation Movement NPC and Others v President of the Republic of South Africa and Others in which the Constitutional Court was called upon to determine whether the Electoral Act was unconstitutional to the extent that it allowed individuals to be elected to the National Assembly and Provincial Legislatures only through membership of political parties.

This appeal emanated from a judgment of the Western Cape High Court Division, Cape Town pertaining to an urgent application brought by the applicants' in late 2018 contending that the Electoral Act was unconstitutional for unjustifiably limiting the right to stand for public office and, if elected, to hold office conferred by section 19(3)(b) of the Constitution. In addition thereto, it was contended that the Electoral Act infringes upon the right to freedom of association enshrined in section 18 of the Constitution. The court a quo dismissed the application on the rationale that nowhere in section 19(3)(b) of the Constitution does it expressly provide for independent candidates to stand for public office. Moreover, it held that section 1(d), 46(1)(a) and 105(1)(a) of the Constitution properly interpreted were irreconcilable with the interpretation contended by the applicants.

The majority of the Constitutional Court held that insofar as the Electoral Act makes it impossible for individuals to stand for political office without political party membership that amounted to a limitation of the rights in section 19(3)(b) of the Constitution. The question was thus whether the limitation was reasonable and justifiable in section 36(1) of the Constitution. In response thereto, the court held that there was no reason to hold that the limitation was reasonable and justified as the respondents had failed to offer any complying justification. Accordingly, insofar as the Electoral Act makes it impossible for candidates to stand for political office without allegiance to a political party, it is unconstitutional.

The Constitutional Court held that the declaration of invalidity would be effective from date of judgement, being 11 June 2020, but that the judgement will be suspended for 24 months in order to provide parliament the opportunity to rectify the unconstitutionality of the Electoral Act and allow for individuals to participate in national government elections.

In light of this judgement the 'Notice of Intention to Introduce A Private Member's Bill And Invitation For Comment On The Draft Electoral Laws Amendment Bill, 2020' was gazetted.

2.1 South Africa's current electoral system

From 1910 until 1993 South Africa has used variations of the British first-past-the-post (FPTP) electoral system which is a common sight in many English speaking and Commonwealth countries. In the first-past-the-post system, voters cast their vote for a candidate of their choice, and the candidate that receives the most votes win. The 1993 Interim Constitution proposed a change in the electoral system. A proportional representation (PR) list system was introduced in 1993 and officially used in South Africa's 1994 first democratic, non-racial elections. Under the PR system parties receive a share of the total seats proportional to the number of votes they received with no minimum fixed proportion of the total number of votes (i.e. a threshold) required for parties to gain representation in national or provincial legislatures.

Our current electoral system is a closed-party list system. South Africa's PR system uses the Droop quota to allocate seats and the largest-remainder method to apportion surplus seats. The Droop quota divides the total number of votes by the number of seats plus one. The denominator in the calculation would then be the number of seats which are contested plus one. Surplus seats are then distributed on the basis of ranking the parties based on the extent of their fractional remainders. Those with the largest fractional remainders will each get an additional seat until all the seats are allocated.

Section 46 of our Constitution states:

> "(1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that—
>
> (a) is prescribed by national legislation;
>
> (b) is based on the national common voters roll;
>
> (c) provides for a minimum voting age of 18 years; and
>
> (d) results, in general, in proportional representation.
>
> (2) An Act of Parliament must provide a formula for determining the number of members of the National Assembly."

The Constitution requires proportional representation but does not prescribed the method to be used to achieve proportionality.

Currently our closed-party list system results in candidates being drawn from a list compiled by political parties. Once parliament is elected, the candidates selected by the party become the Members of Parliament, who elect the state president. Citizens, therefore, do not currently directly vote for their choice of members of legislatures, Cabinet or the president.

At the local government level there is already a mixed electoral system, with half the councillors elected in first-past-the-post-ward elections, through local representation at ward level (a constituency system), and the other half on a closed-party list PR system.

3. CONSTITUTIONAL ANALYSIS

From the outset it is important to note that the envisioned purpose of the amendment is to rectify an unconstitutional aspect of our current electoral system. Nonetheless, any potential amendment must be meticulously worded and drafted in order to ensure that the amendment itself is not unconstitutional.

The above-mentioned notice describes the ambit of the proposed amendment as:

"The draft Bill will therefore, inter alia, seek to amend:

- the Electoral Commission Act, 1996 (Act No. 51 of 1996), so as to provide for, and to regulate, the registration of independent candidates;
- the Electoral Act, 1998 (Act No. 73 of 1998), so as to, inter alia, give full effect to section 19(3)(b) of the Constitution, which provides that every South African citizen has the fundamental right to stand for public office and, if elected, to hold office; to ensure that individuals can stand for office as independent candidates without having to stand for office by virtue of his or her membership of a political party; to provide for the creation of constituencies along current district boundary lines and the replacement of the "closed list" proportional representation system with the "open list" proportional representation system with greater requirements for all candidates to uphold the Constitution and to give impetus to the realisation of the Bill of Rights; and to promote democratic governance and electoral accountability; and
- any other relevant legislation so as to provide for independent candidates to participate in election broadcasts and political advertisements on an equitable basis with political parties; to provide for independent candidates to receive financial and administrative assistance to enable them to perform their functions effectively; and to provide for related and other consequential matters."

It must, however, be noted that these submissions are merely based on the notice which calls for public comment as well as the 'Policy Paper an Opportunity for Meaningful Electoral Reform in South Africa'. In other words, this submission is limited to the idea and principle of electoral reform in line with the judgement by the Constitutional Court and are preliminary comments to assist with the initial drafting of the amendment. This submission will therefore rather highlight potential pitfalls that may come about during the process of considering amendments regarding the electoral system.

3.1 Civic education

A crucial element of adopting any new electoral system is the accompanying responsibility to educate the South African electorate regarding the proposed amendments. Civic education remains crucially important in any democracy, and even more so in a young democracy such as South Africa. The electorate must be empowered and able to understand any new proposed electoral system and how it influences their relationship with public office bearers.

DearSA therefore submits that any amendment to the electoral process must be accompanied by a national civic education program aimed at all South Africans, including those of voting and non-voting age, to ensure constitutional and civic comprehension amongst the electorate and the future electorate.

3.2 Vagueness

In terms of South African law, laws must be written in a clear and accessible manner. As held by the Constitutional Court in the case of Affordable Medicines Trust v Minister of Health:

"The doctrine of vagueness, … requires that laws must be written in a clear and accessible manner. What is required is a reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."

The complex nature of an electoral system necessitates and requires that any possible amendment be accompanied with clarity and certainty. Any vagueness would not only be considered as unconstitutional, but it would gravely endanger our democracy and the public's faith in our institutions.

DearSA therefore forewarns that careful consideration should be given to the particular wording of any amendment to ensure clarity and certainty.

3.3 Scope of amendment

Although the trigger for the proposed amendment is undoubtedly the Constitutional Court case as mentioned above, the opportunity has arisen to address other concerns regarding our electoral system. Parliament, with the assistance of civil society, has the opportunity to fix existing weaknesses in our electoral system and to ensure more political accountability.

DearSA therefore calls upon parliament to use the opportunity to broaden the scope of the amendment and to seek public participation beyond the order by the Constitutional Court to rectify the unconstitutionality regarding independent candidates, to also include the rectification of other deficiencies in our current electoral system.

3.4 Future public participation

DearSA further submits that the public participation process that follows the proposed draft amendment should be significantly thorough and comprehensive. The potential change to the South African electoral landscape is most likely the biggest change to the South African constitutional and societal structure since the adoption of the Constitution in 1996. Moreover, the potential effect and consequences of these changes will not only influence the way in which elections are conducted but it will completely change the manner in which the South African electorate interact with public offices bearers and elected officials.

Sections 59 and 72 of the Constitution also require the National Assembly and National Council of Provinces to facilitate public involvement in the legislative and other processes of the National Assembly and its committees. The Constitutional Court held that this imposed a duty on the assembly and the National Council of Provinces to act reasonably in ensuring the voices of ordinary people are heard before passing legislation.

Moreover, the more important the amendment that is sought, and the greater the public interest, the more onerous the obligation to facilitate public involvement. The rules of the National Assembly and National Council of Provinces already provide for this and will therefore have to be followed. The importance therefore to take all public and civil society inputs into consideration cannot be overemphasised.

4. AD SERIATIM COMMENTS

The comments made in this subsection are submitted in reference to the 'Policy Paper an Opportunity for Meaningful Electoral Reform in South Africa' and particular issues raised in that document policy paper.

4.1 Gender representation

The policy paper proposes to legislate mandatory gender based representivity of 'at least 33% of nominated candidates" to be female. It is submitted that it is foolhardy to constitutionally legislation gender-based representation in the electorate mainly firstly because South Africa has achieved tremendous gender parity in political representation in the national legislator. Currently, 46% of Members of Parliament are female, a feat achieved without mandating female representivity. The fact that South Africa is able to achieve these levels of representation of female political leaders should be celebrated, not mandated.

4.2 Requirements for nomination as candidate

It is submitted that careful consideration should be given to the financial requirements imposed by the policy paper. Independent candidates will in all likelihood already face enormous challenges to achieve financial parity with established political parties, and therefore requiring all independent candidates to pay the required fee could potentially serve as a barrier to entry that prohibits all South Africans of the opportunity to effectively participate in the electoral process as candidates.

4.3 Reducing the size of legislative government

DearSA submits that the proposed goal of reducing the size of all levels of the legislative government is noble and should be vigorously supported. In light of the fact that the Constitution allows for a minimum of 350 representatives in the national legislator, no constitutional amendment will be required to limit the number of available seats to 350.

4.4 Who can contest the provincial as well as the national elections?

DearSA supports the proposal that independent candidates should be allowed to contest in both national and provincial elections simultaneously in order to give effect to the Constitutional Courts judgment as well as section 19 of the Constitution.

5. PUBLIC COMMENTS THROUGH DEARSA

DearSA is a network of online platforms designed to facilitate government and encourage the public to participate in unbiased decision-making processes or policy formation at SOE, municipal, provincial and national levels. To this end DearSA provides an online platform for active citizens to provide their comment to proposed legislation, policy, and regulations.

DearSA has launched a public comment platform regarding the proposed amendment of the South African electoral system. We attach hereto a summary containing each submission received by DearSA.

6. CONCLUSION

In summary, DearSA wishes to highlight the following preliminary points to consider when drafting the initial draft amendment bill:

1. That civic education will be crucially important with any potential amendment to the electoral structure of South Africa;
2. That any potential draft should be cautious of legislative vagueness;
3. That the opportunity should be used to address other existing weaknesses of the South African electoral system;
4. That public participation will be of essential importance.

Kind regards

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