

COMPLYING WITH S.118

(ENSURING COMPLIANT PUBLIC INVOLVEMENT)

1. BACKGROUND

Section 118 of the Constitution imposes a duty on the Legislature to facilitate public involvement in its legislative processes. It requires that the Legislature takes steps to ensure that the public participate in the process but also gives the Legislature considerable discretion to determine how best to fulfil this duty.

Failure to comply with this duty or to adequately comply may result in the legislation being declared invalid or for its operation to be suspended for a period to enable the Legislature to comply. This has happened in numerous instances previously where NCOP Bills were challenged eg the Doctors for Life case¹, the Matatiele case,² the Lamosa³ case, Mogale⁴ etc. In these matters the Bills were declared invalid in view of the courts view that s.118 was not complied with.

¹ Doctors for Life International v The Speaker of the National Assembly and Others, CCT 12/05

² Matatiele municipality and others v President of the Republic of South Africa and others, CCT 73/05

³ Land Access Movement Of South Africa & 5 Others v Chairperson Of The NCOP & 17 Others

⁴ *Mogale and Others v Speaker of the National Assembly and Others* [2023] ZACC 14

It is therefore imperative that the Legislature ensures that it complies with its duty to adequately facilitate public involvement to s.118. This duty can take a variety of forms and the appropriate form will vary from Bill to Bill, as long as a reasonable and meaningful opportunity is offered to the public and interested parties.

2. LEGAL CONSIDERATIONS: NATURE AND EXTENT OF PUBLIC INVOLVEMENT

The Constitutional court in the Matatiele judgement and the Doctors for Life judgement gave some guidance with regard to what must be taken into account by the Legislature when it decides on what degree of public involvement to undertake for each Bill.

It was noted by the court at para 50 of the judgement as follows -

*“[T]he duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as it is reasonable to do so. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the **duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them.***

Our Constitution demands no less.

The court further noted at para 54 as follows -

*“What is ultimately important is that the **legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process.** Thus construed, there are at least **two aspects** of the duty to facilitate public involvement. The first is the duty to provide **meaningful opportunities for public participation** in the law-making process. The second is the duty to **take measures to ensure that people have the ability to take advantage of the opportunities** provided. In this sense, public involvement may be seen as ‘a continuum that ranges from providing information and building awareness, to partnering in decision-making.’*

This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation.”

With regard to the factors to be taken into account the court held at para 68 as follows -

“The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have regard to what the legislatures themselves considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation.”

As can be seen from the above the court gave some guidance with regard to what must be taken into account when deciding on the level of public involvement. It is advised that whenever a committee is dealing with a Bill (be it provincial or NCOP), these factors must be taken into account by the committee when it decides on public involvement, specifically on question of whether verbal or written inputs are to be received, whether public hearing are to be held or just written submissions accepted, if public hearings are necessary then how many public hearings should be held, where should the public hearings be held etc. This will assist in ensuring that s.118 is complied with. The attached template can be used in the process.

3. QUESTIONS TO BE ASKED BY THE COMMITTEE WHEN DECIDING ON THE NATURE AND EXTENT OF PUBLIC INVOLVEMENT

NO.	FACTORS TO BE TAKEN INTO ACCOUNT	YES	NO	COMMENTS/ INPUT/ RECOMMENDATION/ DECISION
1.	Nature and importance of the legislation			
	1.1 What is the nature of the Bill?			
	1.2 Are the rights of the public being affected by the Bill?			

NO.	FACTORS TO BE TAKEN INTO ACCOUNT	YES	NO	COMMENTS/ INPUT/ RECOMMENDATION/ DECISION
	1.3 What are these rights?			
	1.4 Are they constitutional rights? <i>(the more important the rights that are being affected the greater the level of public involvement is needed eg land rights in LAMOS)</i>			
	1.5 Are there interests that are being affected by the Bill?			
	1.6 What are these interests (their nature and importance)?			
2.	Intensity of impact on the public <i>(if there is a specific group that is being impacted by the Bill then it must be ensured that this group is adequately consulted eg the Matatiele community in the Matatiele judgement)</i>			
	2.1 Does the Bill impact on specific identifiable groups?			
	2.2 Who are these groups?			
	2.3 Where are they located?			
	2.4 Is the impact on this group high enough to warrant a greater level of public involvement for this group?			
	2.5 What is the level of sophistication of the parties that may be impacted? <i>(to determine method of engagement)</i>			

NO.	FACTORS TO BE TAKEN INTO ACCOUNT	YES	NO	COMMENTS/ INPUT/ RECOMMENDATION/ DECISION
	2.6 Based on 2.5 above what will be the appropriate method of engagement (<i>eg will a call for written submission suffice or will it be necessary to go to the relevant areas</i>)?			
3.	Degree of public interest			
	3.1 What is the level of public interest in the legislation? <i>(the higher the level of public interest the higher the level of public involvement that would be required)</i>			
	3.2 Who has already been consulted? <i>(eg by the Department (in the case of provincial Bills) or by Parliament (in the case of NCOP Bills)). This should give an idea as to relevant stakeholders and the degree of interest in the Bill</i>			
4.	Time constraints			
	4.1 Are there any time constraints which need to be factored in? <i>(to be taken into account but not enough on its own to warrant a limitation on public involvement)</i>			
5.	Resources			

NO.	FACTORS TO BE TAKEN INTO ACCOUNT	YES	NO	COMMENTS/ INPUT/ RECOMMENDATION/ DECISION
	5.1 Are there any resource constraints which should be taken into account? <i>(to be taken into account but not enough on its own to warrant a limitation on public involvement)</i>			
6.	PPP mechanisms			
	In light of all of the above factors what are the appropriate public involvement mechanisms to be used by the committee			

4. LEGAL CONSIDERATIONS: STANDARDS WHEN UNDERTAKING PUBLIC INVOLVEMENT

The must be a meaningful and reasonable opportunity for the public to participate and to try and influence the content of the Bill. In *Mogale and others v Speaker of the NA and others*⁵ the court held as follows regarding what amounts to “a reasonable opportunity to participate”-

⁵ *Mogale and Others v Speaker of the National Assembly and Others* [2023] ZACC 14

*“A reasonable opportunity to participate in legislative affairs “must be **an opportunity capable of influencing the decision to be taken**”. It is unreasonable if the content of a public hearing could not possibly affect Parliament’s deliberations on the legislation. If the hearing is not effectively or timeously advertised, if people are unable to attend the hearing, or if the submissions made at the hearing are not transmitted or accurately transmitted to the legislature, then the hearing is not capable of influencing Parliament’s deliberations. This does not mean that the legislature must accommodate all demands arising in the public participation process, even if they are compelling. The public involvement process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public’s views. Even if the lawmaker ultimately does not change its mind, it must approach the public involvement process with a willingness to do so.”*

The court further pointed out critical areas that if not complied with often render public involvement insufficient⁶-

1. Pre-hearing workshops
2. Communication and awareness programmes
3. Communities must be mobilised
4. Public hearings must be accessible
5. Summaries of the bill must be translated into the language that the community understands
6. Transport to the hearings
7. In terms of the Framework, invitations must be sent at least five weeks before the public hearings and, in terms of the Practical Guide, provincial legislatures must give at least seven days’ notice of a hearing

⁶ See para 60 of the Mogale judgement

8. Translations at the hearings if required by the community
9. Permanent delegates to the NCOP on the relevant Select Committee must attend public hearings arranged by the provincial legislatures.
10. Negotiating mandates must be accompanied by detailed public comments
11. Each amendment proposed by a provincial delegation must be considered in detail and decided on.

5. WHAT CAUSES LAPSES IN PUBLIC INVOLVEMENT AT IMPLEMENTATION STAGE

No.	Shortcomings	Possible Interventions
1.	Lack of awareness of the detailed public involvement requirements by chairpersons e.g. awareness programmes, notice periods, translations, adequate venues etc	Training workshops on public involvement especially for committee chairpersons
2.	Lack of advance planning i.e. dates for hearings are decided upon without factoring time needed to source venues, SCM processes, time for advertising – thus resulting in inadequate notice periods etc	Project plan for public involvement on the Bill
3.	Insufficient coordination between the committee, legal advisor, SCM, communications and public participation e.g. SCM is not given enough	Planning meetings among admin units to plan the public involvement process,

	time to source venues, Communications has insufficient time to advertise with at least 7 days' notice.	agree on a project plan and make recommendations to the committee
4.	Political influences e.g. in selection of venues, giving sufficient time even to those opposed to the Bill, a fair chance to all to make submissions	Committee must be guided by a public involvement checklist to ensure compliance
5.	Lack of on the spot detailed guidance i.e. need for a public involvement checklist	Legal guidance/ Compliance checklist
6.	Lack of high level record keeping of submissions	Improve record keeping
7.	Lack of sufficient detail in mandates to NCOP so that the select committee can consider the submissions themselves	Sufficiently detailed mandates to NCOP

6. PUBLIC INVOLVEMENT CHECKLIST

NO.	PUBLIC INVOLVEMENT REQUIREMENTS	ARE THERE COMPLIANCE CONCERNS? YES/NO	POSSIBLE INTERVENTIONS IN THE EVENT OF CONCERNS/ NON-COMPLIANCE (re-advertising, further hearings, request for more time etc)
	Pre-Hearing		
1.	Has there been pre-hearing workshops/ awareness programmes <ul style="list-style-type: none"> - Bill must be accurately represented so that people are aware of the impact thereof 		
2.	Effective advertising <ul style="list-style-type: none"> - Widespread advertising - Reaching all relevant stakeholders - In language of the affected community - cater for rural communities and lack of technology eg use of radio etc 		
3.	Timeous advertising (at least 7 days' notice of hearing)		
4.	Has the Bill been distributed widely?		
5.	Is the Bill in the language of the communities?		
6.	Have summaries of the Bill been provided?		

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7.	Have the summaries been translated in the language of the communities?		
	Hearing Stage		
8.	Will people be able to attend? <ul style="list-style-type: none"> - Accessible locations - Distance of venue from affected communities - Is transport required and has it been provided - Cater for disadvantaged communities and provide assistance to get to hearings 		
9.	Is the NCOP delegate in attendance?		
10.	Has sufficient time been provided to hear the submissions?		
11.	Has everyone been given an equal and fair chance to give submissions? <ul style="list-style-type: none"> - Avoid perception of political bias etc - No preference or priority in receiving submissions 		

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	<ul style="list-style-type: none"> - No one must be silenced/ excluded/ disadvantaged 		
12.	Are translators necessary and have they been provided?		
	Post Hearing		
13.	<p>Reports of hearing must be accurate and contain sufficient detail to assist decision makers</p> <ul style="list-style-type: none"> - Transcribers/ records keepers/ legal advisors report to committee - Don't place emphasis on some submissions at the expense of others 		
14.	<p>Committees must pay equal attention to all submissions</p> <ul style="list-style-type: none"> - Must be able to show a willingness to consider all submissions even if it does not agree with all of them - Minutes must reflect due consideration of all submissions/ proposed amendments 		

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15.	Mandates from provinces to NCOP must have sufficient detail to assist NCOP to be aware of the submissions <ul style="list-style-type: none"> - Not just the provinces proposed amendments – more detail - Summary of all submissions - Summary of proposed amendments from communities - Copies of written submissions 		