



**COUNCIL**  
FOR THE ADVANCEMENT OF THE  
SOUTH AFRICAN  
CONSTITUTION

21 February 2022

Hon. M S Chabane, MP  
Chairperson of the National Assembly Portfolio Committee on Home Affairs

[REDACTED]  
Att: Mr E Mathonsi

Dear Hon. Chabane

Submission on the Electoral Amendment Bill [B1 -2022]

Please see attached CASAC's submissions on the Electoral Amendment Bill. We would also request an opportunity to make an oral presentation to the Portfolio Committee at the appropriate time.

Yours sincerely

Lawson Naidoo  
Executive Secretary

Council for the Advancement of South African Constitution

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## Submission on the Electoral Amendment Bill [B1-2022]

### Introduction

1. Pursuant to the Constitutional Court judgment in the *Neal Nalio Movement case*<sup>1</sup> it is common cause that the electoral system must be amended. While the legislative changes that are being considered by Parliament are aimed at satisfying the ruling of the Constitutional Court, it is also an opportunity to improve parliamentary representation and embed greater responsiveness of public representatives to citizens. This will serve to strengthen the basis of South Africa's constitutional democracy. The reform of the electoral system must, however, take into account the trade-offs inherent in changing electoral systems.
2. To that end and following the appointment by the Minister of Home Affairs, Dr. Aaron Motsoaledi, of the Ministerial Advisory Committee on Electoral Reform (MAC), the Council for the Advancement of the South African Constitution (CASAC) made written submissions

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<sup>1</sup> *New Nation Movement NPC & Others v President of the Republic of South Africa & Others* [2020] ZACC 11.



to the MAC on a preferred electoral system that would in our view best advance the democratic values of accountability, responsiveness<sup>2</sup> and fairness.

3. In what follows, we briefly set out CASAC's principal submissions to the MAC and thereafter offer our views on the Electoral Amendment Bill that is currently before the Portfolio Committee. Whilst we do not support the electoral scheme set out in the current draft Amendment Bill, we nevertheless make some suggestions for its improvement and highlight areas for further consideration and consultation.

#### **CASAC's submissions to the MAC**

4. The two most important principles guiding an electoral system are accountability, and fairness; others include simplicity and inclusivity. Accountability is a relatively simple principle: representatives should be held responsible for their performance by voters, and

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<sup>2</sup> The Founding Provisions of the Constitution, inter alia section 1(d), make "responsiveness" a foundational value. This applies to responsive government in general, but also to the relationship of responsibility and answerability (accountability) of the Executive to the Legislature and the answerability and accountability of public representatives to citizens. It states:

"1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."



voters should have a way to register their disappointment or approval of the conduct of their representatives. Responsiveness is closely tied to accountability.

5. Fairness is a more complex principle, but it can be simplified as including both representativity and the expression of every voter's voice through electoral mechanics.

This means that the composition of a legislative body should more or less express the will of the people (i.e., proportionality), and votes should not be wasted or discarded where possible.

6. These two goals, at least where it concerns electoral systems, have differing solutions.

Proportional representation is undoubtedly the fairest and most inclusive system, but it seems to have contributed toward an accountability deficit, has blunted the oversight responsibility of parliament over the executive<sup>3</sup> and weakened the links between MPs and the voters and strengthened the control of party hierarchies. Single-member constituency systems, on the other hand, produce obvious mechanisms of accountability but are “winner-takes-all”, i.e., many constituents' votes are effectively not represented.

7. It has become relatively orthodox to advance a multi-member constituency system with a proportional list component as the future of South Africa's electoral system. This stretches

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<sup>3</sup> Sections 42(3), 55(2)(a) and (b) of the Constitution of the Republic of South Africa, 1996.



back to the majority view of the 2002 Electoral Task Team, which recommended a multi-member system based on the boundaries of district councils with a compensatory national party list.

8. It is CASAC's contention that the multi-member system does not deliver direct accountability between representatives and constituents, but rather a diffuse accountability that could lead to blame-shifting among multi-member representatives. The fact that constituencies will necessarily be geographically and/or population-wise very large militates against any direct relationship between MPs and the voter. Multi-member constituencies could also encourage the cultivation of electoral niches by representatives, rather than encouraging cross-cleavage campaigning and appeals to all potential voters. The architecture of multi-member constituencies, at least as envisaged in the Van Zyl Slabbert Report, would also result in significant overrepresentation of smaller constituencies, to the detriment of larger constituencies. The creation of an imbalance in voting power (i.e., increasing the comparative value of one voter's vote over another's) is an undesirable outcome.
9. For these reasons, CASAC prefers the adoption of a single-member constituency system, which delivers constituencies of relatively similar population size. This will of course entail



the creation of fairly large geographic constituencies in areas of low population density, but the benefits could easily outweigh the potential downsides. Single-member constituencies provide a direct form of accountability: the local representative is the link between constituents and Parliament. A common dissatisfaction with representation in South Africa is that articulating grievances and having them heard by those with the power to address them is difficult if not impossible. Constituency representatives are an obvious mechanism for the collation of societal grievances or inputs on proposed legislation or policy.

10. The current system attempts to achieve this through setting aside specific 'constituency periods' and the assignment of constituencies to MPs by their political parties, but few South Africans seem to know who their constituency representatives are or how to contact them, and MPs have little incentive to pay attention to constituency grievances given that their election to office is not dependent on any specific community's support. Moreover, there is no system in Parliament for MPs to report back on their consultations with their constituents despite Parliament providing some funding for this constituency work. Parliament conducts public hearings on some issues of national importance, but these are mass gatherings, often stage-managed and ineffective in giving voice to ordinary people.





11. Single-member districts will require MPs to pay attention to the desires and concerns of their constituents if they wish to be re-elected. It also provides a mechanism for constituents unhappy with their representative to express their dissatisfaction through the ballot box at the following election.
  
12. The introduction of directly elected representatives should also have a positive upside for the behaviour of Parliament: MPs will be, at least theoretically, more powerful and will not be vulnerable to arbitrary removal from Parliament by party officials. This ought to comparatively empower Parliament vis-à-vis parties and government, and therefore strengthen parliamentary oversight (although this should not be taken as a given). Examples of directly elected ward councillors voting against party lines in the interests of good governance at municipal level do exist, and this pattern could be replicated at a national level. However, electoral system design will have to decide whether directly elected MPs on a party ballot could be removed by the loss of party membership or not. In other words, although beyond the scope of the current legislative process, consideration must be given to the possible deletion of section 47(3)(c) of the Constitution. While giving constituency MPs security of tenure for their electoral term will strengthen their hand, it





may also contradict the desires of their constituents who voted for representatives because of their party affiliation.

13. The accountability and directness of the link between constituents and representatives in single-member districts certainly seems a desirable outcome for an electoral system, especially in the South African context where accountability has been at best illusory.
14. However, there are obvious disadvantages to single-member districts. The most obvious is that they may produce unfair outcomes: while the voting system (two-round, transferable or not, etc.) can mediate this effect, generally single-member districts are good for large parties and those with regional support concentration, and bad for smaller parties, especially those with widely dispersed support. Single-member districts with a first-past-the-post (FPTP) voting system have the most disproportional outcomes. It may disadvantage smaller parties and diminish the fairness and inclusivity of the current electoral system. FPTP also means that some voters' votes are wasted, in that their voice will not be represented if their preferred constituency candidate loses.
15. To compensate for this, and to ensure the constitutionality of the electoral system (which must result in terms of section 46(1)(d) of the Constitution "in general in proportionality"), a proportional representation component must be included. The van Zyl Slabbert majority



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view argued for a 300:100 split, where 300 constituency seats across 69 constituencies would be supplemented by 100 compensatory proportional seats. The number of constituency seats in comparison to proportional seats is something that is probably best decided based on how constituencies would be demarcated, and what the imbalances in registered voters are between existing demarcations. Several options prefer constituencies demarcated along municipal lines, which, while allowing for the grouping of people with similar general interests into electoral districts, would also create huge imbalances in constituency size and population. It may therefore be necessary for the number of seats in the National Assembly to be increased for the municipal demarcation option to be implemented.

16. Another issue that must be decided is whether the proportional list should be compensatory or separate from the constituency ballot. Compensatory lists are intended to correct the disproportionality of outcomes from constituency systems, by compensating affected parties with seats based on their vote share in constituency elections. It is a mechanism that does not accommodate independent or individuals contesting constituency elections — their votes would be lost / discarded in a compensatory list.

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17. Separate proportional ballots would allow for voters to split their ballot, and vote in their constituency based on the performance of their representative, while still voting for their party preference at a national level.
18. Both systems have drawbacks, as do all electoral models. Separate ballots would not necessarily guarantee completely fair and proportional seat allocation outcomes, although they would soften the blow for smaller parties. A compensatory list, however, removes the option for a split ballot. The split, or second, separate PR ballot empowers and increases the voice available to a voter, and expands the choices they can make in expressing their preference at both a local (constituency ballot) and national (PR ballot) level. It may also be detrimental to smaller parties, who will have to run candidates in all constituencies if they wish to have a sufficient national vote share to be represented in Parliament. A separate ballot is thus a more appropriate choice, as it will allow small parties to run national campaigns and give voters more options to express their political preferences.
19. There are several further modalities that Parliament will have to consider, in terms of actual balloting systems (transferable votes, for instance), what would qualify a candidate for electoral victory (first-past-the-post or majorities achieved through two-round elections?) and the demarcation of constituencies.





20. Nevertheless, CASAC believes that the correct choice of electoral system in terms of the balance of accountability and fairness is a single-member constituency system combined with a separate national proportional ballot. This will serve to expand voter voice and choice, and empowers voters.

21. Finally, we would urge Parliament to consider that designing an electoral system is not just for the next election or even the one after that. It is indeed a rare opportunity for societies to re-assess such a fundamental mechanism around which any democracy pivots. It is therefore necessary to consider the long-term sustainability and effectiveness of an electoral system. It should be a system that harnesses and deepens the democratic culture in society.

#### **CASAC's submissions on the Electoral Amendment Bill**

22. Before setting out our views on the Bill, we wish to make some preliminary observations.

23. First, we acknowledge that the current Bill is a product of the work done by the Department of Home Affairs and that the content represents the choice made by Cabinet in relation to electoral reform.





24. Second, we also highlight that the chosen electoral model reflects the minority view (“option 1”) as contained in the report of the MAC and that the choice by Cabinet did not include any of the reforms envisaged by a majority of the MAC in “option 2” of the report.
25. Third, we understand from the deliberations of the committee of the meetings held on 8 and 15 February 2022, respectively, that there is no consensus among members of the Committee about which option is best suited to the needs, circumstances, and political realities of the South African electorate.
26. Fourth and lastly, we are encouraged by the Committee's decision to seek an extension of the period of suspension stipulated by the Constitutional Court in its order in *New Nation* //Yoxe/r/e / and believe that it will be necessary to engage thoroughly with the public and other stakeholders to design an electoral system which is fair, enhances accountability and produces proportional outcomes, and that that cannot be achieved within the current timeframes.
27. The Bill, broadly stated, envisions a modified version of the existing multi-member constituency system coupled with a compensatory proportional representation system. It divides the 400-member National Assembly into 200 “constituency seats” which may be contested by both political parties and independent candidates and 200 “compensatory



seats” which may only be contested by political parties to correct any deviations from proportionality resulting from the allocation of the constituency seats.

28. It further envisions a three-stage vote allocation process where the constituency seats are allocated to independent candidates in the first two stages by employing a quota system where a seat is allocated to an independent candidate once the quota is reached and excess votes are discarded. In the third stage, the remaining seats after the allocation of seats to independent candidates and the discarding of excess votes are allocated to political parties based on a formula set out in the Bill.
29. In relation to the compensatory lists, seats will be allocated in accordance with the number of votes cast for each political party and in terms of the existing formulae used by the Electoral Commission.
30. In terms of the Bill, provinces would constitute ‘regions’ which would in turn constitute ‘constituencies’ for the purposes of determining where independent candidates can stand for election. In sum, each province would have separate elections with separate independent candidates standing in those elections.
31. CASAC submits that the option reflected in the Bill is inappropriate. The current version of the Bill serves to empower political parties by disempowering voters. CASAC submits that



Parliament should extensively amend the Bill to ensure that the reforms that best enhance accountability for elected MPs and reflect the electoral choices of voters, is adopted.

32. In that respect, CASAC submits the following:

- 32.1. The multi-member constituency model in the Bill is skewed in favour of political parties. CASAC once again reiterates that a single-member constituency model with a separate national proportional representation (PR) ballot is best suited for our country.
- 32.2. Under CASAC's proposed model independent candidates would not be restricted to regional elections as is currently the case and would compete for votes against political parties at a constituency level.
- 32.3. The Committee rightly expressed concerns about the discarding of excess votes after independent candidates meet the quota, which leads to 'excess' votes being "wasted". The Bill as it stands maximises only the roles of political parties and does not adequately integrate independent candidates.
- 32.4. To address this, CASAC submits that Parliament should amend the Bill to introduce a mechanism to ensure that very few votes, if any, are wasted.





- 32.5. One suggestion is to make use of choice-ranked voting for constituency seats where a voter is given a ballot with two votes and the option of ranking their preferred candidates as first or second. Where the first-ranked candidate is elected, the excess votes received by such a candidate would be distributed to the second-ranked candidate or party, to ensure that independent candidates are able to compete fairly against, and are not crowded out by, political parties.
- 32.6. Such a system would also be beneficial to political parties who would also not lose as many votes as they would if the excess votes were simply to be discarded and not redistributed. This system also ensures that each vote cast counts and is not wasted.
- 32.7. The system described above would not work with large constituencies such as provinces or regions, therefore, it is proposed that constituencies be drawn up in accordance with the existing districts at local government level, adjusted for population numbers and spatial considerations.
- 32.8. At national PR level, voters across the country would have the choice of voting for any independent candidate in any part of the country and perhaps the current formula in the Bill may be slightly modified and used to determine the overall





proportional share of seats allocated to political parties once the independent candidate quota has been reached.

- 32.9. The ranked-choice voting system would also assist in filling vacancies left by independent MPs, which would be filled by the next-in-line candidate and not left vacant for the remainder of the term until the next election and would avoid the need for multiple and costly by-elections whenever a vacancy arises.

#### Conclusion

33. In sum, the Bill at present does not adequately address the issues pertinently raised by the Constitutional Court, nor does it address the weaknesses of the current electoral system which were highlighted in the 2002 Van Zyl Slabbert Task Team Report, and the Report of the High-Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change, chaired by former President Kgalema Motlanthe. The latter Report states:

“The Panel recommends that Parliament amend the Electoral Act to provide for an electoral system that makes members of Parliament accountable to defined constituencies in a proportional representation and constituency system for national elections.”





34. Regrettably, the Bill adopts a light-touch approach to electoral reform which does not meaningfully provide South Africans with the opportunity to elect and hold accountable their public representatives and instead entrenches the dominance of political parties in the system. That is unfortunate.
35. Parliament now has the chance to give effect to the will of the South African people by bringing them closer to their democratic institutions. It should not shirk from this duty by adopting an approach that is pragmatic at the expense of making a real change.
36. For these reasons, CASAC urges the Committee to consider “option 2” as detailed in the MAC report, with the necessary modifications as detailed above.

