



SOUTH AFRICA

**SUBMISSION BY THE ELECTORAL COMMISSION TO THE NATIONAL ASSEMBLY'S
PORTFOLIO COMMITTEE ON HOME AFFAIRS**

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A. INTRODUCTION

- 1 Free and fair elections are the lifeblood of democracy.¹ They allow people to select their leaders and then to hold them accountable.²
- 2 The Constitution requires the Electoral Commission (Commission) to manage elections of national, provincial and municipal legislative bodies in accordance with national legislation, to ensure that those elections are free and fair, and to declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.³
- 3 The determination of the most appropriate electoral system and any review of the legislation pertaining to elections requires significant consultation with all South Africans and finalisation by democratically elected representatives. One of the Commission's duties – as set out in section 5(1)(j) of the Electoral Commission Act, 1996⁴ - is to review proposed electoral legislation and to make recommendations in connection therewith. The role of the Commission in these processes is to assist on the basis of its knowledge, experience and expertise and to outline potential practical implications of any proposal.
- 4 Sections 46(1)(d) and 105(1)(d) of the Constitution require the election of members of the National Assembly and provincial legislatures, respectively, to be conducted in terms of an electoral system that results, in general, in proportional representation.
- 5 In New Nation Movement NPC v President of the Republic of South Africa,⁵ the Constitutional Court declared that the Electoral Act, 1998⁶ is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties. The Court suspended the operation of the declaration of invalidity for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.

¹ Donald J. Trump for President, Inc. and Others v Secretary Commonwealth of Pennsylvania and Others, available at <https://www2.ca3.uscourts.gov/opinarch/203371np.pdf>

² Steven L. Taylor, Matthew S. Shugart, Arend Lijphart, and Bernard Grofman, *A Different Democracy* (Yale University Press, 2014).

³ Section 190(1) of the Constitution

⁴ Act No. 51 of 1996

⁵ 2020 (6) SA 257 (CC).

⁶ Act No. 73 of 1998

- 6 On 31 December 2021 the Minister of Home Affairs (Minister) published a notice of his intention to introduce the Electoral Amendment Bill, 2022⁷ in the National Assembly, together with an explanatory summary of the Bill.⁸ The Bill was subsequently introduced in the National Assembly on 10 January 2022 and referred to the Portfolio Committee on Home Affairs (Committee).
- 7 The Amendment Bill seeks to make provision for the election of independent candidates to the National Assembly and provincial legislatures and to provide for matters connected therewith.
- 8 In general, the Bill has adopted a “minimalistic” option – one of two approaches proposed by the Ministerial Advisory Committee (MAC). The option envisages the accommodation of independent candidates in the existing electoral system. It does so by dividing the 400 seats in the National Assembly into 200 “regional seats” and “compensatory seats”.
- 8.1 Each region is a multi-member constituency and is allocated a proportional number of regional seats, for which both political parties and independent candidates can compete on a proportional basis.
- 8.2 Only political parties can compete for the compensatory seats on a proportional representation basis, using a closed list system.
- 9 In line with the request of the Portfolio Committee on Home Affairs (Committee) and given its constitutional mandate, the Commission makes these submissions to the Committee in its capacity as the country’s election management body. In keeping with this role, the Commission’s submissions focus on the technical aspects of the proposed amendments and their expected impact on the freeness and fairness of elections by optimising the operation of the electoral system proposed in the Amendment Bill. The submission avoids expressing itself on policy preferences and choices of any electoral system.
- 10 In this submission, the Commission makes its submissions thematically, as opposed to a clause-by-clause critique.

B. ALLOCATION OF REGIONAL SEATS IN THE NATIONAL ASSEMBLY

- 11 Under the existing legislative scheme, regional seats in the National Assembly are allocated per region to the parties contesting an election according to a quota and highest surplus method as follows:

⁷ B1 - 2022

⁸ Under GN No. 1660 in GG No. 45716 of 31 December 2021

- 11.1 A quota of votes per seat must be determined in respect of each region by dividing the total number of votes cast in a region by the number of seats, plus one (the Droop quota basis), reserved for such region.
 - 11.2 The result plus one, disregarding fractions, is the quota of votes per seat in respect of a particular region.
 - 11.3 The number of seats to be awarded in respect of such region to a party is determined by dividing the total number of votes cast in favour of such party in a region by the quota of votes per seat for that region.
 - 11.4 Where the result of the calculation yields a surplus of seats not absorbed by the number awarded to contesting parties, such surplus competes with other similar surpluses accruing to any other party or parties in respect of the relevant region, and any seat or seats in respect of that region not awarded must be awarded to the party or parties concerned in sequence of the highest surplus.
 - 12 The Amendment Bill proposes the allocation of regional seats in the National Assembly using a quota system in three rounds. In the first and second rounds, independent candidates will have an opportunity to gain a seat if they meet the quota of votes per seat. A Hare quota is used for the quota calculation in the first two rounds, i.e., dividing the number of valid votes (parties and independents) by the number of seats available in the region. The result, plus one, disregarding fractions is the quota to be used.
 - 12.1 In the first round, any independent candidate who satisfies the quota for a seat will be allocated a seat.
 - 12.2 In the second round, any independent candidates who succeeded in the first round will be removed, along with all the votes cast for him or her. A new quota will be calculated by taking into account the remaining votes and seats. Any independent candidate who satisfies the new quota will be allocated a seat.
 - 12.3 In the third round, political parties will be allocated their seats. All independent candidates (whether successful or unsuccessful) and all votes casts for independent candidates will be removed. A Droop quota will be used (as is currently the case) to allocate the remaining seats in proportion to the number of votes per political party.
 - 13 As already indicated, the Constitution requires the election of members of the National Assembly and provincial legislatures, respectively, to be conducted in terms of an electoral system that results, in general, in proportional representation.
 - 14 At the outset, it is apt to point out that none of the proportional representation systems actually achieve complete proportionality. The list systems of PR incorporate their own distortions to proportionality. In the existing legislative scheme, our PR system uses subnational
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constituencies, or regions, which do not create a perfect reflection of overall proportionality because of the inevitable distorting effects of all electoral formulas.⁹ Electoral formulas are therefore not as innocuous as they may at first blush look.

- 15 This ties in with the requirement to ensure “free and fair elections”, which the Constitutional Court has held to highlight “*both the freedom to participate in the electoral process and the ability of the political parties and candidates, both aligned and non-aligned, to compete with one another on relatively equal terms*”.¹⁰
- 16 The Commission would recommend the simplification of the three round allocation system by adopting a single round allocation using a Droop quota and a highest remainder method. By simply including the independents in the current calculation of regional seats, more proportional results will be produced, with smaller parties (and in this case independent candidates) standing a better chance of gaining seats. A Droop quota moderates the potential bias in favour of smaller parties resulting from the largest remainder system by providing for a lower quota (as opposed to the Hare system), which results in more seats being allocated to parties and independent candidates who receive a full quota and fewer being allocated by remainders.¹¹ In addition, independent candidates will benefit from highest remainder allocations, which, in the current Bill, will not be the case.
- 17 The Commission’s suggestion in response to the existing provisions in the Bill would operate as follows:
 - 17.1 A quota of votes per seat must be determined in respect of each region by dividing the total number of votes cast in a region by the number of seats, plus one, reserved for such region.
 - 17.2 The result plus one, disregarding fractions, is the quota of votes per seat in respect of a particular region.
 - 17.3 The number of seats to be awarded in respect of such region to a party or independent candidate is determined by dividing the total number of votes cast in favour of such party or candidate in a region by the quota of votes per seat for that region. Each independent candidate who meets the quota is allocated a seat and does not take any further part in the allocation process.
 - 17.4 Where the result of the calculation yields a surplus of seats not absorbed by the number awarded to a party or independent candidate, these seats are allocated to parties and

⁹ David M Farrell, *Electoral Systems (A Comparative Introduction)*, 2nd Ed., Red Globe Press, London, 2011, at page 65

¹⁰ Kham and Others v Electoral Commission and Another 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC), para [86]

¹¹ Farrell *supra*, note **Error! Reference source not found.**, pages 68 – 69

independent candidates who have not already been allocated seats on the basis of the largest remaining votes in descending order.

C. RESTORING PROPORTIONALITY

- 18 In the current scheme, after the regional seats are determined and aggregated by party, a national proportional quota is determined.
- 19 The quota, using the Droop method, is determined by dividing the total valid votes by 400 plus 1 seats (i.e. 401) and the result plus 1, disregarding fractions, is the national proportional quota.
- 20 The regional seats (200) are then subtracted from the national seats (400) to arrive at the 200 proportional seats.
- 21 The Amendment Bill proposes to restore proportionality by determining a compensatory quota with 200 seats, i.e. the quota is calculated by dividing the total valid votes by 200 plus 1 seats (201) and the result plus 1, disregarding fractions, is the compensatory national quota.
- 22 The effect of using 200 seats instead of 400 seats is a doubling of the national proportional quota.
- 23 The Commission submits that this distorts proportionality and eliminates smaller parties.
- 24 The Commission suggests that the current scheme in the Bill, using 400 seats, is therefore adapted as follows:
 - 24.1 The national quota is determined by dividing the total valid *party* votes by 400 plus 1 minus independent seats allocated. The result, plus 1, disregarding fractions is the national proportional quota.

D. FILLING OF VACANCIES IN RESPECT OF INDEPENDENT CANDIDATES

- 25 Sections 47(4) and 106(4) of the Constitution require that vacancies in the National Assembly and in a provincial legislature must be filled in terms of national legislation.
 - 26 The current scheme – provided for in Item 23 of Schedule 1A to the existing Act – requires that in the event of a vacancy in a legislature, the party which the vacating member represented must fill the vacancy by nominating a person whose name appears on the list of candidates from which that party's members were originally nominated and who is the next qualified and available person on the list.
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- 27 The Amendment Bill proposes to retain this scheme for those members of the National Assembly and provincial legislatures who were elected from party lists.¹² However, it proposes to leave seats allocated to independent candidates which become vacant during a term unfilled until the next elections.¹³
- 28 The Commission submits that this differentiation between vacancies in seats allocated to political parties and those allocated to independent candidates is likely to negatively affect the constitutional requirement of general proportionality, the right to equality before the law, the express constitutional requirement that vacancies must be filled in terms of national legislation and the minimum requirement of representatives prescribed by the Constitution and national legislation. Simply put, if the will of the people, proportionally expressed, is that a legislature must comprise *inter alia* five independent candidates and two vacate office during a term, leaving the seat unfilled for the remainder of the term brings about a result that is no longer proportional and one that does not reflect the will of the people.
- 29 The issue of the filling of vacancies is something that needs further legislative consideration. However, any by-election using the scheme proposed in the current Amendment Bill is not practical during a term.
- 30 The Commission seeks to provide proposals on the basis of the current Amendment Bill for consideration by the Portfolio Committee as a contribution to the possible resolution of this vexed issue. The Commission's puts forward one suggestion as follows:
- 30.1 The vacant seat is allocated to the party or qualified and available independent candidate with the highest remainder of votes in the relevant regional election.
- 30.2 The quota to fill a vacant seat is recalculated according to the same formula, except that the vacant seat(s) and the number of votes cast for the previous incumbent as well as independent candidates already holding seats, are disregarded. The same process of highest remainders will also be followed for seats not allocated during the first round.
- 31 In terms of this initial suggestion as outlined above, a vacant seat arising from either a member of a party or an independent be reserved for either category of member which could be a second approach. However, to "reserve" a seat for an independent candidate or a member of a party could risk a seat being allocated in an unfair manner which may offend the principles of vote of equal value and the will of the voter.

¹² See the proposed Item 33 of Schedule 1A

¹³ See the proposed Item 34 of Schedule 1A

E. ELIGIBILITY OF CANDIDATES TO CONTEST REGIONAL ELECTIONS FOR THE NATIONAL ASSEMBLY AND ELECTIONS OF PROVINCIAL LEGISLATURES

- 32 Sections 47(1) and 106(1) of the Constitution provide that every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly and/or of a provincial legislature.
- 33 The Commission accepts that eligibility to vote is subject to the additional requirement that the person seeking to vote must be registered to vote in terms of the Electoral Act. In New National Party,¹⁴ the Constitutional Court considered the intersection between the right to vote and the right to free and fair elections:

“The right to vote is, of course, indispensable to and empty without, the right to free and fair elections; the latter gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised.”

- 34 Therefore, there is nothing constitutionally repugnant in making it a requirement (as the Amendment Bill does) for a person seeking to stand for public office to be registered to vote, as qualification for voting is subject to the statutory requirement of registration.
- 35 The current scheme gives effect to this constitutional injunction in that every citizen qualified to vote – regardless of their place of ordinary residence or where that person is registered to vote – may appear on a party’s regional lists for the National Assembly and a party’s provincial legislature list, even if that candidate does not ordinarily reside and is not registered to vote in the region or province concerned.
- 36 The Amendment Bill proposes to retain this system in relation to candidates nominated on a party’s regional list: the candidate need not be ordinarily resident registered to vote in the region or province concerned, and the only requirement is that the candidate be qualified to vote in an election for the National Assembly.
- 37 However, the proposed section 31A(1) provides that a person may be nominated to contest an election as an independent candidate in a region for the National Assembly or for a provincial legislature if that person is (a) ordinarily resident in the region or province concerned and (b) registered as a voter on the segment of the voters’ roll for the region or province concerned. The Commission understands that the requirement is intended to foster better accountability in respect

¹⁴ *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) para [12].

of independent candidates but is concerned that the same requirement does not apply to party candidates.

38 For these reasons, the Commission would suggest:

- 38.1 That the requirement be removed from the Amendment Bill. The effect of removing that provision would be that a qualifying independent candidate who is registered as a voter will be entitled to contest the regional elections in all nine regions. This however, does not equate to the independent candidate being able to aggregate votes across regions. The independent's ability to stand without limitation to a specific region is conditional on the independent being only allocated to a seat they have won with the highest proportion of votes relative to the respective quota in that region. All other seats won by the independent in other regions would be forfeited and excluded from further results calculation in all other elections contested by that independent. This will require that provision be made for a recalculation of the quota in the forfeited regional constituency, disregarding the forfeited seat(s) and the votes cast in favour of the independent candidate who forfeited the seat concerned as well as any other independent candidates already holding a seat. Similarly, the proposal in Item 3(4)(b) that a party list candidate may only appear on one regional list would have to be discarded.
- 38.2 Alternatively, and to the extent that the legislature approves the proposal that independent candidates should only be able to contest regional elections for the National Assembly and elections for provincial legislatures provided they are ordinarily resident and registered as a voter on the segment of the voters' roll for the region or province concerned, the Commission proposes that the same requirement should apply to persons whose names appear on a party's regional lists for the National Assembly and a party's provincial legislature list.

F. NUMBER OF BALLOTS

- 39 In the current scheme, elections for members of the National Assembly and provincial legislatures are conducted simultaneously.
- 39.1 A registered voter who presents at a voting station to vote is ordinarily given two ballot papers: one for the National Assembly and another for the legislature of the province in which he is registered to vote.¹⁵
- 39.2 Voters registered on the international segment of the voters' roll and those who are voting outside of the province where they are registered are not given a provincial ballot.

¹⁵ Item 15 of Schedule 1A to the Electoral Act

- 39.3 A voter's vote for the National Assembly is cast on a single ballot, which means that the voter's vote for a regional list and a national list are cast for the same party on a single ballot.
- 40 The Amendment Bill proposes to retain the same scheme, with the additional requirement that the ballot paper to be used in each region for the election of members of the National Assembly shall include only the independent candidates standing in that region for election to the National Assembly, together with the relevant political parties.
- 41 The Commission is of the view that it would better enable the realisation of the right to make political choices if the voter is afforded a multiplicity of choices regarding who to vote for in the election of members of the National Assembly. Accordingly, the Commission recommends that the Committee considers amending this scheme to provide for three separate ballots:
- 41.1 The first ballot will be for the election of the compensatory 200 members of the National Assembly, which is contested on a closed list basis. In keeping with the legislative proposal in the Amendment Bill that this election be contested by registered parties only, only the names of those parties who have met the requirements for contesting this election will appear on this ballot.
- 41.2 The second ballot will be for the regional elections of the 200 members of the National Assembly. This ballot will vary from region to region, depending on which parties and independent candidates contest the relevant regional election. Only the names of the parties and independent candidates who have met the requirements for contesting each such regional election will appear on this ballot.
- 41.3 The third ballot will be for election of the members of the provincial legislature in each province (provincial ballot). The names of the parties and independent candidates who have met the requirements for contesting each such regional election will appear on this ballot.
- 42 The Commission has considered whether its proposal will not add an additional complexity to the elections for members of the National Assembly and provincial legislatures and is of the view that the proposal will make it easier for voters, to make informed choices, thus giving better effect to the will of the people. The current proposal is that there will be one ballot for the National Assembly, on which the voter must cast a vote for the regional constituency election and for the 200 compensatory seats. This will mean that a voter casting a vote for the National Assembly is offered a binary choice: vote for *either* a party or an independent candidate to represent them in the National Assembly. Such a voter may want to split their vote for the regional constituency election and for the 200 compensatory seats and, for instance, vote for an independent candidate in the regional constituency election and for a party in the election of the 200 members elected on a closed list system. The Commission's proposal would expand that choice.
- 43 In addition, most voters who are registered to vote outside metropolitan municipalities already have to cast three separate ballots in general local government elections, i.e., a ballot for the ward

constituency election (in which independent candidates compete with political parties for ward seats and is therefore similar to a regional constituency election), the local council PR election and the district council PR election. Previous experience has shown the Commission that, with adequate voter education, most voters are able to understand the system and give effect to their choices when marking each ballot.

- 44 The proposal would further facilitate the participation of voters abroad in the election of the envisaged 200 National Assembly compensatory seats which is consistent with the current scheme on the participation of South Africans resident outside of the Republic.
- 45 It follows, in the Commission's submission, that an additional ballot will not detract from the requirements of a free and fair election.

G. CONSEQUENTIAL MATTERS

- 46 As the Office of Parliamentary Legal Services rightly points out, the change in the electoral system will require several consequential amendments to the Electoral Act such as those we deal with below. There is other legislation, including that administered by the Commission such as the Political Party Funding Act, which may also require amendment.

Requirements for participation and electoral deposits

- 47 The Electoral Act currently provides for parties seeking to contest elections of members of the National Assembly and provincial legislatures to pay electoral deposits, which are refunded to the parties that obtain representation in the relevant legislature.
- 48 The proposed section 31B(3)(b) of the Electoral Act proposes to authorise the Commission to prescribe an electoral deposit in respect of independent candidates.

PLC representation

- 49 One of the Commission's duties is to establish and maintain liaison and co-operation with parties.¹⁶ Pursuant to that power, the Commission has made the Regulations on Party Liaison Committees, 1998¹⁷ to establish party liaison committees in which parties represented in the National Assembly and provincial legislatures are represented.

¹⁶ Section 5(1)(g) of the Electoral Commission Act, 1996

¹⁷ Published under GN R824 in GG 18978 of 19 June 1998

- 50 The Commission submits that it may be necessary to amend section 5(1)(g) of the Electoral Commission Act, 1996,¹⁸ to include liaison and co-operation with independent candidates as one of its duties.

Agents

- 51 As a natural consequence of the use of the closed party list system hitherto, the Electoral Act currently provides for only parties to have agents during elections.
- 52 Chapter 5 of the Electoral Act will have to be amended to allow independent candidates to appoint agents, similar to independent ward candidates in local government elections.

H. CONCLUSION

- 52 The Commission has apprehensions about the increase in the number of electoral contestants, namely that:
- 52.1 This has serious implications for the increased costs of elections;
- 52.2 The threshold which the Commission must adopt for determining qualification to be a candidate - whether by way of monetary deposit and demonstration of electoral support - may have to be adjusted upward to obviate frivolity without creating perceptions that barriers are being placed to participation;
- 52.3 The increase in number of contestants has a corresponding and consequential increase in the size of the ballot paper and electoral logistics generally. An unwieldy ballot paper also has a deleterious effect on the ability of voters to identify their candidates and to vote on an informed basis.
- 53 The Commission has an interest that whatever electoral system that Parliament eventually adopts must be simple both from a voter's perspective and that of election administration. For the voter, the ritual of making a mark on a ballot must retain the connection with the understanding of how seats are allocated in a legislative assembly. For an election management body, the system must be simple enough to facilitate the release of election outcomes sooner rather than later.
- 54 To the extent that the Portfolio Committee decides to pursue other specific alternatives other than those tabled in the current Bill following its consultations and deliberations, the Commission stands ready to express its views.

¹⁸ Act No. 51 of 1996
