



# HELENSUZMAN FOUNDATION

For attention: Mr Eddy Mathonsi

Email: [elab@parliament.gov.za](mailto:elab@parliament.gov.za)

Portfolio Committee: Home Affairs

30 October 2020

Dear Mr Eddy Mathonsi

**Submission in response to the Electoral Laws Amendment Bill [B22-2020]**

We attach our written submission in response to the Electoral Laws Amendment Bill [B22-2020].

Should you have any queries, it would be appreciated if you could contact Catherine Kruyer (Email: [catherine@hsf.org.za](mailto:catherine@hsf.org.za)).

Yours sincerely

Francis Antonie

Director



**Submission in response to the Electoral Laws Amendment Bill [B22-2020]**

**1. Introduction**

The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions to the Portfolio Committee on Home Affairs (“the Committee”) on the Electoral Laws Amendment Bill [B22-2020].

The Bill seeks to amend, among others, the Electoral Act 73 of 1998 and the Local Government: Municipal Electoral Act 27 of 2000 – the legislation prescribing the electoral system for national and provincial elections and for local government elections.

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability. Given the importance of the electoral system for democracy in South Africa, the HSF wishes to submit its comments to Parliament on the text of the Bill. However, the HSF first wishes to raise a concern relating to the period for public comment on the Bill.

**2. Formal Request for an extension of the period for comment**

The HSF understands that the period available for public comment comes to an end today – 30 October 2020. While the Bill was published on 23 September 2020, it did not garner much media attention and has gone largely unremarked. In fact, the Bill did not come to the HSF’s attention until 29 October 2020.

Given the importance of the issues raised by the Bill – in particular, the potential prescription of a different voting method for elections – the HSF submits that there must be more time for the public to comment on the Bill.

The HSF requests that the public be given until at least the end of November 2020 to comment. This provides a reasonable time for the preparation of comment and it is assumed that this more extended period will not affect the preparation of the draft legislation unnecessarily.

### **3. Parliament’s impermissible delegation of its legislative function to determine the details of the electoral system**

Section 38 of the Electoral Act governs ‘voting procedure’ in national and provincial elections. Section 38(6) prescribes the method by which voters may vote in detail. Voters must vote by entering a voting compartment at their voting station, marking a ballot paper in a way that indicates their preference, and placing the marked ballot in the ballot box.<sup>1</sup> Section 47 of the Municipal Electoral Act contains identical provisions concerning the voting method for local government elections.<sup>2</sup>

Clause 14 of the Bill seeks to amend section 38 of the Electoral Act through the addition of a new sub-section. The new sub-section will confer upon the Independent Electoral Commission (“the IEC”) the power to “prescribe a different voting method” to that prescribed in the Electoral Act.<sup>3</sup> Clause 21 of the Bill seeks to introduce an identical amendment into section 47 of the Municipal Electoral Act. The effect of clauses 14 and 21 will be that, notwithstanding the detailed provisions governing the voting method in the relevant legislation, the IEC will be empowered to prescribe a different voting method for national and provincial elections and for local government elections.

The HSF submits that this is an impermissible delegation of Parliament’s constitutionally original legislative function to prescribe the details of our electoral system.

---

<sup>1</sup> Section 38(6) of the Electoral Act.

<sup>2</sup> Section 47(5) of the Municipal Electoral Act.

<sup>3</sup> The new subsection provides: “Despite anything to the contrary contained in this Act or any other law, the Commission may prescribe a different voting method”.

The Constitution requires that election to the National Assembly and the Provincial Legislatures take place in terms of an electoral system that is “prescribed by national legislation”.<sup>4</sup> The Constitution similarly requires that election to a Municipal Council must be in accordance with “national legislation”. The Constitution clearly provides that the national legislative authority is vested in Parliament.<sup>5</sup> In addition, the Constitutional Court has on numerous occasions confirmed that Parliament has the “constitutional authority and duty” to design the electoral system<sup>6</sup> and that the details of our electoral system are a matter left to Parliament.<sup>7</sup>

Parliament may delegate its law-making function, but its authority to do so is subject to the Constitution.<sup>8</sup> The Constitutional Court has explained that where the Constitution indicates that a matter must be prescribed in national legislation (or uses words to similar effect), this is a strong indication that the legislative function may not be delegated by Parliament.<sup>9</sup>

The HSF submits that the key details of the electoral system must be prescribed in national legislation by Parliament and that this constitutionally original legislative function may not be delegated. In the HSF’s view, the voting method is such a key detail of the electoral system.

The voting method is a critical aspect of the electoral system. The voting method plays a crucial role in giving effect to the constitutional rights to free, fair and regular elections,<sup>10</sup> and to vote<sup>11</sup> – rights which are foundational to our democratic system and without which there

---

<sup>4</sup> Sections 46(1)(a) and 105(1)(a) of the Constitution.

<sup>5</sup> Section 44(1) of the Constitution.

<sup>6</sup> *AParty v The Minister for Home Affairs, Moloko v The Minister for Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at paras 5 and 80; and *New National Party of South Africa v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (5) BCLR 489 (CC); 1999 (3) SA 191 (CC) at para 14.

<sup>7</sup> *United Democratic Movement v President of the Republic of South Africa* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) (*UDM II*) at para 47; and *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) at para 15.

<sup>8</sup> *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development, Executive Council of KwaZulu-Natal v President of the Republic of South Africa* [1999] ZACC 13; 2000 (1) SA 661; 1999 (12) BCLR 1360 (15 October 1999) at para 122.

<sup>9</sup> *Id* at para 125.

<sup>10</sup> Section 19(2) of the Constitution.

<sup>11</sup> Section 19(3)(a) of the Constitution. The importance of the right to vote was eloquently explained by the Constitutional Court in *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 at para 17, in which it was said:

“The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.”

can be “no democracy at all”.<sup>12</sup> The right to vote cannot be exercised without a legislative framework facilitating the exercise of the right<sup>13</sup> – including provisions regulating how voters vote. It is for this reason that the voting method is a key detail of our electoral system, which *must* be prescribed in national legislation by Parliament.

The HSF would also emphasise that in carrying out its law-making function, Parliament has a duty to facilitate public participation.<sup>14</sup> Public participation is an essential part of our constitutional democracy<sup>15</sup> and the Constitution expressly requires that the public be given the opportunity to participate in law-making.<sup>16</sup> In *Doctors for Life*, the Constitutional Court emphasised that what is ultimately important is that the public is given a meaningful opportunity to participate effectively in the law-making process.<sup>17</sup>

There is genuine public concern that a change to the prescribed voting method may open the door to electoral fraud – in particular, electronic voting is seen as more vulnerable to electoral fraud than our currently prescribed voting method. Electoral fraud has the potential not only to undermine the constitutional right to free and fair elections, but to subvert our democracy. The public has a genuine interest in its voice being heard concerning any changes to the prescribed voting method.

In the HSF’s view, Parliament has sought to evade its obligation to fully facilitate public participation through delegation of its legislative function to another entity. By empowering the IEC to prescribe another voting method, Parliament has avoided amending the Electoral Act and Municipal Electoral Act to prescribe another voting method. Parliament is effectively side-stepping its duty to facilitate public participation in connection with a matter of great importance to our democracy – how we vote.

The HSF takes issue with the manner in which Parliament has sought to delegate its legislative function to the IEC in the Bill. The Bill seeks to confer upon the IEC an almost unfettered

---

<sup>12</sup> *New National Party v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 at para 122. Section 1(d) of the Constitution enshrines regular elections as one of the values upon which our democracy is founded.

<sup>13</sup> O’Regan J judgment in *New National Party* above n 12 at para 122.

<sup>14</sup> Sections 59(1), 72(1)(a) and 118(1)(a) of the Constitution. *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (*Doctors for Life*) at paras 129 and 131.

<sup>15</sup> *Id* at para 121.

<sup>16</sup> Sections 59(1), 72(1)(a), 118(1)(a) and 195(1)(e) of the Constitution.

<sup>17</sup> *Doctors for Life* above n 14 at para 129.

discretion to prescribe a different voting method. The Bill provides no guidance to the IEC regarding the prescription of a different voting method at all. The conferral of an almost unfettered discretion does little to guard against arbitrary or capricious decision-making or to facilitate rational decision-making on the part of the IEC.<sup>18</sup> It is inconceivable that the IEC may be empowered to unilaterally make prescriptions on a matter of such foundational importance to our democracy without any guidance from Parliament.

#### **4. Conclusion**

The HSF objects to Parliament's impermissible delegation of its legislative function to determine the voting method for elections to another entity, namely the IEC. This impermissible delegation has the unacceptable result that Parliament evades its constitutional duty to fully facilitate public participation in the process of determining how we vote in national legislation.

*Catherine Kruyer*

*Legal Researcher*

[catherine@hsf.org.za](mailto:catherine@hsf.org.za)

---

<sup>18</sup> *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 85-6.