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MEMORANDUM

[Confidential]

TO: MS. S SHAIKH, MP
CHAIRPERSON: SELECT COMMITTEE ON SECURITY AND JUSTICE

COPY: MS. P.N. TYAWA
ACTING SECRETARY TO PARLIAMENT

FROM: CONSTITUTIONAL AND LEGAL SERVICES OFFICE
[ADV Z ADHIKARIE – CHIEF LEGAL ADVISER]

DATE: 25 MAY 2020

REFERENCE: 53. 2020

SUBJECT: PUBLIC PARTICIPATION



MEMORANDUM

TO: Ms S Shaikh, MP
Chairperson: Select Committee on Security and Justice

COPY: Ms. P.N. Tyawa
Acting Secretary To Parliament

FROM: Constitutional and Legal Services Office
[Adv Z Adhikarie – Chief Legal Adviser]

DATE: 25 May 2020

REFERENCE: 53.2020

SUBJECT: PUBLIC PARTICIPATION

INTRODUCTION AND BACKGROUND

1. Our Office was requested to provide a legal opinion on the procedure in respect of public participation. The Civil Union Bill, which is before the Select Committee on Security and Justice (“the Committee”), was passed by the National Assembly on 6 December 2018 and was transmitted to the Select Committee as required by the Constitution.
2. The Committee is considering written submissions it received on the Bill after it was advertised for public comment. We have been furnished with a letter that sets out the process the Committee has followed in respect of public participation, the number of submissions received and what has led to the request for this opinion. In the letter, amongst other things, we are informed that two organisations who made written submissions on the Bill wrote to the Committee requesting an opportunity to make oral submissions. The organisations allege that should the Committee not yield to their request such failure might render the Bill unconstitutional especially in light of the fact that the Portfolio Committee did not conduct public hearings.

3. In giving the advice the Committee requested that we take certain issues into account, namely:

- Most members are satisfied with and understand the content of the submissions;
- The large number of submissions and the practicality of conducting public hearings on virtual platforms;
- The Portfolio Committee on Home Affairs, when it considered the Bill, did not hold public hearings; and
- The call from organisations to the Select Committee to hold public hearings, in light of the fact that the Portfolio Committee on Home Affairs did not hold public hearings.

LEGAL QUESTION

4. The legal questions for consideration are thus as follows:

4.1 What does the Constitution require from Parliament in respect of public participation?;

4.2 does the Select Committee have a constitutional obligation to conduct public hearings, especially if the Portfolio Committee did not do so?; and

4.3 should virtual meetings be a hindrance to Parliament giving meaningful public participation?

LEGAL ANALYSIS

What does the Constitution require from Parliament in respect of public participation?

5. Sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution of the Republic of South Africa, 1996 (“Constitution”), place a constitutional duty on the National Assembly, the National Council of Provinces and provincial legislatures respectively, to facilitate public participation when executing their legislative processes. In **Doctors for Life International v Speaker of the National Assembly and Others**¹, (*Doctors for life*), a case which is the seminal authority for the principle that legislation can be declared invalid for lack of public participation in the law-making process, the Constitutional Court (“Court”) held:

¹(CCT12/05) [2006] ZACC 11.

“In our country, the right to political participation is given effect not only through the political rights guaranteed in section 19 of the Bill of Rights, as supported by the right to freedom of expression but also by imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process.”

6. The effect of such public participation should be that ‘all parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.’² In other words, public participation afforded by Parliament must be meaningful, and it must be of such nature that the Court would find it meaningful and reasonable.

Does the Select Committee have a constitutional obligation to conduct public hearings, especially if the Portfolio Committee did not do so?

7. Whilst the Constitution imposes an obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement – rather it leaves it to Parliament to determine what and how it will do so³. The Constitution gives discretion to both houses of Parliament to determine how best to fulfil their duty to facilitate public involvement. This was affirmed by Ngcobo J, as he then was, in *Doctors for Life* when he stated that ‘it is apparent that the Constitution contemplates that Parliament and the provincial legislatures would have considerable discretion to determine how best to fulfil their duty to facilitate public involvement. Save in relation to the specific duty to allow the public and the media to attend the sittings of the committees, the Constitution has deliberately refrained from prescribing to Parliament and the provincial legislatures what method of public participation should be followed in any given case. In addition, it empowers Parliament and the provincial legislatures to “determine and control [their] internal arrangements, proceedings and procedures” and to make their own rules and orders concerning their businesses.’ He further stated that ‘it follows that Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement.’

²Doctors for life para *per* Sachs, para 235.

³The National Assembly and the National Council of Provinces (“NCOP”), derive the power to make rules from sections 57 and 70 of the Constitution of the Republic of South Africa, 1996 (“Constitution”). Both sections provide for internal arrangements, proceedings and procedures of the National Assembly and of the NCOP.

8. Similar sentiments were echoed by the Court in **Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others**⁴ where the Court stated that ‘the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say.’
9. The Court’s jurisprudence reaffirms the existence of a duty on Parliament to involve the public when developing and processing legislation, while also acknowledging that Parliament has discretion to decide how to go about allowing the public to participate in its business. Therefore we are of the view that the Committee has the power to decide how best to fulfil its obligation to facilitate public involvement. What is important is that there should be reasonable opportunity offered for public to participate in the law making process.⁵ The Portfolio Committee, in our view, correctly exercised the same discretion to decide whether to or not have public hearings on the Bill.
10. The fact provided in the brief, namely that most members are satisfied with and understand the content of the submissions, are of import here. Together with the fact that the Committee provided the public with ample time to make submissions, it is indicative of the public having been given a real opportunity to have their say, and that their views matter and will receive due consideration.
11. The decision of the Portfolio Committee on Home Affairs not to have public hearings, does not affect this discretion of the Select Committee at all. The Constitution requires facilitation of public involvement. It does not require the holding of public hearings.

Should virtual meetings be a hindrance to Parliament giving meaningful public participation?

12. It is common knowledge that the country is under lockdown as the President declared the National State of Disaster, on 15 March 2020, in terms of the Disaster Management Act,

⁴[2005] ZACC 14.

⁵Ngcobo J in Doctors for life case stated- in para 123 “It is apparent that the Constitution contemplates that Parliament and the provincial legislatures would have considerable discretion to determine how best to fulfil their duty to facilitate public involvement. Save in relation to the specific duty to allow the public and the media to attend the sittings of the committees, the Constitution has deliberately refrained from prescribing to Parliament and the provincial legislatures what method of public participation should be followed in a given case. In addition, it empowers Parliament and the provincial legislatures to “determine and control [their] internal arrangements, proceedings and procedures” and to make their own rules and orders concerning their businesses.” In para 124 he stated: “It follows that Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement.” What is important is that there should be reasonable opportunity offered for public participation.

2002 (Act No. 57 of 2002). This has compelled Parliament to find alternative ways of working to perform its functions. As a result of such declaration, on 15 and 20 April 2020 the Speaker and the Chairperson, respectively, made rules for virtual meetings of the NA and NCOP and published these in the two respective ATCs. This was done to enable Parliament to carry out its functions and fulfill its constitutional obligations. The NCOP rules relating to virtual meetings provide that subject to section 72(1)(a) of the Constitution, a Select Committee must facilitate public involvement on matters before it by electronic means determined by the Select Committee. Taking the above into account, virtual meetings are not a hindrance to the Select Committee calling for oral submissions should it decide to exercise its abovementioned discretion on whether or not to call for oral submissions.

CONCLUSION

13. It is evident from the discussion above that the view that the Bill could be rendered unconstitutional if no public hearings are held is not correct. Parliament has discretion when it comes to decide on how best to fulfil its duty to facilitate public participation. Thus the Committee has no obligation to call for oral submissions but rather an obligation to facilitate meaningful and reasonable public participation. It falls within the discretion of the Committee to decide what would be the best way to do that.



Adv Zuraya Adhikarie
Chief Legal Adviser