

MEMORANDUM

for

MINISTER AND DEPARTMENT OF HOME AFFAIRS

on

**PUBLIC COMMENTS RECEIVED BY NCOP SELECT COMMITTEE ON
ELECTORAL AMENDMENT BILL**

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Chambers, Sandton & Cape Town
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OVERVIEW

- 1 Our urgent advice is sought by the Minister and Department of Home Affairs.
- 2 In this memorandum, we provide broad responses to the public comments received by the National Council of Provinces Select Committee on the Electoral Amendment Bill [B1B—2022] (“**the Bill**”).
- 3 We do not respond to every comment, but deal with broad themes arising from the comments.

RESERVING 200 SEATS IN THE NATIONAL ASSEMBLY FOR POLITICAL PARTIES

- 4 Comments were made that 200 seats only for political parties and excluding independent candidates from contesting those seats is unfair.¹
- 5 We have previously expressed a view that reserving half the seats in the National Assembly for political parties – for purposes of achieving overall proportionality in generally – is not unfair and will likely be found to be constitutionally permissible.
- 6 This is because section 157(2) and (3) of the Constitution expressly contemplates an electoral system at local government level that balances

¹ Right 2 Know Campaign p 2.

participation of independent candidates and proportional party representation in a similar fashion.

6.1 Subsection (2) requires that national legislation must prescribe a system for the election of members of a municipal council:

*“(a) of proportional representation based on that municipality’s segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party’s order of preference; **or***

(b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll.”
[Emphasis added.]

6.2 Subsection (3) requires that an *“electoral system in terms of subsection (2) must result, in general in proportional representation.”*

7 In *New Nation Movement*,² Madlanga J commented on this provision when considering whether the participation of independent candidates in national and provincial elections would undermine the proportionality requirements of the Constitution. He held as follows:³

“[I]t is quite plain from the provisions of section 157(3) of the Constitution that proportional representation is quite possible where there is a combination of representation through party lists and representation by individuals who need not be attached to political parties. Here is why I say so. In respect of the election of members of a Municipal Council, section 157(2) empowers Parliament to pass legislation that prescribes a

² *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC).

³ At paras 79-80.

system: where members are exclusively elected through party lists (section 157(2)(a)); or where membership is drawn from a combination of party lists and ward representation (section 157(2)(b)). Read in the context of section 157(2)(a), which is specific on exclusive party representation, ward representation under section 157(2)(b) certainly does admit of independent candidate representation. That is so because in respect of ward representation the section is silent on party participation. It matters not that in ward representation some – even most – individual candidates may, in fact, be sponsored by political parties.

Section 157(3) then requires that an electoral system under section 157(2) (meaning either exclusively party based or comprising a combination of party lists and ward representation) “must result, in general, in proportional representation”. This is the clearest possible statement that dispels the notion that proportional representation is consonant only with representation through political parties.”

8 Thus, the Constitution recognises that a mixed system – of political party proportional- and independent candidate-representation – can still satisfy the requirements that an electoral system must generally result in proportional representation.

9 Parliament enacted a mixed system at local government level.

10 Section 22 of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act) provides the following in respect of the election of councillors to metropolitan and local municipalities:

“(1) The council of a metropolitan or local municipality consists of councillors elected in accordance with Schedule I—

- (a) *by voters registered on that municipality's segment of the national common voters roll, to proportionally represent the parties that contested the election in that municipality; and*
 - (b) *by voters registered on that municipality's segment of the national common voters roll in the respective wards in that municipality, to directly represent the wards.*
- (2) *The number of ward councillors in a metropolitan or local council referred to in subsection (1) (b) must be equal to 50 per cent of the number of councillors determined for the municipality in terms of section 20 the number of councillors determined in terms of section 20 is an uneven number, the fraction must be rounded off upwards.*
- (3) *The number of proportionally elected councillors in a metropolitan or local municipality referred to in subsection (1) (a) is determined by subtracting the number determined in terms of subsection (2) from the number of councillors determined for the municipality in terms of section 20."*

11 Two ballots are used to determine the seats allocated for ward councillors and proportional representation councillors respectively.

12 In our view, mirroring a similar system for elections of the National Assembly – including the use of two ballots – strikes a balance between permitting independent candidates to contest the election, while at the same time ensuring overall proportionality.

13 While the Structures Act has never been challenged, we are of the view that it is constitutionally permissible. It provides a justification for the position taken in the Bill.

- 14 The fact of the matter is that independent candidates by their nature have the potential to skew proportionality in the system (as they can only ever obtain a single seat no matter how large or small their proportional support is amongst the voters). It is therefore entirely appropriate for the system to take measures to ensure that proportionality can be achieved. Of course, political parties are the prime bodies through which proportionality is achieved in any electoral system.
- 15 The Constitution recognises the role of political parties in our political and electoral system. Section 1(d) provides that the Republic is founded on the value of *inter alia* a “*multi-party system of democratic government, to ensure accountability, responsiveness and openness.*” The Constitutional Court has emphasised that on “*our system of democracy political parties occupy the centre stage and play a vital part in facilitating the exercise of political rights*”.⁴
- 16 The exact proportion of how many seats should be used to achieve overall proportionality (the compensatory seats), and how many should be available to be contested by independent candidates and political parties (the regional seats) is something that is pre-eminently that Parliament must decide. We accept that an extreme skewing may be found to be irrational (say if independent candidates could only contest 1 or 2 seats out of 400), but reserving half the seats as compensatory seats is rational.

⁴ *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) at para 65.

WASTED VOTES AND PROPORTIONAL REPRESENTATION FOR INDEPENDENT CANDIDATES

17 Concerns were again raised with the fact that votes may be forfeited by independent candidates who receive an excess of votes to be allocated a seat.

18 We reiterate that in virtually any electoral, there is always the occurrence of what might be termed “wasted” votes.⁵

18.1 If Candidate X stands as an independent and receives 50 000 votes, whereas the threshold for election to a seat is only 40 000 votes, there is nowhere else for these excess 10 000 votes to go. Some might say that they are then “wasted”.

18.2 Even in the current pure PR electoral system, if a political party receives 40 000 votes, and the quota for a seat is 45 000 votes, then the party will not obtain a seat at all and those 40 000 votes will be “wasted”. Or if a party were to received 85 000 votes, they would only receive a single seat, and the additional 40 000 votes would be “wasted”.

18.3 In a single member constituency or first-past-the-post system, there are always wasted votes. This is because the election turns not on overall proportionality, but the extent to which a party or candidate wins the majority of votes within a single constituency. The overall balance of power in the legislature is not determined by the proportional number

⁵ Some of the public comments recognised this, see Inclusive Society Submission p 5.

of votes received, but rather by the number of constituencies that are won. Because it is impossible to demarcate perfectly proportional constituency boundaries, a party may receive the majority of votes overall, but their candidates may not have won the majority of constituencies, and so many votes are wasted because a minority of voters would have chosen the majority of representatives in the legislature. This system gives rise to gerrymandering and all sorts of other problems.

18.4 The point we wish to make is that in any electoral system wasted votes is a possibility

19 We have previously expressed the view that the fact that there may be wasted votes, does not render the system impermissible or unconstitutional on its own.

19.1 As we have said, “wasted” or “lost” votes are a common feature of other election systems, including single member constituency systems.

19.2 Moreover, the reality is that the votes cannot truly be said to be “wasted” or “lost”. If Independent Candidate X runs for the National Assembly as an independent and is elected, then both Independent Candidate X and the voters have achieved their objective. The mere fact that she might have been elected with fewer votes (40 000) does not change that.

19.3 And, of course, if Candidate X considers that she will get so many votes that they will cover two more seats, then she has the right to form her

own political party to run for multiple seats, rather than running for a single seat as an independent.

20 In addition to the question of “wasted” votes, some public comments also bemoaned the fact that the system in the Bill would not provide for proportional representation by independent candidates, if they were to receive votes in excess of two quotas for a seat in the election concerned.⁶

21 Again, this is a result inherent in any system which allows for independent candidates to run and requires overall proportionality. An independent candidate is defined by their choice (which the Constitutional Court has held is constitutionally protected) to contest an election by not associating with others. An independent candidate cannot expect to contest an election as an individual not associating with others— a constitutional choice they are entitled to make – while at the same time, being able to contest as a group. If independent candidate A is convinced they are extremely popular and as a result will receive votes in excess of the quota, the solution from them is simple: register a political party called “Candidate A Party” and run as a group, where the party can put forward a second or third or fourth candidate and so on for any additional votes.

22 The suggestion of permitting the transferring of votes by independent candidates to one another is in our view not required by the Constitution. There are in actually serious concerns about a system which allows an individual candidate to pass over excess votes to other candidates or parties: there is no way to know

⁶ See for example, Afriforum’s comment paras 10-23.

whether those who voted for the candidate would want their vote to go to such other candidate or party. It would also potentially concentrate an enormous amount of power in an individual, which would undermine the founding principle of a multi-party system and the value of proportionality.

LONG-TERM AND BROADER ELECTORAL REFORM

23 In some of the public comments, criticisms are levied against the Bill for not undertaking major electoral reform.⁷ The reasons why the Bill addresses the inclusion of independent candidates into the current electoral system, and does not change the system as a whole are numerous.

23.1 First, the relatively short period of time in which the amending act needs to be passed – both in light of the deadline prescribed by the Constitutional Court and the fact that the next elections must be held in 2024 – meant that it would not have been possible to amend the entire system (for example, to include the creation of new constituencies) for the election to run.

23.2 Second, the current Parliament has no representation from independent candidates, as the system did not permit them to contest elections for the National Assembly and Provincial Legislatures.

24 We are of the firm view that the new system proposed in the Bill should be adopted only for the 2024 elections, and that the Bill should specify the creation

⁷ See for example the submission by the Helen Suzman Foundation.

of a body of experts – broadly representative of society – to undertake a more thorough and long-term investigation into the electoral system, and propose more long-term and larger reforms to the system (should they be appropriate).

25 That would give Parliament, the Department, the Electoral Commission and society as a whole a much longer period of time to consider the issues raised by including independent candidates in the electoral system, and how best to balance this with the constitutional requirements of proportional representation in the system. The 2024 elections will provide concrete evidence of any merits or demerits of the proposed system. And the elected Parliament which provides the long-term electoral reform will be the result of a system which permits independent candidates to contest elections.

26 We are currently considering precisely how to achieve this in the Bill.

ALLOCATION OF SEATS IN NATIONAL ASSEMBLY VERSUS THE PROVINCIAL LEGISLATURES

27 In some of the public comments, it was pointed out that the system for allocating seats in the National Assembly and provincial legislature now differs, in that for the provincial legislature no seats are reserved for political parties as compensatory seats.

28 How this came about was the current system allocates seats on a national-to-national basis and provincial-to-national basis for the National Assembly, but no similar process is used for the provincial legislatures. This was, it seems, to

enable a spread of National Assembly members from the different nine provinces – whereas no similar spread was deemed necessary within a provincial legislature.

- 29 Dividing the seats in the National Assembly to be allocated in accordance with regional lists and national lists submitted by political parties in this manner – to enable a spread of representatives from the provinces – was adopted initially in Schedule 2 of the Interim Constitution of the Republic of South Africa Act 200 of 1993.⁸ The allocation of seats in the provincial legislatures did not follow this approach in the Interim Constitution – indeed all the seats were allocated in the same manner.⁹ This system, as modified, was what was eventually adopted as Schedule 1A of the Electoral Act.

⁸ Schedule 2 clause 2:

“The 400 seats in the National Assembly referred to in section 40 (1), shall be filled as follows:

- (a) *200 seats from regional lists submitted by the respective parties, with a fixed number of seats reserved for each region as determined by the Commission for a particular election, taking into account available scientifically based data in respect of voters, representations by interested parties and the following proposed determination in respect of the various regions:*

Western Cape - 21 seats

Eastern Cape - 26 seats

Northern Cape - 4 seats

Natal - 40 seats

Orange Free State - 15 seats

North-West - 17 seats

Northern Transvaal - 20 seats

Eastern Transvaal - 14 seats

Pretoria-Witwatersrand-Vereeniging - 43 seats; and

- (b) *200 seats from national lists submitted by the respective parties, or from regional lists where national lists were not submitted.”*

⁹ See Schedule 2 clauses 10-14.

- 30 The Bill follows the minimalist approach in respect of the MAC report, which was to use the current system and include independent candidates.
- 31 Mirroring this system of allocating seats in the provincial legislatures may cause practical difficulties. It would, for example, require a second ballot for the provincial legislatures (resulting in four ballots used in the elections for the National Assembly and provincial legislatures).

VACANCIES

- 32 Many public comments were directed at the provision which dealt with the filling of vacancies.
- 32.1 In respect of seats allocated to political parties, vacancies would be filled by the parties' lists as it currently is.
- 32.2 The initial Bill proposed that vacancies in seats of independent candidates should be filled only at the next election. Holding by-elections would not be workable or financially feasible across an entire region or province whenever a vacancy arises.
- 33 The B Bill currently being considered by the NCOP Select Committee adopts a system that the votes from the previous election will be used to fill the vacancy as follows:
- 33.1 the votes and seat allocated to the independent candidate causing the vacancy will be disregarded;

- 33.2 the votes and seats allocated to the independent candidates already in office will be disregarded;
- 33.3 the result for the region or provincial legislature would be recalculated, respectively;
- 33.4 the vacant seat would be awarded to an eligible independent candidate or party that contested the preceding election.
- 34 This addresses the concerns that were raised in the public participation process concerning section 47(4) of the Constitution that provides: “*Vacancies in the National Assembly must be filled in terms of national legislation*”. It was said that this requires the vacated seat to be filled, even before the next general election.
- 35 While it is true that a seat allocated to an independent candidate that is vacated could be allocated to a political party and not another independent candidate, that is the system that best reflects the will of the voters. If, for example, the seat were to go to the next eligible independent candidate, that could in theory be a candidate who only received one or two votes, instead of a party that receive many thousands. That would evidently not fulfil the requirements of proportionality.
- 36 Of course, there is a downside to this approach. Those voters who chose a specific independent candidate on their one ballot and who won a seat, would have their votes removed from the reallocation of the seat concerned. There are two answers to this:

- 36.1 One: that is the nature of the system of independent candidates and a voter must vote knowing the limitations of the person they vote for;
- 36.2 Two: the voter in any event still had and presumably exercised their opportunity to vote for the compensatory seats on their other ballot, so their vote still impacts on make-up of the National Assembly.

INDEPENDENT CANDIDATES CONTESTING MORE THAN ONE REGION

37 The Bill permits independent candidates to participate in more than one region for election in the National Assembly (this was not permitted in the original Bill).

38 We have previously advised that such a system would be constitutionally compliant.

39 We repeat what we have previously stated:

39.1 The Bill provides that *"if ... an independent candidate stands to be allocated a seat in more than one region, he or she is only allocated a seat in the region where he or she received the most number of votes and shall forfeit any additional seats."*

39.2 We fully support the inclusion of a rule which governs the seat that would be allocated to an independent candidate in the event that they receive a seat in more than one region. It would be patently inappropriate to leave that to the individual discretion of the candidate.

39.3 In our view consideration should however be given to stating that the candidate would be awarded the seat in the region where he or she received the highest proportion of votes, rather than the greatest number of votes *per se*.

39.3.1 This is because in some regions a candidate may receive a large number of votes, but proportionally receive less support (in regions with larger populations, like Gauteng or KwaZulu-Natal).

39.3.2 In other regions with smaller populations (like the Northern Cape) the candidate may receive fewer votes numerically, but a larger proportion of support from the electorate.

39.4 In our view, a rule that awards the seat with the greater proportion of votes better gives effect to the voice of the voters.

40 There is a downside to allowing independent candidates to contest more than one region.

40.1 There will likely be more wasted votes.

40.2 A candidate may obtain enough votes for a seats in both region A and region B.

40.3 They can only get a single seat however.

40.4 So, the voters in the region where the candidate does not take up a seat will lose out.

- 40.5 There is of course no way to avoid this problem.
- 40.6 One could not, for example, permit votes to be aggregated across regions.
- 40.7 That is because different regions will be allocated a different number of seats depending on the size of the population in each region (more seats will be available in regions with larger populations) and aggregating votes across regions would completely upend that principle.
- 40.8 As we see it, the wasted votes problem is one that is inherent in any system that allows independent candidates to contest elections.

41 However, ultimately these are calls for Parliament to make.

THE SIGNATURE REQUIREMENT

42 Section 31B(3)(a) of the B Bill provides:

“The following must be attached to a nomination when it is Submitted ... A completed prescribed form confirming that the independent candidate has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear on the segment of the voters’ roll for that region or province in which the independent candidate is standing for election and who support his or her candidature, totalling at least twenty percent of the quota for a seat that was required for a seat in the previous comparable election;”

43 In principle, we repeat that we are of the view that using a formula to determine the voter support eligibility requirement would be a rational approach.

44 The previous quota for a seat in the National Assembly was approximately 44 000.¹⁰ Assuming that a similar quota would occur in future, it would require an independent candidate to demonstrate the support of 8 800 voters in order to contest an election.

45 It would be more difficult for an independent candidate to satisfy the eligibility requirement for each and every election, than it would be for a political party to register with the Commission for any election.

45.1 Section 15(3)(a) of the Electoral Commission Act 51 of 1996 provides that a political party's application for registration for purposes of contesting all elections "*shall be accompanied by ... that party's deed of foundation which has been adopted at a meeting of, and has been signed by the prescribed number of persons who are qualified voters*";

45.2 The Commission is empowered to prescribe the number concerned.

45.3 The relevant regulation currently provides:¹¹

"The deed of foundation referred to in section 15 of the Act must be signed by—

¹⁰ Droop quota calculated using the results of the 2019 election, see the Commission's Electoral Report available at <https://www.elections.org.za/pw/Downloads/Documents-National-And-Provincial-Election-Reports>.

¹¹ Regulation 3(1)(a) of GNR. 13 of 7 January 2004: Regulations for the Registration of Political Parties (as amended).

- (i) 1, 000 registered voters for an application in respect of the entire Republic;
- (ii) 500 registered voters for an application in respect of a particular province; and
- (iii) 300 registered voters for an application in respect of a particular district or metropolitan municipality.”

45.4 Accordingly, political parties require at most 1 000 voters to register to contest an election.

46 It is obvious that a political party would have a greater ability to motivate voters to assist it register to contest the elections, than an independent candidate would. Requiring an independent candidate to obtain eight times the number of votes to contest one election than a political party does to contest all elections strikes us as arbitrary and unfair.

47 The Electoral Commission has proposed a way to address these issues that we believe should be incorporated into the Bill.

47.1 First, to introduce a requirement that a registered party not presently represented in a legislative body, must provide form demonstrating that the party has the support of voters in each region or province in which the party has nominated candidates, totalling at least 20 percent of the quota for a seat in the previous comparable election – thus mirroring the requirement for independent candidates; and

47.2 Second, to add a proviso to the signature requirement for independent candidates, that a candidate who was elected to the National Assembly

or a provincial legislature as an independent candidate in the preceding election is be exempted from the requirement.

- 48 These changes would treat the political parties and independent candidates on a more equal footing and should in our view certainly be adopted.

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