# SUBMISSION OF THE ELECTORAL COMMISSION TO THE PORTFOLIO COMMITTEE

# Proportionality in comparative perspective

1. The central claim of submissions relating to seat calculation is that the Bill will lead to disproportionality, thus violating sections 46 and 105 of the Constitution.
2. Studies to electoral systems generally agree that perfect proportionality, meaning an electoral system where each party receives exactly the same share of seats as it received of the votes, is unattainable.
3. It logically follows that some deviation from perfect proportionality (i.e., disproportionality) is unavoidable. Presumably, this is the reason why the drafters of the Constitution used the phrase “in general, in proportional representation”, when specifying the electoral system.
4. Three (primary) factors determine the proportionality of an electoral system:
   1. **Electoral threshold**: Refers to the minimum share of votes, in percentage, that a party or candidate must win to obtain a seat in parliament.
   2. **The district magnitude**: The number of candidates to be elected in an electoral district
   3. **The electoral formula**: Is the mathematical equation that determines how votes are translated into parliamentary seats.
5. Overall, the proportionality of an electoral system increases with:
   1. Decreases in the electoral threshold;
   2. Increases in the average district magnitude; and
   3. Improvements in the proportionality of the electoral formula.
6. Across all three factors, South Africa’s electoral system is ranked among the most proportional in the world. There is no electoral threshold, meaning that relatively few votes are wasted.
7. The average district magnitude is high, exceeded only by countries with just one (national) district (e.g., East Timor, Israel, Netherlands, San Marino, and Slovakia). Pertinently, section 46(1) of the Constitution provides that the National Assembly consists of 350-400 members. On the other hand, item …Schedule 1A provides that the 400 seats of the national assembly will be contested on the bases of 200 national compensatory seats and 200 regional seats. The Commission is empowered to proportionally determine the regional allocation of regional seats. Furthermore, schedule 3 of the Electoral Act provides that ahead of an election, the Commission must determine the size of provincial legislatures.
8. Finally, Droop is considered one of the most proportionate electoral formulas, along with Hare and Sainte-Laguë. Based on the submissions two additional refinements are proposed to optimize the seat calculation formula.

# Theme #1

*The allocation of regional seats is “biased in favour of larger parties, and can have the unintended consequence of transferring a seat from a smaller party to a larger party”*

* While the argument is mathematically correct, it is important to keep in mind that most electoral systems tend to reward parties with large electoral support except where contestants with small support bases are protected, for example, through minority quotas.
* The Bill does not fundamentally violate the principle of proportionality. Moreover, a review of the examples provided in the annexure to the submission suggests that the bias has a measurable effect only in extreme cases.

# Theme #2

*The use of a single ballot for provincial legislatures “causes the results to be disproportional”.*

The Submission claims that “because individuals (independent candidates) are placed on the same ballot as parties, disproportionality in outcomes is inevitable”, and that elections for provincial legislatures “cannot meet the constitutional requirement of proportionality (s 105(1)(d)) without having some form of sub-provincial constituencies”.

* The issue raised is the fact that a province does not have 2 ballots like the national assembly. However, the provincial legislature should be likened to the regional seat calculations where independents are included and compete on the same basis as the parties and therefore a spilt is not indicated. A spilt would furthermore require some sort of geographical determination inside the provinces, which, is not provided for in the Bill.
* The claim is also not properly explained and runs counter to the basic thesis that increases in the average district magnitude increases the proportionality of an electoral system. Further explanation is necessary to fully understand the claim.

# Theme #3

*The inclusion of regional ballots in PR calculations for the National Assembly “violates the s 46 requirement of ‘in general, proportional representation’, and the s 19 right to fair elections”.*

Referencing the IEC’s proposal that a second ballot is required for the National Assembly to meet the constitutional requirement of proportionality, the Submission argues that “the calculation of PR totals using both regional and PR ballots is incorrect, and creates a situation where the disproportionality of the regional ballots (having had votes and seats for independents removed) is transferred to the overall PR calculations”.

* 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.

# Theme #4

*The provisions allowing independent candidates to contest multiple elections (National Assembly regions, and a provincial legislature) “disenfranchises voters, and creates disproportionality […] with a bias towards larger parties”.*

* The argument is mathematically correct. When an independent candidate forfeits a seat in the provincial legislature in favour of a seat in the national assembly, the former is reallocated as described in the Bill and may benefit parties with large electoral support.
* This does not fundamentally violate the principle of proportionality.

# Theme #5

*The method of filling vacancies “relies on a defective recalculation method that is unnecessarily complicated, and that has a built-in bias in favour of larger parties”.*

The Bill proposes to fill vacancies by making use of the re-calculations described in Items 7 and 12 of Schedule 1A. According to the Submission, “these recalculations rely on removing votes from the system, which has the effect of reducing the Quota”, which means that “parties with Quota seats benefit by the amount of the reduction in the Quota multiplied by the number of Quota seats”. The Submission proposes that “vacancies can be filled by using the original seat allocation calculations, and allocating the seat to the party or candidate with the highest Remainder out of those parties and candidates that have not yet secured a Remainder seat”.

* This does not seem advisable, as it could theoretically allocate seats to contestants with few votes in the elections.
* Also, during the 5-year term, remainders may be depleted. Without a recalculation there could be a shortage of remainders to allocate seats to.

# Drafting Proposals

Item 7 2(a) and (b)

(2) *(a)* If an independent candidate has been allocated more than one seat in a region, he or she is allocated one seat and forfeits any additional seat.

*(b)* Where an independent candidate has been allocated a seat in more than one region, he or she is allocated the seat in the region where he or she received the most number of votes and shall forfeit any additional seats.

Item 12(d)

*(d)* The number of seats to be awarded for the purposes of paragraph (*f*) in respect of such province to a party or independent candidate participating in the recalculation must, subject to paragraph (*e*), be determined by dividing the total number of votes cast in favour of such party or independent candidate in such province by the amended quota of votes per seat indicated by paragraph *(c)* for such province.

***Filling of Vacancies***

Item 22

(1) In the event of a vacancy in a region or provincial legislature with respect to a seat allocated to an independent candidate, the chief electoral officer must in writing allocate the seat by recalculating the result as follows:

*(a)* disregarding the votes allocated to the independent candidate causing the vacancy;

*(b)* disregarding the votes and seats allocated to the independent candidates already in office; and

*(c)* recalculating the result for the region or provincial legislature in terms of the provisions in subitem 3.

(2) The vacant seat is awarded to an eligible independent candidate or party that contested the preceding election in terms of subitem 1*(c)*.

(3) *(a)* An amended quota of votes per seat must be determined in respect of such region or province by dividing the total number of votes cast in the region or province, minus the number of votes cast in the region or province in favour of the party or independent candidate causing the vacancy, minus the votes cast in such region or province in favour of independent candidates already allocated one seat, by the number of seats, plus one, determined in terms of item 4 or item 8 in respect of the region or province concerned, minus the seats held by independent candidates in terms of paragraph 5*(i)* or 11*(f)*.

*(b)* The result plus one, disregarding fractions, is the amended quota of votes per seat in respect of such region or province for purposes of the said recalculation.

*(c)* The number of seats to be awarded for the purposes of paragraph (*e*) in respect of such region or province to a party or independent candidate participating in the recalculation must, subject to paragraph (*d*), be determined by dividing the total number of votes cast in favour of such party or independent candidate in such region or province by the amended quota of votes per seat indicated by paragraph *(b)* for such province.

*(d)* Where the result of the recalculation in terms of paragraph *(c)* yields a surplus not absorbed by the number of seats awarded to a party concerned or independent candidate who has not been awarded a seat, such surplus competes with other similar surpluses accruing to any other party, parties or independent candidates participating in the recalculation, and any seat or seats in respect of such region or province not awarded in terms of paragraph *(c)*, must be awarded to the party, parties or independent candidates concerned in sequence of the highest surplus.

*(e)* The aggregate of such a party's awards in terms of paragraphs *(c)* and (*d*) in respect of such region or province, subject to paragraphs *(f)* and *(g)*, indicates that party's or independent candidate’s final allocation of the seats determined under item 4 or item 8 in respect of that region or province.

(f) In the event of a party being allocated an additional number of seats in terms of this item and if its list in question then does not contain the names of a sufficient number of candidates as set out in item 7(1) or item 12(1), the process provided for in item 7 or item 12 must be repeated with the changes required by the context until all seats have been allocated.

(g) In the event of an independent candidate being allocated more than one seat in terms of this item, the procedure provided for in item 7 and item 12, must be repeated with the changes required by context until all seats have been allocated.

Item 23

(1)Should any party or independent candidate stand to lose a seat during the recalculation contemplated in item 22, the party or independent candidate will retain the seat.

(2) A recalculation must be done as follows:

*(a)* disregarding the votes and seat allocated to the party or independent candidate contemplated in subitem (1);

*(b)* disregarding the votes and seats allocated to independent candidates already in office; and

*(c)* recalculating the result for the region or provincial legislature in terms of the provisions in item 7 or item 12.