



Submission on
**Electoral Act
Amendment Bill**

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13 February 2022

Introduction

1. If the Electoral Act Amendment Bill is passed in its current format, it will damage the integrity and efficacy of the Republic's electoral system.
2. What the Bill essentially proposes is to merely change the definition of *political party* to include independent candidates. It does not cater adequately for the paradigm shift that such a route represents.
3. The presently proposed model has the potential to lead to a shocking number of wasted votes, far beyond the pale of what is considered constitutional or reasonable. It will also lead to a disparity in relative legislative voting power, which does not reflect the true intentions and/or support of the voter base – a single seat for an independent candidate with more votes than a political party is an absurd outcome.
4. For this reason, AfriForum opposes the passing of the Bill as it currently stands and urges Parliament to amend the text in light of what is set out herein below.
5. This submission is **narrow** in scope. AfriForum does not profess expertise in election design. Thus, AfriForum does not deal herein with the entirety of the proposed amendment and its vagaries.¹ It also does not express preference or support for either of the two options presented to the Minister of Home Affairs by the Ministerial Advisory Committee.
6. AfriForum deals herein only with the issues of **wasted votes** and **the likely practical effects of the proposed system**, which it considers issues of political common sense and deductive reasoning.
7. This submission is drafted and presented on the presumption that the reader has studied and perused the contents of the *Report of the Ministerial Advisory Committee on Electoral System Reform*, dated 9 June 2021, as well as the *Memorandum for*

¹ The failure to deal with these issues and permutations is not to be considered tacit acceptance or affirmation of same and AfriForum reserves the right to submit additional commentary should it become necessary. Matters that are not addressed herein include:

- Qualifications of independent candidates
- Desirable scope and extent of electoral reform
- Need to amend legislation and policy relating to political party funding.

Minister of Home Affairs on Electoral Amendment Bill (the Memorandum), dated 25 November 2021 and drafted by the authors of the Bill.²

Independent candidates should be welcomed

8. AfriForum supports the introduction of a system that enables independent candidates to contest seats in the National Assembly (NA) and provincial legislatures (PLs) as an effective measure to ensure more electoral accountability and a devolution of power. AfriForum thus supports and affirms, in broad terms, the injunction which flows from the judgement in *New Nation Movement NPC v President of the Republic of South Africa*.³
- 8.1 AfriForum is of the opinion that, although this is not a silver bullet or free from its own permutations, allowing independent candidates to contest legislature elections is beneficial in the following respects:
 - 8.1.1 Independent candidates are more directly accountable to their voters/constituencies and free of the fetters of party diktats.
 - 8.1.2 Reform is sorely needed to break the stranglehold of party politics and the closed-list system within the NA and PLs.
 - 8.1.3 Independent candidates generally further the possibilities of participatory and direct democracy, which are imperative to addressing socio-political dissatisfaction with the current system.
9. However, the introduction of independent candidates should not take place in a manner that has the potential to illegitimate the electoral system. As stated already, AfriForum submits that the proposed model will have this unfortunate effect and must therefore be rejected.

² The MAC's report and the Memorandum are both available at https://static.pmg.org.za/Report_of_Ministerial_Advisory_Committee_on_electoral_System_Reform.pdf.

³ *New Nation Movement NPC & Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC)

The Bill

10. The Ministerial Advisory Committee (MAC) and the drafters of the Bill explicitly recognised the vital importance – as well as the immense logistical challenge – attendant upon reforming the electoral framework in line with the judgement in *New Nation Movement NPC v President of the Republic of South Africa* while maintaining proportional representation.
11. The MAC proposed two “stark” options to the Minister: 1) a “minimalist” option and 2) a more reformist option that necessitates far-reaching change.
12. The Minister opted for the former and instructed counsel to draft the Bill in line with that option’s precepts and modelling. The resultant Bill is what forms the subject matter of this submission.⁴
13. AfriForum’s understanding of the proposed model is:
 - 13.1 The number of allocated seats in the NA and PLs remains unchanged, as does the split system of 200 seats each for the regional and provincial lists.
 - 13.2 Rather, it is now merely possible for an independent candidate to stand for, contest and be allocated a seat within the 200 reserved for the regional lists. The seats are allocated via proportional representation in accordance with a predetermined quota or threshold for winning a seat.
 - 13.3 The system in place for the 200 regional seats in the NA is then directly replicated in the PLs.
 - 13.4 Each candidate will only be allowed to contest one region (province or constituency, depending on terminology). Ballot papers will reflect parties as well as independent candidates.
 - 13.5 In the NA, the allocation of the 200 regional seats will take place in the novel three-round devolving system whereby independents are allocated seats in the first and

⁴ The procedural history is effectively set out on pages 1–5 of the Memorandum. AfriForum does not repeat it here, for the sake of brevity.

second rounds only, the votes garnered by them then being discounted and disregarded when the proportional allocation of party seats is allocated.

- 13.6 Stated plainly: Seats in the NA regional list and the PLs continue to have a threshold number of votes that must be garnered to win a seat. What is now different is that independent candidates can also win one of these seats in the same way that a nominee from the closed list of a political party can win a seat.

The problem

14. **Independent candidates cannot be allocated more than one seat even where they receive sufficient votes to justify the allocation of more than one seat. Irrespective of how many votes a candidate receives, they will not gain a concomitant increase in influence. The excess votes that the candidate received are scrapped, which results in a negation of the democratic intent of the voters.**
15. In attempting to give effect to the judgement in *New Nation Movement NPC v President of the Republic of South Africa* and the rights of political representatives, we **cannot lose sight of the rights of voters and what voters expect to get in return for their vote.**
16. The excess votes received for a candidate who has already passed the threshold are **discarded** in terms of the proposed system – these simply do not count.
17. These votes are **wasted** or **lost**, otherwise termed **“inefficient”** or **“surplus”**, in that such a vote accomplishes nothing.
18. The Memorandum has presciently recognised this issue. At paragraphs 22.1 and 22.2 on page 7 it states:

We noted that in virtually any system of this sort, there is always the occurrence of what might be termed “wasted” votes [...] If Candidate X stands as an independent and receives 50 000 votes, whereas the quota for 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”. In our view however, this does not render the system impermissible or unconstitutional.

19. The drafters make the following arguments in attempting to mitigate the impact of such wasted votes and propagate the legitimacy of the proposed system:
 - 19.1 The three-round system, which discounts those seats already allocated to independent candidates in the first and second rounds to ensure proportionality in the final round, maintains proportionality *in general*.⁵
 - 19.2 A vote is not “wasted” where the voters’ chosen candidate has succeeded, even though the vote was not necessary to establish a seat for the candidate, as the candidate and their voters “have achieved their objective”.⁶
 - 19.3 Independent candidates who desire more influence and the use of the excess votes are welcome and able to create a political party to which the excess votes may be allocated to be allocated more seats.⁷
20. From the outset it should be noted that the three-round novel system is apparently there – on AfriForum’s understanding – to ensure that when calculating the number of seats to be allocated to political parties, the number of votes on which that calculation is based is not distorted by votes that were given to independent candidates.
21. In other words, it is there to ensure that seat allocation for parties is proportional to the number of votes that were cast for parties – not to make up the excess votes that were disregarded in that process, or to ensure that those excess and surplus votes are effectively utilised to represent the political voice and will of the voters who had cast them.
22. Regarding the second argument above mentioned in paragraph 19.2, it is an oversimplification of the voting process to suggest that a vote is based only on a desire to see a candidate win a seat. For a seat allocation to mean anything, the holder of that seat must be able to express the reason for which they were voted to it in the first place, namely the will of the voter. An independent candidate with a

⁵ Paragraphs 23 and 24 of the Memorandum

⁶ Paragraph 22.4 of the Memorandum

⁷ Paragraph 22.5 of the Memorandum

single seat cannot hope to exercise the same influence as that of a party with even two or three seats. We elaborate further on this below.

- 22.1 AfriForum notes as an aside that the methodology is unclear by which independents will be accommodated in the day-to-day business of the legislature. Although provision is made for the mandatory participation of minority parties in many respects, it is unclear whether independents will fall under these same provisions, and, if so, how this is to be operationalised. See, for example, the report by the Inclusive Society Institute, *Proposed electoral model for South Africa: A response to the Constitutional Court judgement declaring the current electoral legislation unconstitutional*, where an appropriate summary of the practical difficulties is noted:⁸

So too, the national and provincial legislatures may, as a consequence of the judgement, have to re-think how they function now that independent candidates may take up seats. The rules and procedures of the legislature may require amendments, as may the constitutional provisions providing for minority party participation in the business of the legislatures, which will have to be expanded to include independent candidates.

23. The Memo further sets out a hypothetical scenario that is modelled on the recent Gauteng PL election results to illustrate the practical outcome of the application of the preferred model suggested in the Memo. In the Memo's scenario, the hypothetical independents received respectively 220 000, 57 000, 54 000, 20 000 and 10 000 votes out of a total 4 400 000.
24. Its proposed solution is premised on the erroneous assumption that any independent candidate who garners sufficient votes to win a seat will do so only by the skin of their teeth, and that there is no chance of an independent ever garnering the number of votes that a political party does.
25. The Bill and the Memo also neglected to plan for or address a likely scenario that may arise within South Africa's particular socio-political context: where an independent

⁸ Inclusive Society Institute. 2021. *Proposed electoral model for South Africa: A response to the Constitutional Court judgement declaring the current electoral legislation unconstitutional*, p. 11. Available at https://cisp.cachefly.net/assets/articles/attachments/84679_2021.02.24_electoral_reform_report.pdf. Accessed on 12 February 2022.

candidate is so popular that they garner voter support that almost equals that of a political party.

- 25.1 One only needs to consider the case of Mr Herman Mashaba as an example of a person with the potential to eclipse a political party.
- 25.2 His party, ActionSA, which was established only in late 2020, garnered **547 905** votes in the 2021 local government elections while only contesting in Gauteng and KwaZulu-Natal.⁹ Although it is admittedly arguable, it is not unreasonable to state that ActionSA's astonishing success was almost entirely down to Mr Mashaba himself. The party is self-evidently built around his persona and status.
- 25.3 One can only speculate as to the number of votes strong personas like Mr Ace Magashule or Mr Jacob Zuma might garner as independent candidates. Prominent and popular figures who currently form part of political parties but have previously indicated an intention to break away include people like Helen Zille. All these politicians have significant grass-roots support, and given the currently fractious state of South African politics, it is entirely conceivable that independents may break away from the major parties and contest in their own names.
26. **Seats equal voting power and influence** – the more seats controlled by a party, the easier it is for this party to influence the legislative process. This is the core of proportional representation.
27. As indicated above, those votes for an independent candidate that are not necessary for the candidate to win the seat **are discarded, i.e. not allocated whatsoever toward determining any additional seats.**
28. The hypothetical scenario provided for by the Memo addresses only the situation where a few independent candidates receive a modest number of votes, and it has been planned accordingly. The system works in theory **only** where an independent receives just barely enough to win a single seat.
29. However, where the threshold number of votes necessary to obtain a seat is for example 50 000, and a candidate receives 500 000 votes – which, it should be

⁹ Independent Electoral Commission. 2021. *Municipal election results*. Available at <https://results.elections.org.za/dashboards/lge/#>. Accessed on 12 February 2022

repeated, is in a South African context quite possible – 450 000 votes are discarded and disregarded, not because the voters' chosen candidate has lost, which would not be abnormal for some electoral systems, but purely because the system does not allow for such votes to be considered.

30. With the current system, an independent candidate may in the above scenario hypothetically receive 550 000 votes, 500 000 of which will be surplus or wasted. That candidate will receive only one seat – and thus have only the influence and voting power of one seat, despite being theoretically imbued with the democratic will of 550 000 voters, whose votes will find no expression anywhere else.

30.1 Stated otherwise: the democratic power of 550 000 votes is watered down on a practical level to the power of one seat.

31. To take the example further: Suppose an independent candidate gains a single seat despite 550 000 votes, and a smaller political party with 200 000 votes gains four seats. This creates a situation whereby a party will have four times the influence of an independent, despite having half the votes (i.e. half of the democratic will of the voters).

32. That this discrepancy is inimical to the intention of the Constitution is illuminated by Froneman J in his minority dissenting judgement in *New Nation Movement NPC v President of the Republic of South Africa*, where he writes as follows (own emphasis):¹⁰

The entrenchment of proportional representation, and its achievement through the vehicle of political parties, flows from the prioritisation of equality in political voice (every vote counts equally) over the accountability that might be better secured through a constituency-based system or a mixed system. The “never again” impulse of section 19 is therefore not merely that whole categories of citizens must not be disenfranchised, but also that never again must some people’s voices count more than others in our representative democracy. The rationale thus goes beyond disenfranchisement, to the distortion of equality in political voice.

¹⁰ *New Nation Movement NPC & Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC), at para. 221

33. The proposed model allows for every vote to ensure a seat to the voters' chosen representative, whether independent or party. However, that is as far as it goes. A vote for an independent can **only ensure one seat. It cannot ensure true power or influence, whereas a vote for a party can go further in winning more seats.**
34. Self-evidently, this is not a proportionate devolution of voter intent. Proportional representation as an electoral system is chosen precisely because it caters for an absolute minimum in wasted votes. Every vote goes towards a proportional distribution of power. The limit on seats for independents runs contrary to the advantage sought to be gained.
35. Hence: Where it is accepted that "proportional representation" is achieved when political representatives gain seats in proportion to the amount of popular support that they receive in an election an independent candidate confined to only one seat – despite receiving several times more than the votes necessary to gain such a seat – cannot be said to wield power that is proportional to the amount of support they received. **A political party will therefore always have an inevitable advantage.**
36. Therefore, a system where independent candidates may have only one seat each cannot be described as proportionate, regardless of how the other seats are distributed. There is a fundamental breakdown in how the voter intention finds expression at the legislative level.
37. It is simply insufficient or ineffective for any proposed system to be premised on an assumption. As stated above, the assumption in this case is that independents will be unable to garner the number of votes that political parties normally garner.
38. Furthermore, and despite the in-principle undesirability of discarding votes and the disproportionality that it creates, such a system may have a knock-on effect on a practical level of unintended consequences.
39. AfriForum submits that the following considerations form part of the cumulative illegitimacy of the proposed system and amplify AfriForum's core concerns regarding the proposed model.

Practical effects of proposed model

40. Any new electoral system must be legitimate in terms of the Constitution. The overarching requirement is that proportional representation must be the foundation of the system and must be achieved “in general”. The MAC has furthermore identified the following requirements, stated as principles:¹¹

40.1 inclusiveness

40.2 fairness

40.3 simplicity

40.4 accountability

40.5 gender equality

40.6 proportionality

40.7 effective participation of independents

40.8 genuine choice

40.9 effectiveness

40.10 legitimacy.

41. AfriForum broadly aligns itself with the above values.

42. AfriForum contends however, that the proposed model will be detrimental to **simplicity, effectiveness, legitimacy** and **fairness**. The question of effectiveness, legitimacy and fairness was canvassed above. Below, AfriForum deals with the concomitant question of simplicity, as well as its subtextual effect on the other requirements.

Simplicity

43. Commentators have often noted that simplicity and accessibility are strong considerations in the realm of South African politics and voter systems. In 2014,

¹¹ Ministerial Advisory Committee on Electoral Reform. 2021. *Report of the Ministerial Advisory Committee on electoral system reform*, pp. 12–13. Available at https://static.pmg.org.za/Report_of_Ministerial_Advisory_Committee_on_electoral_System_Reform.pdf. Accessed on 16 February 2022.

following that year's elections, Mr Ebrahim Fakir summarised as follows (own emphasis):¹²

Mixed systems may minimise disadvantages and maximise advantages, but depending on the mix used, can potentially create such overwhelming systemic complexities that they are rendered indecipherable to citizens. In addition, they create serious complications in the management and administration of elections as well as the tabulation of results. This can cast a pall of doubt on the credibility of electoral processes and consequently serve to delegitimise the electoral outcomes as oversight over and transparency of the calculation and counting of outcomes are rendered ever more complicated. Simplicity of the electoral system should not be under-estimated as a great virtue.

44. AfriForum supports this sentiment. As should be clear from the above, the proposed system necessitates an increase in calculation, application of formulae and the potential for permutations arising from same.
- 44.1 This is in addition to the extra strain placed on the Independent Electoral Commission (IEC) in processing the independent candidates who are now able to register and stand for election. The latest municipal elections conclusively demonstrated how fragile the IEC's operational capacity already is.¹³
45. The proposed model will necessitate a re-understanding of the process of seat allocation. Voters will have to be educated on the variables such a system poses, particularly considering the new three-round system. The mathematics involved are novel, although not overly complicated.
46. AfriForum submits that the system is not sufficiently simple to grasp and explain. With the spectre of a "wasted or "inefficient" vote looming over the voter, the system requires far more engagement, critical reasoning and analysis than the South African public is accustomed to.

¹² Fakir, E. 2014. The electoral system: Is there vice or virtue in reform? *Daily Maverick*, 22 May. Available at <https://www.dailymaverick.co.za/opinionista/2014-05-22-the-electoral-system-is-there-vice-or-virtue-in-reform/>. Accessed on 12 February 2022

¹³ Khumalo, J. 2021. *IEC defends faulty voter management devices amid party complaints, reports of issues*. News24, 1 November. Available at <https://www.news24.com/news24/southafrica/news/iec-defends-faulty-voter-management-devices-amid-party-complaints-reports-of-issues-20211101>. Accessed on 12 February 2022

47. Not only does this problem arise in the context of actually casting a vote, but the difficulty is repeated in relaying the system to the public, as well as in processing, reporting and disseminating the results *ex post facto*.

Tactical voting

48. Where a voter knows that their preferred candidate can only gain one seat irrespective of how many votes the candidate receives, the voter may choose to vote for a party because the party will have more influence by virtue of the fact that it can obtain more seats.
49. Conversely, a voter may feel that a popular independent candidate will win a seat regardless of their vote. In such a case, the voter may refrain from voting for their preferred candidate and cast their vote for another candidate or party purely because additional votes do not result in additional seats.
50. Essentially: Some voters may vote based on their view of how others will vote, which is not generally a feature of pure proportional representation. Additionally, substantial undue influence will be exercised by the media, pollsters and social media for this reason.
51. Regardless of how this sentiment is expressed, the fact remains that the proposed model encourages tactical voting and a stronger grasp of an electoral season's vagaries than does the system of proportional representation.

Decrease in voter participation

52. Although difficult to predict, AfriForum submits that given the extremely concerning downward trend in voter turnout and participation,¹⁴ the above two factors must be given serious consideration. A system that is novel, more complex and facilitates **more** politicking on some level may very well further discourage those voters who are already disenchanted with the current political landscape.

¹⁴ Smillie, S. & Payne, S. 2021. Dismal voter turnout at South Africa's municipal polls a blow to democracy. *Daily Maverick*, 2 November. Available at <https://www.dailymaverick.co.za/article/2021-11-02-dismal-voter-turnout-at-south-african-municipal-polls-a-blow-to-democracy/>. Accessed on 12 February 2022.

53. **Such a scenario must at all costs be avoided.** AfriForum submits that these concerns are not sufficiently addressed in the current proposal. Any radical change or novel approach must be proportionately advantageous and desirable to the constitutional order to risk further alienating the voter base. In other words, the wider the reform is in scope, the more promise it should hold for the voters in bringing about real change. The current proposal fails to do so.

Conclusion

54. While **some** wasted votes are arguably acceptable in certain electoral systems, the foundation of proportional representation is that **no** votes are wasted – the strength of support is directly reflected in the number of seats allocated.
55. What is more, the proposed system will not lead to **some** wasted votes – there is potential for **hundreds of thousands** of votes to be wasted. This scenario may be likely or unlikely – the fact is that the proposed system does not cater for it at all.
56. A single seat for an independent candidate who receives more votes than a political party cannot be said to be proportional.
57. Furthermore: Systems that do in fact cater for this or a similar scenario, have built-in adaptations that serve to mitigate or otherwise compensate, such as the single transferable vote (STV) or open party lists. The proposed model does not contain a similar compensatory feature.
58. Beyond that, the model is likely to create a number of practical difficulties relating to voter participation and understanding, which serves to amplify the core problem that is outlined above.
59. For these reasons, it is reiterated that AfriForum opposes the passing of the Bill in its current format. It urges the legislature to consider what is set out herein, and what has been raised by several commentators and stakeholders, many of whom possess expertise in election design, and to amend the proposed legislation accordingly.
60. The NNM injunction has presented the legislature with a unique opportunity to give effect to reform that has been on the cards for many years – reform that may prove

essential to reviving South Africa's failing democracy. This opportunity should not be wasted by taking the path of least resistance and by implementing a system that is illegitimate and dilutes the expression of the voters' democratic intent.