



HELENSUZMAN FOUNDATION

For attention: Mr Eddy Mathonsi

Email: electoralact1@parliament.gov.za

Secretary of the Portfolio Committee on Home Affairs

15 February 2022

Dear Mr Eddy Mathonsi

Submission to the National Assembly's Home Affairs Portfolio Committee in Response to the Electoral Amendment Bill (B1-2022)

We attach our written submission in response to the notice of intention to introduce the Electoral Amendment Bill (B1-2022).

Should you have any queries, it would be appreciated if you could contact Nicole Fritz (Email: nicole@hsf.org.za) and Charles Simkins (Email: charles@hsf.org.za).

Yours sincerely

Nicole Fritz
Director



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Executive Summary of the HSF's Submission

The existing system provides that parties obtain seats in direct proportion to the votes that they receive. For example, if a party receives 1 000 000 votes out of a total vote of 20 000 000, it receives 5% of the 400 seats in the National Assembly, i.e. 20 seats. No provision is made for independent candidates to contest national or provincial elections at all. In addition, the current system provides no link between voters and elected members, as all members are simply nominated in accordance with their place on their party's national list. This results in a serious lack of accountability of members of the National Assembly to voters whom they, in theory, represent.

The Electoral Amendment Bill ("the Bill") now makes provision for independent candidates. Such a candidate will be elected if he/she obtains more votes than required in terms of a quota, which is calculated by dividing the total number of votes in a region, by the number of seats allocated to that region. If a total of 2 000 000 votes are cast for 50 seats in a specific region, an independent candidate will therefore require more than 40 000 votes to be elected (the result of dividing 2 000 000 by 50). The Bill falls short of meaningful electoral reform in two ways. First, it does not account for independents who have national support outside of the region in which they run. Second, the Bill does not provide any improvement regarding the absence of a link between voters and nationally elected representatives.

The electoral system that would best accommodate independents and create better accountability to the electorate while at the same time ensuring that it does not conflict with any party's proportionate support on a national level, is a mixed-member proportional electoral system.

The mixed-member proportional system may seem complicated at first sight, but is actually quite simple. It provides for each voter to have two votes: one for an individual local representative and a second for a party on a national basis. A number of seats in the National Assembly would be taken up by locally elected members, whereas the remaining seats would be allocated to ensure that the total number of seats of any party is not out of proportion with its support on a national level.

Let us assume that there are 200 local seats and 200 party list seats, making up a total of 400 seats:

- If on a local level, a party obtains 40 out of 200 seats (i.e. 20%), but obtains 25% on a national basis by way of the second vote (representing a larger percentage support than that on local level), it would be allocated 60 party list seats, to ensure that its aggregate representation is in line with its proportional support on a national level;
- If on the other hand, it obtains the same number of 40 seats on a local (first vote) level, but its national (second vote) proportion of total votes cast would only entitle it to 10% on a national basis, then no additional seats would be allocated to that party to ensure that the overall proportionate representation in the National Assembly is in accordance with the results of the second vote.

The mixed-member proportional system operates successfully in New Zealand and Germany. However, the South African Government continues to ignore this alternative, in spite of recommendations by three high-level reports over the past 20 years.

It is the HSF's submission that the Bill only goes the minimum distance in allowing for independent candidates, but does nothing to close the existing gap between the National Assembly and the electorate.

The HSF's Full Submission

1. Introduction

- 1.1. This submission is a response to the Portfolio Committee on Home Affairs' invitation to interested individuals and organizations to submit written comments on the Electoral Amendment Bill, by 21 February 2022.
- 1.2. The Helen Suzman Foundation (HSF) is a non-governmental organization whose aim is to promote constitutional democracy and the rule of law. To this end it carries out legal, social, economic and political research, and it litigates from time to time on matters with constitutional significance.
- 1.3. The HSF has taken an interest in electoral issues for nearly a decade. In particular, it published a number of research articles on both the 2016 local government election and in the wake of the Constitutional Court's judgment in *New Nation Movement NPC v President of the Republic of South Africa*,¹ delivered on 11 June 2020. We have also produced a report on electoral system options, which was submitted to the Ministerial Advisory Committee on Electoral Reform, appointed by the Minister of Home Affairs in the wake of *New Nation*. We attach a copy of this report, including an addendum, to this submission.

2. The HSF's General View

- 2.1. We regret that the government has chosen not to avail itself of the opportunity to propose a transition to a mixed-member proportional (MMP) electoral system, instead introducing only the minimum changes to the existing system made necessary by *New Nation*.
- 2.2. The government's decision flies in the face of:
 - 2.2.1. The majority report of the Electoral Task Team appointed by Cabinet in 2002, which was chaired by Dr van Zyl Slabbert and which reported in January 2003.

¹ *New Nation Movement NPC v President of the Republic of South Africa* (CCT110/19) [2020 ZACC 11].

2.2.2. Recommendation 6.8 in the Report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, which reported to Parliament in November 2017 and that recommended as follows:

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

2.2.3. The majority report of the Ministerial Advisory Committee on Electoral Reform, dated 9 June 2021.

2.3. The HSF has listened to the presentation on the Bill made by the Minister to the Portfolio Committee on 7 December 2021, as well as the question and answers which followed. The Minister informed the Committee that electoral reform was discussed twice in Cabinet committee and once in Cabinet itself. The Minister was asked directly why Cabinet decided on the minimal option, but he did not give a direct reply.

2.4. On the one hand, he implied that the Electoral Task Team report and the High-Level Panel report, neither of which had discussed independent candidates, had been superseded by the introduction of the need to accommodate independent candidates. On the other hand, he implied that the Portfolio Committee would come to see that the Bill represented the only practical way forward.

2.5. We are convinced by neither argument for the following reasons. The points made by the Electoral Task Team and High-Level Panel Reports about the responsiveness and accountability of Parliament to the electorate remain as valid as they ever were. An MMP system not only better accommodates independents, but it also directly addresses the concerns at the heart of the Electoral Task Team and High-Level Panel Reports. Moreover, MMP systems have proven to be not only practicable, but practiced in some countries, notably Germany and New Zealand.

2.6. One may argue that there is no time to introduce an MMP system before the next national election. This is not true for reasons set out in paragraph 6.7 below.

3. Does the Bill Accommodate Independents Adequately?

3.1. The purpose of the Bill is to allow people to stand for election to the National Assembly without having to do so through an association with a political party. Are the opportunities it affords to independent candidates adequate? We believe the answer is no.

3.2. As the Bill stands, an independent candidate may stand for election only in the region in which they ordinarily reside. While this would afford a reasonable prospect for election for a candidate whose support is heavily concentrated in that region, a candidate with equal total support, but more thinly and more widely spread throughout the country, would be at a disadvantage. The portion of the support outside the region of residence would simply not be counted for the candidate's benefit.²

3.3. In actual fact, this harms not only the independent candidate's interests, but it also prevents voters from fully exercising their right to choose their preferred representative in the National Assembly, when they are not resident in the same region. In this way, the Bill sells short the potential held by independent candidates to make the National Assembly more accountable to voters and representative of their interests.

4. The Need to Close the Gap Between the National Assembly and the Electorate

4.1. We draw the Portfolio Committee's attention to the context in which it will consider the Bill and report to Parliament. It is evidenced by information from Afrobarometer surveys. Afrobarometer, founded in 1999, is a non-partisan, pan-African research institution conducting public attitude surveys on democracy, governance, the economy and society in more than thirty countries, repeated on a regular cycle. It is a well-respected, reliable source of information on public opinion in Africa. The eighth round of surveys was conducted in 2021, the South African fieldwork being carried in May and June.³

4.2. The results make for grim reading and show how far South Africa remains from democratic consolidation. In particular:

4.2.1. A growing majority (67%) of South Africans would be **willing** to forego elections if a non-elected government could provide security, jobs, and housing.

4.2.2. In 2021, the proportion of respondents who would be **very willing** to give up regular elections for an unelected, but efficient government shot up to 46%.⁴

² The brief which accompanies this submission sketches out how an MMP system might rectify the flaw.

³ We rely on two reports of the survey results.

[Afrobarometer 1], Afrobarometer with Plus 94 Research, Summary of results: Afrobarometer Round 8 survey in South Africa, 2021, available at <https://afrobarometer.org/publications/summary-results-afrobarometer-round-8-survey-south-africa-2021-0>

[Afrobarometer 2], Mikhail Moosa and Jan Hofmeyr, South Africans' trust in institutions and representatives reaches new low, Afrobarometer Dispatch No. 474, Afrobarometer and Institute for Justice and Reconciliation, 24 August 2021, available at https://afrobarometer.org/sites/default/files/publications/Dispatches/ad474-south_africans_trust_in_institutions_reaches_new_low-afrobarometer-20aug21.pdf

⁴ Afrobarometer 2, p 13

4.2.3. Popular trust in Parliament has declined. Majorities in 2006 (54%) and 2011 (56%) indicated that they trusted members of Parliament “somewhat” or “a lot.” Since then, this proportion has fallen steadily, reaching just 27% in the most recent survey.⁵

4.2.4. The survey asked whether respondents had approached persons during the past year about some important problems or to give them their views. The percentage of respondents which had **not** done so rose from 67% for a local government councillor, to 74% for a traditional leader to 82% for a political party official and 94% for a member of parliament.⁶

4.3. There is not just a gap between Parliament and people. It’s a chasm, and a threat to our constitutional democracy.

5. What We Expect an MMP System to Achieve

5.1. The HSF situates its expectations about what an MMP system can achieve within the following framework:

5.1.1. Electoral reform cannot be a panacea for all of democracy’s ills. For instance, it cannot change the fact that South Africa’s democracy will continue to struggle with issues of social and economic inclusion for many years to come.

5.1.2. No electoral system is perfect. Each strikes a different balance between competing values which an electoral system should satisfy. These values are discussed at length in the Electoral Task Team report, the Ministerial Advisory Committee report and our own report, attached as an addendum hereto. At this stage in South Africa’s history, we believe that a greater emphasis on accountability is needed.

5.1.3. It is not always straightforward to trace the effects of institutional change, some of which may be subtle or unexpected.

5.2. With these caveats in mind, we advance the following propositions –

5.2.1. ***A National Assembly in which at least half of its members are elected by constituencies will be more powerful than it currently is.*** This may seem paradoxical, since constituency elected MPs desiring re-election will be constrained by constituency interests and desires. But it is not. For instance, it has become clear from the hearings at the Zondo Commission that the cause of state capture was an overlapping set of

⁵ Afrobarometer 2, p 5

⁶ Afrobarometer 1, pp 43-44

criminal conspiracies at the heart of the state, aided and abetted by unscrupulous business people. It is also clear that Parliament's performance of its role overseeing the Executive and public administration was less than stellar when state capture was at its height. It was press revelations which started to uncover the extent of state capture, and a horrified civil society mobilisation followed, along with investigations by the Public Protector at the time. These were all signs of a well-functioning democracy, but we cannot help but believe that Parliament would have played a stronger role had irate constituents been able to place effective pressure on constituency MPs to investigate more vigorously than they did.

5.2.2. ***An MMP system will redefine the nature of a parliamentary career.*** In order to qualify as an attractive candidate for election as a constituency representative, an aspiring MP will need to build up a record of public service within it. After election, success would depend on keeping close contact with constituency supporters, both by reporting back on achievements in Parliament and by listening to community concerns. A common complaint about politicians is that they appear at election time, but are never seen otherwise. This would become a risky practice for a constituency MP.

5.2.3. ***An MMP system would not undermine party discipline. Rather, the rational consequence will be for the balance of influence in formulation of party programme to shift – giving greater regard to constituency concerns.*** Candidates wishing to contest constituencies for parties will require party nomination. Party representatives would continue to be members of party caucuses, to be subject to the discipline of party whips and expected to work to realize party programmes. But, under an MMP system, party representatives in parliament will, in their own interests, be more attuned to constituency concerns, and a rational party can be expected to pay attention to them.

6. Our Approach to the Text of the Bill

6.1. What we offer here is not a full redrafting of the Bill, but a suggested specification for its redrafting. As will become clear, we do not think that extensive redrafting is necessary in order to incorporate two changes in principle.

6.2. The first change is an alteration of the equation of the term 'region' with the territorial area of a province. We propose that the definition of 'region' in item 35 of Schedule 1A in the Bill be amended to read:

'region' means the territorial area of a province, or any part of a province;

6.3. This would open the way for a region to become a multi-member constituency, as contemplated by the majority in the Electoral Task Team report, or a single member constituency advocated by the majority in the Ministerial Advisory Committee. And then all the specifications for regional lists in the Bill would apply. Party regional lists would then be short in the case of multi-member constituencies (since the number on a party list cannot exceed the seats available) and consist of a single name in the case of single member constituencies. Independent candidates will now be added to the lists. Were multi-member constituencies to be decided upon, and no further amendments were to be made, this would amount to the proposal submitted to the Ministerial Advisory Committee by the Inclusivity Society Institute. In such a case, we would prefer short party lists and independents to be disaggregated into individuals between whom choices can be made.

6.4. The second change is the recognition of the MMP principle that the ballot paper in national elections asks two questions, instead of the one asked at present. The questions are:

- A. Which individual(s) do you want to represent the region in the National Assembly?
- B. Which party do you support?

The aggregate representation of parties in the National Assembly will be determined in proportion to aggregate answers to this second question?⁷ It is the B votes which ensure overall proportionality in the outcome.

6.5. The existing system deals with this by counting the same votes twice, first at the provincial and then at the national level.⁸ In short, it asks the second question without asking the first. The point of asking the questions separately is to give voters the maximum scope for expressing their preferences. For example, a voter might want to support an independent at the individual level, but a party at the national level. Or she might be most impressed by a candidate from one party, but support another for representation at the national level. Both these would be cases of split (but not incoherent) voting, permitted by an MMP system but not by our current one.

6.6. Should the definition of a region change from a province to a constituency, as we propose, the Bill would have to specify the number of constituencies and regional seats, along with a means for delimiting the constituencies. It is possible, but not necessary, for the number of constituency seats to be the same as the number of seats filled from compensatory party

⁷ One way of accommodating candidates with thinly but widely spread support is to put all independent candidates throughout the country as well as all parties on the B list. This may have the disadvantage of creating a very long list. The length of that list would be influenced by the requirements, specified in regulations, for acceptance of independents as candidates. The more demanding they are, the shorter will be the list. If this route were to be chosen, the procedure for allocating seats would have to be revised.

⁸ The national level count includes votes cast outside the country, which the provincial counts cannot do, since those votes cannot be allocated by province.

lists. The number of compensatory seats merely have to be sufficient to avoid the overhang problem.⁹

6.7. It is possible that Parliament will decide, on the evidence before it, that it is not practicable to redefine regions as constituencies in time for the next national election. In that case, we propose that as a transitional measure, regions remain provinces for that election. This should not prevent work on the delimitation of new regions starting immediately after the passage of the Bill, for use in subsequent elections. The delimitation task could be assigned to the Independent Electoral Commission or the Municipal Demarcation Board, or to a body specifically set up for the purpose of the Bill.

7. Conclusion

The natural form of government in a multi-party democracy with proportional representation is through coalition. That contemporary Germany has six parties represented in parliament,¹⁰ contemporary Netherlands has seventeen and contemporary South Africa fourteen does not threaten constitutional democracy in any of these countries. What does threaten constitutional democracy is polarisation and a consequent refusal to reach necessary political accommodation. That can happen even in countries with two main parties, as the experience of the contemporary United States attests to. Where commitment to constitutional democracy is strong, coalition building exerts a centripetal effect on political outcomes. This does not imply stasis: circumstances change, voter preferences change and negotiated political programmes change with them. It is possible that we are entering a more mature phase of our multi-party democracy, and our electoral system should facilitate the process.

⁹ The overhang problem in an MMP system arises when a party gains more constituency seats than it is entitled to on the basis of the votes on the second question of the ballot. The problem is discussed in the addendum to our detailed report.

¹⁰ In addition, the South Schleswig Voter's Association has a single seat in the Bundestag.