

Michael Atkins
Westridge
Durban
23 November, 2022

To: Mr Mosotho Moepya
Chairperson: Electoral Commission

CC: Mr Sy Mamabolo
Chief Electoral Officer

CC: Mr Lawson Naidoo
CASAC
Mr Koogan Pillay
70s Group, Defend Our Democracy

Dear Commissioner Moepya,

RE: COMMISSION PRESENTATION TO NCOP

Further to my letter of 17 November, 2022, and following the meeting with yourselves on November 22, I hereby set out the particulars of the concerns that I have regarding the Commission's advice to the National Council of Provinces (NCOP) Select Committee on Security and Justice on November 14.

As I have communicated, the sole purpose of this discussion is to deal with objective statements made by the Commission to the NCOP in response to the submission that I made on November 9. This is against the backdrop of the fact that, at my request, the CEO met online with me on November 2 to discuss matters relating to advice given to Parliament with respect to the Bill. In that meeting, Mr Mamabolo requested that I provide him with an advance copy of my intended submission. This I did on November 7.

In my submission to the NCOP (titled, "Electoral Amendment Bill: National Council of Provinces – Submission"), under the headings, "National Assembly – Regional Ballots Should Not be Combined with PR Ballots" (page 4), and "National Assembly", under "Remedies" (page 7), I addressed the problems caused by combining the party votes on the regional ballot with the party votes on the PR ballot. I proposed that the calculation referred to in the proposed Item 6 of Schedule 1A in the Bill should be based solely on the votes recorded in the PR (Compensatory) ballot.

In my submission to the National Assembly on September 16, 2022 (titled, "Electoral Amendment Bill – Submission to Parliament"), under the heading, "PR Calculation in the National Assembly" (page 10), I set out the same case, and included a numerical scenario that demonstrated a clear

difference in outcomes between the Bill and what I proposed. That scenario took a high estimate of 15% support for independent candidates collectively in the regional elections, and showed that the Bill conferred a “benefit” of eight seats on the largest party, compared to the composition of the National Assembly being based solely on the PR ballot (less the seats won by independent candidates in the regional elections).

In the Commission’s response of 27 September, 2022 to my National Assembly submission for the Home Affairs Committee of the National Assembly (titled, “SUBMISSION OF THE ELECTORAL COMMISSION TO THE PORTFOLIO COMMITTEE”), under the heading, “Theme #3” (page 3), the following was written:

- “The quota is determined by the sum of valid votes across both ballots. Party votes are also determined from both ballots before being divided by the quota. This is similar to the overall municipal calculations in LGEs and remains proportional in general.”

Essentially, the only response given by the Commission was that the arrangement in the Bill is similar to the equivalent calculation carried out in local government elections. The unsubstantiated assertion was made that this, “remains proportional in general”. There was no rebuttal of the thesis of my submission to the National Assembly, nor any dispute of the numerical example presented.

The point of this letter is not to re-litigate the question, and validity of the claims and proposals made in my submissions, but rather to address the nature of the Commission’s advice to the NCOP. As indicated above, the Commission’s advice to the National Assembly was logically incomplete, and did not address the substance of my submission, in this respect.

In the Commission’s response to my NCOP submission, (titled, “THE ELECTORAL AMENDMENT BILL: COMMISSION RESPONSES TO SUBMISSIONS”) in para 6.3 under the heading, “Comments on the Atkins Submission to the NCOP”, the following is said, “The proposition for creating such a model is logical and correct. It is only the outcome that is not correctly projected.”. Under section 4.2 (“Proportionality Determined by Party Ballot Only”), para 4.2.2 says, “The outcome of this model is not different from that resulting from the implementation of the provisions of the Electoral Amendment Bill and the largest party gains, in both instances, the same number of seats”.

Note: Paras 4.2.1 and 6.3 refer to “Annexure 7”, whereas it seems plain that they, in fact, related to Annexure 6 (titled, “ATKINS PROPOSAL (6 SEATS FOR INDEPENDENTS)”).

The claim made by the Commission (para 4.2.2) is that the scenario presented by them in Annexure 4, encapsulating the seat allocation as contained in the Bill, produces the same outcome as the same set of figures would in terms of my proposal, as shown in Annexure 6 (not Annexure 7, as stated).

The clear implication of this analysis by the Commission is that my submissions in this regard, and the recommendations contained therein, may be disregarded by Parliament in their deliberations.

The first problem with the analysis of the Commission (and hence, with their advice to the NCOP) is that a single scenario does not logically validate the claim that the National Assembly seat allocation carried out in terms of the Bill would be the same as seat allocation carried out in terms of my proposal. A single scenario may illustrate this, but it does not exclude the logical possibility that a different scenario may produce different outcomes. Indeed, in my submission to the National Assembly, I provided such a scenario. It is a basic logical principle of the scientific method that a single case concurring with a proposition (my proposal creates the same outcomes as the Bill) does not prove that proposition, whereas a single case NOT consonant with the proposition does negate or falsify it.

However, a closer examination of Annexures 4 and 6 (where the comparison between the Bill and my proposal are carried out) reveals two logical faults in the methodology employed by the Commission to construct the scenarios.

The Commission starts with the votes cast in the 2019 National Election. In order to show the effect of including independent candidates in the process, some of the smaller political parties are designated as independent candidates, for the purpose of illustration. In itself, this fact does not create any problems. It is the manner in which this is done that leads to an invalid and misleading conclusion.

Firstly, in Annexure 4, the designation of the FF+ votes as being for an independent candidate or candidates in the Gauteng region creates a logical problem. With 175,152 votes, the scenario shows that two regional seats are earned. If that number of votes was earned by a single independent candidate, then clearly only a single seat could be thus allocated. As it happens, that case would result in the ANC being allocated an extra regional seat, with one additional seat being allocated to parties in the proportional representation calculations carried out in terms of Item 6 in Sch 1A. In terms of the given scenarios, this would result in the Bill producing a seat allocation where the largest party gained an extra seat (due to the small reduction in Quota) compared to the results obtained from employing the system proposed in my submission.

If the given number of votes were “distributed” among two or more hypothetical independent candidates, then it is not clear that, between them, they would gain two seats. The Commission does not consider this situation in their analysis. This first problem does not make a large impact on the overall situation, though. However, the second problem with the methodology of constructing a scenario does make a notable logical difference.

In the scenario contained in Annexure 4, as described above, the Commission “constructs” a hypothetical set of results for the regional elections for the National Assembly, by converting some of the party votes from the 2019 National Election into independent candidate votes. In terms of the Bill, the results from parties in the regional election must be added to the results from the PR (or compensatory) ballot. What the Commission does is to take the votes cast for parties in the regional election as the votes cast in the PR ballot. For the purposes of modelling, *per se*, this duplication is reasonable. However, this is the point where the modelling falls down.

In the hypothetical regional election, 700,376 votes are cast in favour of independent candidates. These votes are not considered in the duplicated set of votes making up the PR ballot (by virtue of the fact that these are now independent candidates, and not political parties, for the purposes of the illustration). The logical fault is that those 700,376 votes represent voters who would have PR ballots to cast. In the model used for this scenario, the Commission does not make provision for allocating those votes for parties. This is clearly unrealistic, and is the precise reason for the conclusions drawn by the Commission (and communicated to the NCOP) being erroneous.

What Annexure 4 does is take 16,737,003 votes for parties in the regional ballot (being 17,437,379 minus the 700,376 mentioned above) and add it to another set of 16,737,003 votes, and performs a seat allocation in terms of Item 6 in Sch 1A. This is then compared with Annexure 6 (not Annexure 7) where a single set of 16,737,003 is used to perform a seat allocation in the manner I propose.

Using 16,737,003 votes doubled in one seat allocation and comparing it to a single set of 16,737,003 votes in another seat allocation is effectively guaranteed to produce identical outcomes. What this means is that the methodology employed by the Commission to compare my proposal with the Bill is what produced the “outcome” that these were the same. The Commission thus effectively misled the NCOP Select Committee.

Note: my description above, for the purpose of simplicity, does not mention the 18,513 votes from overseas voters that are added in to the Annexure 4 calculations. This number represents 0.05% of the total, and has no effect on the outcomes. It can also be noted that, in Annexure 6, the Commission did not add the 18,513 overseas votes into the set of votes used to illustrate my proposal. They should have done this, as this represents the PR ballot, for which overseas voters are eligible, and which Annexure 4 uses.

If it is argued that we don't know whether voters voting for independent candidates in the regional ballot will, in fact, cast votes at all in the PR ballot, then the answer is simple. On an individual level, we don't know how voters will behave, but in aggregate we do, because of other data available from which we can draw inferences. We can look at voter behaviour in prior provincial and national elections, as well as the behaviour (in aggregate) of voters voting for independent candidates in local government elections. There is no data in any of these elections to support an assumption that no voters voting for independent candidates in regional elections would choose to vote in the PR ballot. In the absence of such data, the only reasonable assumption that can be made in modelling the Bill compared to my proposals is that all those voting for independent candidates in the regional ballot would vote in the PR ballot.

If the set of voters who vote for independent candidates in the regional election (700,376 in the scenario presented) are to be designated as voting for parties, then a method must be devised for calculating how these votes are distributed among parties.

The simplest assumption would be that the votes are distributed among parties in the same proportion as the votes that were cast for parties in the regional ballot. However, it is clear that for modelling purposes, particularly where this directly impacts on the advice given to Parliament, and

hence on the decisions of Parliament, this is not the only approach that can be taken. Indeed, a strong case exists that this is not the best, or even a valid, approach.

It should be noted, however, that should the set of votes in question be allocated to parties in proportion to their existing support, then it is true that the seat allocation carried out in terms of the Bill would have the same outcome as that carried out in terms of my proposal. However, this would be premised entirely on the assumption that, collectively, those voting for independent candidates in the regional ballot would behave in the same manner in the PR ballot as those voting for parties in the regional ballot. Statistically, this is simply not a defensible assumption.

From a commonsense perspective, it “makes sense” that those choosing to vote for independent candidates in the regional ballots do not wish to support the main parties in that ballot to the same extent as those voting for parties. Thus, it would be a reasonable inference that, collectively speaking, that group would support the main parties to a lesser extent in the PR ballot than those voting for parties in the regional ballot.

However, commonsense is not a sufficient basis upon which to construct a model that would be used in such a critically important context. Fortunately, we do have a set of data available from which inferences might be drawn, and which might be used as a basis for constructing scenarios that Parliament relies upon in their decision-making process.

In local government elections, we have a number of people contesting Ward elections as independent candidates. Where significant numbers of people vote for independent candidates in Ward elections, we can compare the votes cast for parties in the Ward elections with the votes cast for parties in the corresponding PR elections in the same locations. This analysis could be done at either the Voting District or the Ward level (slightly different results would be obtained in selecting results for analysis).

Although a proper analysis of this form has not been done, I conducted a preliminary partial view of the 2021 election results. This shows a discernible difference in support for the largest three parties nationally (ANC, DA and EFF) in the PR ballot and in those who voted for parties in Ward elections where independent candidates gained at least 200 votes and at least 20% of the votes cast (Note: the data underlying this claim can be supplied on request).

Models are by definition simplifications that use reasonable assumptions, and where certain values (parameters) are varied, with outcomes examined for each variation of the input parameters. Examples of parameters could be the overall percentage support enjoyed by independent candidates, as well as the extent of deviation of support for the largest parties among those voting for independent candidates as compared to those voting for parties in the regional elections.

As has been indicated previously, individual scenarios showing an equivalence of outcomes between the Bill and my proposal do not prove the equivalence in all situations, whereas any single reasonable scenario demonstrating a difference in outcome (numbers of seats awarded to each party) does demonstrate that the two are not equivalent.

It can be shown easily that any variation in patterns of support for parties between those voting for independents in the regional ballot and those voting for parties will certainly result in differences in seat allocations between the Bill and my proposal. This is simple, and objectively verifiable.

It is true that different levels or patterns of support for independent candidates in the regional elections will lead to lesser or greater discrepancies between the two systems. In an important sense, having relatively low differences is not material to the present discussion, which is confined to an analysis of the scenarios and analysis presented by the Commission to the NCOP. Any difference in the outcomes in terms of the Bill compared to those in terms of my proposals is enough to undermine the advice given by the Commission to the NCOP.

What can well be stated is that the extent of the differences will vary in proportion to the overall levels of support for independent candidates in the regional ballot. As the level of support for independent candidates increases, the imbalance between their support and the seats they gain will increase (due to additional “excess” or discarded ballots). This increases the disproportionality within the individual regions. By including those ballots in the overall PR calculations, the overall level of distortion will increase.

In conclusion, given the fairly plain fact that the Commission has presented unhelpful scenarios to the NCOP, and has therefore drawn inaccurate inferences, I submit that it is incumbent on the Commission to communicate this fact as a matter of urgency to the Select Committee on Security and Justice. I argue that this injunction holds regardless of the stage of deliberations reached by the Committee.

I submit further that it would be appropriate for the Commission to endorse to the NCOP my proposal for the Item 6 seat allocations to be calculated only with respect to the PR ballot. However, I respect the fact that the Commission, after examining suitable scenarios, might reach a different conclusion.

I remain available to engage in further discussion with the Commission, or with the Select Committee, either to clarify the contents of this letter, or of my submissions to Parliament.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Michael Atkins".

Michael Atkins