

South African Institute of Race Relations NPC (IRR)

Submission to the National Council of Provinces

regarding the

Electoral Amendment Bill (B1-2022)

Johannesburg, 9th November 2022

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Introduction

The National Council of Provinces (NCOP) has invited interested parties to make submissions on the Electoral Amendment Bill. This comes after a Constitutional Court judgement in 2020 which compelled Parliament to change the Electoral Act to allow independents to stand for the National Assembly (NA) and the various provincial legislatures. The Bill was passed by the National Assembly and is now before the NCOP.

This submission on the Bill is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

The Institute of Race Relations (IRR) has long proposed electoral reform in South Africa. While the pure proportional representation (PR) system that we use at the national and provincial levels has its advantages, it also has some significant flaws – not least that there is no mechanism for independents unaffiliated with a party to run for the NA or the nine provincial legislatures.

While the IRR welcomes electoral reform broadly, the current electoral amendment bill is significantly flawed and while meeting the letter of the Constitutional Court’s ruling it does not meet the letter. Independents are significantly disadvantaged compared to those standing on political party tickets and as it stands, a party could win more than 50% of available seats while failing to win 50% of votes cast. These are serious flaws which, if left unamended, could deal a serious blow to the perceptions of electoral integrity in South Africa, which would have serious implications for South African democracy.

The IRR has laid out a number of proposals for electoral reform. In 2020 the IRR released a report entitled, *Electoral Reform: The Time Has Come*, proposing a number of potential electoral systems which could be implemented. It can be found [here](#) and is included as an appendix to this submission. More recently the IRR produced a report authored by noted election analyst, Michael Atkins, looking at some of the issues with the current electoral amendment bill, and also setting out some potential electoral systems. It is also included as an appendix and can be accessed [here](#).

This submission will set out the problems with the current amendment bill. It will then provide suggestions for systems which could replace our current electoral system. It concludes by recommending that the bill be withdrawn and the next national and provincial elections held under the current electoral system. This will require approaching the Constitutional Court to extend its finding on unconstitutionality, a situation that is not ideal, but which is the result of dithering around implementing a new electoral system.

The Bill – problems and concerns

Despite many organisations raising and highlighting the problems with the Bill as it currently stands very few of these problems have been resolved in the current version before the NCOP. The core issue with the bill – that individuals are expected to compete with political parties – remains in the bill and most of the problems with the current bill flow from that contradiction.

The amendment in its current form effectively proposes to turn South Africa into nine multi-member constituencies (MMCs) in which independents can stand. This will advantage political parties while discriminating against independent candidates and doing little to solve the problems with the current system.

As it stands the bill treats individuals the same as political parties. As noted, it proposes turning each province into an MMC. Half of the National Assembly's 200 MPs will be elected from these MMCs, while the other 200 will be elected from a compensatory national list.ⁱ Each MMC (or region as they are also called in the bill) will return differing numbers of MPs to the National Assembly, being determined by the population of each province. Gauteng will thus likely have the largest number of MPs, while the Northern Cape will have the fewest.

Bolting individuals on to a PR system without properly accommodating them, meaning in effect, that individuals have to function as political parties on ballots, is an illogical and unfair outcome.

The formula to determine the quota will also discriminate against independents and their supporters. As it stands, an independent will need to meet a certain quota threshold to be elected (similar to what a political party must meet in the current system to have representatives elected).

For the sake of argument, let us assume that once the results are in and the quota has been calculated using the formula, it is determined that the minimum quota of votes to secure one seat in the legislature is 50 000. If an independent crosses the quota threshold, any of the votes he or she won above the quota are discarded. So, for example, if an independent wins 200 000 votes and the quota is 50 000, the independent still only wins one seat. However, if a political party wins the same number of votes it will be entitled to four seats in the relevant legislature.ⁱⁱ

This means that an independent's excess votes do not 'compete' for seats in the quota, contrary to the additional votes a political party might receive.

In certain scenarios, this will break proportionality: some political parties will secure a proportion of seats out of sync with their proportion of the vote. It must be noted that the constitutional requirement is that the system must, generally speaking, be proportional.

Another problematic situation, related to the above, which again benefits political parties over independents, occurs when a party fails to provide enough names to fill the seats that it is entitled to. The party forfeits these seats and the new quota for the distribution of seats is calculated while disregarding votes for independents and disregarding independent candidates. This again will affect proportionality and benefit political parties over independents.ⁱⁱⁱ

The Bill also sets a very high barrier for entry for independents to stand. For example, the signature requirement entails potential candidates needing the signatures and ID numbers of people equal to 20% of the quota required for a seat in the previous comparable election. Depending on how this is finalised this could mean that an individual would need the signatures of at least 8 000 people (and probably more).^{iv} A political party wishing to be registered only needs the signatures of 1 000 people.^v

When a vacancy occurs in a seat that was held by an independent, a new calculation is done which ignores votes cast for that independent. This will not only break proportionality but also disenfranchise those who voted for that particular independent.^{vi}

Although the proposed mechanism, as it stands, will make it extremely difficult for an independent to even be elected, it goes against democratic principles to simply leave the seat of an independent open should it be vacated for whatever reason. It betrays the trust of the voters who would have selected that particular person to represent them in the particular legislature.

An additional issue is that independents can stand in more than one region.^{vii} If an independent wins a seat in more than one region they will only be able to take up one of the seats. The recalculations done, with regard to the region that the independent opts to not represent, again disadvantage independents, could break proportionality, and disenfranchise the voters in the region who cast a vote for an independent, where he or she decided not to take up their seat.^{viii}

In addition, votes cast across regions cannot be aggregated for independents, further disadvantaging independents.^{ix}

A further issue is that independents can only stand for the 200 seats that are elected from the nine regions.^x However, when calculating the overall seat count, all votes will be used to calculate the minimum quota of votes that is necessary to secure a seat. This means that the quota for an independent to be elected will effectively be double that for a candidate standing on a political party ticket.

To explain this, independents can only be elected from the 200 MMC seats and the quota to secure a seat is basically calculated by dividing the number of votes cast by the number of seats available (the true calculation is somewhat more complex than that but for this explanation a simplified version will suffice). If ten million votes are cast the quota for an independent to gain a seat will be 50 000 (ten million divided by 200 leaves one with 50 000). For people who are standing on a political party ticket this quota is effectively halved as the quota to elect candidates standing for political parties will be calculated using the additional 200 compensatory seats. This means that the quota for these candidates is determined by dividing ten million by 400, rather than 200, meaning that the minimum quota for a political party candidate is 25 000 – effectively half of that of an independent.

This will also work towards breaking proportionality in some cases. Unlike the system we use at local government level, where the votes cast for independents are not ignored when determining the overall seat count, this is different when determining the compensatory seats.^{xi} This again breaks proportionality.

Not taking the votes cast for independents into account will mean that the compensatory seats do not act to ensure proportionality, as is the case with our local government electoral system.

This is a problem in both awarding seats from the regional and compensatory lists.

There are similar problematic clauses when it comes to awarding seats for provincial legislatures. The votes for independent candidates are ignored in certain scenarios and independents have to essentially function as political parties, again a logical absurdity.

South Africa needs to go the full distance and overhaul its electoral system to allow independents to stand while ensuring that the principle of PR is maintained. The Constitution only requires an electoral system that 'results, in general, in proportional representation'.

For independents to have a real chance of being elected to a legislature while ensuring that proportionality is maintained, it will be necessary for South Africa to implement some form of the mixed-member proportional system (MMP).

This system allows for some legislators to be directly elected from geographical constituencies, with a compensatory list being used to ensure that proportionality is met. South Africa uses a version of this system to elect representatives at municipal level. It also allows independents to stand for various legislative bodies with a good chance of being elected.

Although this submission is not meant to be overly prescriptive and its primary aim is to point out the flaws in the current Bill, much thinking around the issue of electoral reform has already been done. Some of these solutions must be considered to ensure that the spirit of the Constitutional Court's ruling is adhered to, and not just its letter.

A number of proposals are summarised below.

Alternative proposals

Mixed-member proportional (MMP) system with 200 constituency seats and 200 PR top up seats

South Africa could ramp up the system used at municipal level to provincial and national level. Assuming that the number of legislators in the National Assembly remains at 400 (as capped by the Constitution), half the MPs would be elected from 200 single-member constituencies, with a compensatory list of 200 MPs to ensure proportionality. Although the Van Zyl Slabbert Commission (more below) raised a number of concerns about this system, South Africans have shown that in terms of political engineering we can be innovative and find solutions through a spirit of compromise.

This is, of course, only one proposed solution. Another solution, which will have a more satisfactory outcome than that currently proposed by the amendment bill, is the system proposed by the Van Zyl Slabbert Commission.

Van Zyl Slabbert Commission Proposal

It proposed splitting South Africa into 69 multi-member constituencies (MMCs) which would each return between three and seven MPs. Some 300 MPs would be selected by this method, while 100 MPs would be selected by a compensatory proportional list. Modelling at the time showed that using this system would have resulted in a system which would have mirrored the actual election result of 1999.^{xii}

Furthermore, the proposal would also match municipal, district, and provincial boundaries, which would also deal with some of the issues of demarcation.

However, the Van Zyl Slabbert proposal did not allow for independents to run. Candidates in the various MMCs would be selected from closed party lists which would mean that the current problem would not be solved. Nevertheless, the Commission's report did note that allowing so-called open lists, which would allow voters to vote directly for candidates, rather than just a party, could be a possibility. The Commission noted that this could be something to be considered in the future.^{xiii}

As the Commission noted at the time: 'Open lists would not only improve the accountability of individual candidates dramatically but would also substantially increase voter participation in the democratic process'.^{xiv}

Thus, the Van Zyl Slabbert Commission's proposal, but with the added use of open lists, is something that should be considered. It would retain proportionality while allowing independent candidates to stand for legislative positions – without significantly disadvantaging them, as the Bill currently does.

Single-transferable vote

Another system which could be considered is the single-transferable vote (STV) system. Although it is a fairly complex system it nonetheless retains a link between a constituency and its representatives in the legislature.

In this system, candidates in multi-member constituencies are ranked by voters, resulting in an outcome which is proportional. It is used in a number of countries around the world at various levels, including Australia, Malta, Scotland, and Ireland, with the latter using the system to elect members to the Dáil Éireann, the lower house of the Irish parliament. Most other countries which use the system use it to elect members to regional or local bodies.

In this system, voters in each multi-member constituency rank the candidates, from most favoured to least favoured. Voters can rank as many or as few candidates as they like – they can simply put a 1 next to the name of only a single, favoured candidate, or rank all candidates from their favourite to least favourite.

To get elected, each candidate must meet a quota – the quota is determined by the number of positions available for representatives in the constituency and the number of votes cast. Any candidate that has been ranked Number One more times than the quota is elected. However, instead of being 'lost', any votes for a candidate falling short of the quota are transferred to the voter's next-favoured candidate. If, after the first round of counting, nobody has met the quota, the candidate who was ranked first the fewest times is eliminated and their votes are distributed to each voter's second candidate.

The advantages of this system are that it remains broadly proportional and retains a link to a geographic constituency. However, it is complex and might not succeed in a South African context. Furthermore, it does not always reflect proportionality accurately.

An example comes from the election held in the Irish Republic at the beginning of 2020. In that country, 160 legislators are elected from 39 multimember constituencies, each with between three and five members. Sinn Fein emerged as the single biggest party but tied with Fianna Fail in seats. Sinn Fein won 24.5% of the vote and was awarded 37 seats in the 160-member Dáil Éireann. Fianna Fail came second with 22.2% of the vote but also managed 37 seats. Fine Gael won 35 seats with 20.9% of the vote. The remaining seats were split between six other parties and independents.

Unlike in most other countries, independents in Ireland play an important role, partly because of the electoral system. Nineteen of the 160 seats are held by independents. This is equivalent to 12% of the seats in the legislature, very similar to the proportion of the vote – 12.2% – that independents won in the election.

Instant run-off voting

A similar system used in other countries is instant run-off voting (IRV). In this system candidates in single-member constituencies are also ranked and votes are then distributed when a candidate fails to meet a certain threshold. This system could be described as a hybrid system of FPTP and the single-transferable vote system. It is notably used in elections for the Australian House of Representatives and in London mayoral elections.

However, this system has a low level of proportionality and generally has all the disadvantages of FPTP without its simplicity. It lends itself better to elections for an executive position, such as a mayor or other leadership position, as it ensures that the person elected will have been the second choice of a relatively large number of people, potentially resulting in less polarisation.

However, when this system is used to elect a legislature, there is often as little proportionality as in the FPTP system. For example, in the last Australian election, the Liberal/National Coalition won just over 50% of parliamentary seats with 41% of the vote. The Labor Party managed a third of the vote, but was awarded 45% of the 151 seats that were up for grabs. The Greens won 10% of the vote and got only one seat, showing how IRV does not lead to significant proportionality.

Lekota-Maimane proposals

Another system which should be considered is that put forward by Mmusi Maimane and Mosiuoa Lekota, at the time the leaders of the One South Africa Movement (OSA) and the Congress of the People (COPE) respectively.

This proposal would also allow independents to stand, while combining elements of proportional representation and a constituency-based system.^{xv} The constituencies proposed would be based on South Africa's 52 districts, with each constituency returning a certain number of representatives depending on the size of the population in each district.

By way of illustration, they suggested that Cape Town would be entitled to 20 of the 300 constituency seats, or 6.7% of total seats. This is relatively close to the proportion of the population of the country that lives in Cape Town. The city has about four million residents, meaning that about six percent of South Africa's 60 million people live there.^{xvi}

They further proposed reducing the number of parliamentary seats to 350. The constituencies would return 300 MPs, while 50 would be allocated by party depending on how each party performed on the national ballot. In the Lekota-Maimane proposal, elections would be in the nature of an open list STV system. Using this system 'allows voters to cast their votes for a candidate even when that candidate is on the list of a political party'.^{xvii}

In elections for the National Assembly, each voter would receive two ballots – one for the election from the constituency to the National Assembly, and another for a political party – to help ensure proportionality. The system they propose is similar to the STV system in that excess votes for a candidate who has reached the threshold in a particular constituency to be elected to parliament are redistributed to other candidates.

However, each candidate would nominate other candidates to receive their surplus voters. Candidates would be expected to tell voters prior to the election who their surplus votes would be allocated to. This system resembles the Irish approach, but instead of allowing voters to decide on their second and third choices, this decision is left in the hands of the politicians.

While this simplifies the voting system significantly, it keeps power in the hands of politicians. Nevertheless, it is a significant improvement over the current system, where voters have no say over which individual will represent them in Parliament. Lekota and Maimane have a number of other proposals on the mechanisms of their proposed system but these are beyond the scope of this submission.

Conclusion and recommendation

The current bill is unlikely to pass constitutional muster and if the NCOP passes it and allows it to go to the President for his assent the constitutional can will simply have been kicked down the road.

Arguably the bill, as it stands, violates three constitutional principles. These are: proportionality (ss 46 and 105), the right to equality before the law (s 9), and the right to free and fair elections (s 19).

In addition, even if the President decides not to sign the bill and thus wards off the problem of a constitutional challenge there is simply not enough time to develop a new electoral system, which would allow independents to be able to compete on an equal footing with representatives of political parties, while also meeting the constitutionally mandated electoral deadline against which the next national and provincial elections must be held.

In his paper for the IRR Michael Atkins put forward three scenarios which could result if there is a constitutional court challenge. In the first the amendments to the Act could be ruled unconstitutional in their entirety, and the 2024 election could be held in terms of the existing system, as expressed in the current Electoral Act. This would clearly then exclude independent candidates from the 2024 election. In the second scenario parts of the current amendment Bill could be ruled unconstitutional, and those parts struck down. This would result in the 2024 election being carried out partly in terms of the existing system, and partly in terms of the new system. In the third scenario the court might "write in" a few targeted changes to allow at least a partial involvement of independent candidates, with some improvements to how the Bill is currently structured.^{xviii}

The IRR recommends approaching the Constitutional Court for a further extension of the order of unconstitutionality of the current Electoral Act until after the next national and provincial elections. This is a far-from-ideal outcome but it is the only plausible path. This would provide the IEC enough time to ensure that all electoral systems are in place for the 2024 election, while also ensuring that

there is enough time to develop an electoral system ahead of the 2029 election which would meet both the letter *and* the spirit of the 2020 Constitutional Court ruling.

The purpose of laying out various electoral systems and proposals is to show that much of the thinking around reform has already been done. There is no need for major constitutional engineering and many of these changes can be made fairly easily. The above systems will also ensure that proportionality remains while also allowing independents to stand.

But as it stands now there is simply no time to implement a new electoral system while meeting the constitutional deadline against which an election must be held. As last year's local government election showed there is no constitutional mechanism which would allow for the postponement of an election, and any postponement would deal a serious blow to trust in South African democracy and its institutions.

The current Electoral Amendment Bill is not fit for purpose and should be withdrawn. The drafters need to go back to the drawing board to devise an electoral system that complies with the spirit of the Constitutional Court's order and which works for South Africa.

The IRR believes that the system proposed by the Van Zyl Slabbert Commission (with the added use of open lists) best balances the requirements of proportionality, accountability, and simplicity (ease of use) and urges the drafters to study this proposal closely. Alternatively the majority option as recommended by the Ministerial Advisory Committee would also be a satisfactory electoral system to implement.

ⁱ S1, Electoral Amendment Bill, p10

ⁱⁱ S7(2)(a), Electoral Amendment Bill, p12

ⁱⁱⁱ S7(1), Electoral Amendment Bill, p12

^{iv} S31B (3)(a), Electoral Amendment Bill, p4

^v Independent Electoral Commission, *Parties and Candidates: How to register a party*, <https://www.elections.org.za/pw/Parties-And-Candidates/How-To-Register-A-Party>

^{vi} S23 (1), Electoral Amendment Bill, p17

^{vii} S31A(1)(a), Electoral Amendment Bill, p4

^{viii} S21(1), Electoral Amendment Bill, p17

^{ix} S4(k), Electoral Amendment Bill, p11

^x S6a, Electoral Amendment Bill, p12

^{xi} S11a and b, Electoral Amendment Bill, pp 10 and 11

^{xii} Report of the Electoral Task Team, January 2003, <https://static.pmg.org.za/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf> p35

^{xiii} Report of the Electoral Task Team, January 2003, <https://static.pmg.org.za/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf> p23

^{xiv} Report of the Electoral Task Team, January 2003, <https://static.pmg.org.za/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf> p23

^{xv} 'The Path to Direct Elections in South Africa,' One South Africa Movement, 13 July 2020, <https://osa.org.za/wp-content/uploads/2020/08/Policy-Paper.pdf>

^{xvi} *Ibid*

^{xvii} *Ibid*

^{xviii} 'The Road to Electoral Reform,' Institute of Race Relations, November 2022, <https://irr.org.za/reports/occasional-reports/files/the-road-to-electoral-reform-07112022.pdf>