SOUTH AFRICA TOBACCO TRANSFORMATION ALLIANCE

FACTSHEET 1: SHORTCUTS AND SHORTCOMINGS

How Parliament botched public participation in the Tobacco Products Control Bill

[Parliament's] public involvement process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public's views. – Constitutional Court, Mogale & Others vs Speaker of the National Assembly & Others, May 2023

Public participation is the centerpiece of South African policy-making and democratic law-making. It is enshrined in the Constitution, and the Supreme Court of Appeal and the Constitutional Court have both emphasised – in several court judgments – the importance of meaningful public involvement in the process of crafting new laws, whether in written submissions or verbal presentations at public hearings.

When holding public hearings, Parliament is expected to follow a number of crucial steps – including educational briefings, translation of legislation and giving proper advance warning of public hearings – to make sure this happens. And a failure to do so has resulted, on more than one occasion, in legislation being declared invalid.

But despite these prescripts and legal precedents, the process of engendering public participation in the Tobacco Products Control Bill (TPCB) has been deeply flawed from as far back as 2018.

And for the last six years both the Department of Health (DOH) and, more recently, the Sixth Parliament, seem to have got more wrong than they got right.

As even a cursory examination shows, the public participation process falls far short of Government and Parliament's own requirements, and lays Parliament open to yet another Constitutional Court challenge.

How did it come to this?

Submissions ignored, Nedlac sidelined

In 2018, DOH published the original version of the TPCB for comment.

More than 21 000 submissions were received in response – but there is no evidence that any of the issues raised were considered or addressed.

A severely flawed socio-economic impact assessment (SEIAS) was conducted on the basis of the Bill. Even though flaws in it were pointed out by stakeholders, none of the issues raised were considered or addressed.

Once the Bill had been signed off (in its flawed form) by DOH it was supposed to go to Nedlac for line-by-line assessment, as required by the Nedlac Act. This Act stipulates that consensus must be sought on all legislation relating to labour, social and economic policy before going to Parliament.

Despite this legal requirement, despite promises by DOH, and despite a request from Nedlac's social partners, the Bill went directly from DoH to Cabinet, and from there to Parliament.

As Kaizer Moyane -- convenor of business at Nedlac – noted in Nedlac's 2023 annual report: *"Regrettably, there were areas where social dialogue did not work or, more accurately, was not given an opportunity to perform. The Department of Health's tabling in Parliament of the Control of Tobacco Products and Electronic Systems Delivery Bill, before it was discussed by the Nedlac Constituencies, was unfortunate. Bypassing Nedlac in a Bill process, where there are potential economic and labour market implications, is unlawful and undermines trust between government and its social partners. Indeed, it undermines the very objective of Nedlac's existence".*

Shortcuts and shortcomings

Then we come to the public hearing process itself, perhaps the most serious violation of the Constitution, the law, and legal precedents, and littered with shortcuts and shortcomings.

The Parliamentary Portfolio Committee on Health held hearings in seven provinces between August 2023 and February 2024, when the process stopped.

In what was essentially a repeat of the Parliamentary errors that caused the Mogale judgment, the Portfolio Committee proceeded to cut corners and disrespect members of the public – in particular, those in rural areas and those without access to information or information in their mother tongue.

Among the missteps – in almost every provincial hearing – were the following:

- **Insufficient notice** was given to members of the public – in some cases, less than 24 hours before the hearings, and only on elite social media platforms such as X/Twitter.
- **Insufficient transport** was provided and **venues were sometimes changed overnight**.
- In many cases, **no pre-hearing education sessions were held**. Where they were, they were organised by and for members of the governing party rather than as multi-stakeholder forums, preventing proper knowledge of the draft legislation.
- **Translated copies of the draft legislation were not made available** for most of the hearings, preventing participants from fully understanding the Bill.
- The **contents of the draft legislation were misrepresented** in hearings and preference was given to people who favoured certain aspects of the legislation.
- The chairperson of the hearings **prevented certain people from speaking** and, at times, intimidated them from speaking out fully.
- Hearings often did not run for their full scheduled time and were **cut short**, preventing some stakeholders from making their views known.

The optics of public participation

In our view, the public hearings around the Tobacco Products Control Bill were so procedurally flawed as to make them irregular. And it would be a grave error for any interested party – in particular, the Portfolio Committee on Health that was elected by the Seventh Parliament – to attach any legal or constitutional value to them.

The hearings were a box-ticking exercise, and a badly-organised and poorly-run one at that. They replicated the flaws that led to the Mogale judgment – and did a disservice to the concept of public participation and the basic tenets of our Constitution.

Public participation must not be an exercise in managing optics. It must be done properly, with sincerity and commitment.

All political parties – no matter their views on the Tobacco Products Control Bill – should aspire to participatory democracy and to ensuring that public participation processes are conducted with respect for the public.

That means hearings must be **properly and timeously organised, properly advertised in local media and in local languages, and participants must be provided with translated versions of draft legislation**. And hearings themselves **must be run in the spirit of participatory democracy** – fair, open, and structured in such a way that they enable all South Africans to make their voices heard on critical issues that affect them.

Anything else is not just a violation of the principles of our democracy – it is another embarrassment for Parliament that is just waiting to happen.

The Mogale Judgment: a reminder of the key issues

In May 2023, the Constitutional Court ruled that deficiencies at different stages of the public participation process around the Traditional and Khoi-San Leadership Bill (TKLB) were numerous and material – to such an extent that they rendered the Act unconstitutional and invalid. At both National Assembly and provincial legislature levels, deficiencies in the hearings were endemic:

- Insufficient notice was given ahead of many of the hearings.
- At some hearings, there was a failure to conduct pre-hearing education.
- Some of the hearings were inaccessible: limited transport was provided and hearings took place in venues far from where people lived.
- At many of the public hearings, no copies of the draft legislation were provided. Where copies of the Bill were provided, an insufficient number of copies were available. Further, copies provided were often in a language that the local community could not understand. Where there were no written copies of the Bill in the appropriate language, oral presentations were not given or were inadequate or inaccurate.
- Attendees at some hearings complained that they did not have sufficient time to consider the Bill in order to give meaningful input. Further, improper attention was given to certain groups to the exclusion of other groups and attendees were silenced arbitrarily.
- The content of written submissions from the public were insubstantially considered. As a result, the views and opinions expressed at the public hearings and in the written submissions did not filter through to Parliament.

Collectively, the highest court in the land found, these deficiencies demonstrated a wide-ranging and substantial failure to facilitate public participation.

Published by the South Africa Tobacco Transformation Alliance
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