



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

To: **The Electoral Reform Consultation Panel**
For attention: Adv Richard Sizani
Panel Chairperson
Per email: ERCPC@dha.gov.za
Re: **Submission on Electoral System for the National Assembly and Provincial Legislatures**
Date: Wednesday, 30 October 2024 (**Deadline: Thursday, 31 October 2024**)

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INTRODUCTION

Dear Adv Sizani,

1. We refer to the [invitation](#) by the Electoral Reform Consultation Panel ("the Panel") for written submissions on proposals for an electoral system for the National Assembly and Provincial Legislatures.
2. The FW de Klerk Foundation ("the Foundation") is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Our vision is to make our constitutional democracy a reality for all South Africans.

3. To this end, the Foundation seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa.
4. As such, the Foundation welcomes the opportunity to make this concise written submission to the Panel, trusting it will be of assistance in guiding the Panel in its report to the Minister of Home Affairs regarding why and how South Africa's current electoral system should be reformed.
5. We also wish to request an opportunity to make a verbal submission to the Panel, should such an opportunity arise.

EXECUTIVE SUMMARY:

6. The current electoral system fails to meet all of the Constitution's requirements, specifically it fails to ensure accountability, responsiveness and openness.¹
7. Furthermore, it fails to meet four out of the six guiding principles for evaluating an electoral system.²
8. It is thus the Foundation's belief that electoral reform is both justified and necessary.
9. It is submitted that, besides adhering to the Constitution's requirements (set out below), a new electoral system must also:
 - 9.1. Assist to prevent state-capture by *inter alia* preventing Parliament from ever being controlled by the Executive again and, therefore, unable to fulfil its oversight function.
 - 9.2. Build public trust to result in increased voter turnout.
 - 9.3. Increase elected representatives' accountability and responsiveness in order to build the aforementioned public trust.

¹ Section 1(d) of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

² See paragraph 11 below.



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- 9.4. Create an inclusive and widely representative political system for our diverse society to ensure that everyone has a voice and is represented.
- 9.5. Create a level playing field with equal opportunity for independents and parties.
10. In light of the above, and for the reasons set out below, the Foundation supports the Ministerial Advisory Committee on Electoral Reform's **majority recommendation** of a **mixed-member proportional system**.³

LEGAL FRAMEWORK:

Constitution:

11. From the **Constitution** it is evident that any electoral system needs to:
- 11.1. Adhere to the Republic's founding values, including, but not limited to, allowing for a multi-party system⁴ of democratic government, to ensure accountability, responsiveness and openness.⁵
- 11.2. Require the National Assembly to elect the President⁶ and the Provincial Legislatures to elect the Premier⁷. I.e. neither are directly elected by the citizens.
- 11.3. Establish an electoral system that "*results, in general, in proportional representation*"⁸.

³ [Report of the Ministerial Advisory Committee on Electoral Systems Reform](#) ("MAC Report") at para 5.2.

⁴ The Constitutional Court has held that this makes it obligatory to allow different political groups, **including independent candidates**, to organise and participate in elections. See *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [\[2020\] ZACC 11](#) at paras 71 through 73 and *United Democratic Movement v President of the Republic of South Africa* [\[2002\] ZACC 21](#) at paras 24 and 26.

⁵ Section 1(d) of the Constitution.

⁶ Section 86(1) of the Constitution read with Schedule 3 to the Constitution.

⁷ Section 128(1) of the Constitution read with Schedule 3 to the Constitution.

⁸ Sections 46(1)(d) and 105(1)(d) of the Constitution.

- 11.4. Be decided on by Parliament and passed as national legislation.⁹ This subsidiary legislation is the **Electoral Act, 1998**¹⁰ (as amended) which sets out¹¹ the current electoral system (see below).

Panel's Guiding Principles:

12. Although not legislation, the Foundation also notes and agrees with, the Panel's following six initial [guiding principles](#) to evaluate any proposed electoral system(s):

- 12.1. **Inclusivity:** Any proposed system must encourage wide and diverse public participation from all demographics to foster diversity of opinion and encourage representation of all.
- 12.2. **Fairness:** Any proposed system must ensure that, as much as possible, votes have equal value.
- 12.3. **Accountability:** Any proposed system must ensure elected representatives are answerable to citizens to explain their performance and justify their decisions.
- 12.4. **Simplicity:** Any electoral system must be accessible to citizens and reduce the chances of spoilt ballots.
- 12.5. **Electoral manageability:** Any proposed system should enable effective election management to ensure the credibility of the electoral process and limit frivolous disputes.
- 12.6. **Transparency:** Any proposed system's processes for determining the allocation of seats must be clear to voters.

THE ELECTORAL ACT'S CURRENT ELECTORAL SYSTEM:

13. The Electoral Act provides¹² that its Schedule 1A applies in elections for the National Assembly and provincial legislatures.

⁹ Sections 46(2) and 105(2) of the Constitution.

¹⁰ Act 73 of 1998.

¹¹ Section 57A of the Electoral Act.

¹² Section 57A of the Electoral Act.



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14. Independent candidates are allowed to compete in elections, but only for the National Assembly and Provincial Legislature.¹³
15. The seats in the National Assembly are as determined as 1 seat for every 100 000 votes¹⁴ and are allocated as follows:
 - 15.1. Half the seats (i.e. 200 seats) are contested by independent candidates and political party candidates contesting the nine regions (“**regional seats**”); and
 - 15.2. Half the seats (i.e. the remaining 200) are filled by political party candidates (“**compensatory seats**”) to restore overall proportionality between the political parties due to potential distortion created by the regional system.
16. An independent candidate may be nominated in more than one region,¹⁵ but the votes they receive across the different regions may not be aggregated in order to obtain a seat in the National Assembly.¹⁶
17. Furthermore, if an independent candidate wins more than one seat in a region or seats in more than one region, s/he is awarded one seat (in the region where s/he received the highest proportion of votes) and forfeits any additional seats¹⁷

PROBLEMS WITH THE CURRENT SYSTEM:

18. **Inclusivity:** The current system, arguably, does not foster wide and diverse public participation when it comes to standing for public office. This is, because members of the public, who may wish to participate by standing for public office as individual candidates, are discouraged from participating by *inter alia* the fact that independents can only contest 200 seats and the inequality in calculating election results.¹⁸ This also results in not all

¹³ Items 1 and 10 to Schedule 1A of the Electoral Act.

¹⁴ Item 1 to Schedule 3 of the Electoral Act.

¹⁵ Item 3(4)(b) to Schedule 1A of the Electoral Act.

¹⁶ Items 5(k) to Schedule 1A of the Electoral Act.

¹⁷ Items 5(f), 5(g) and 7(2) to Schedule 1A of the Electoral Act.

¹⁸ Dr S Mbete “[Electoral Reform Research Report](#) Prepared for the Organisation Undoing Tax Abuse (Outa) & My Vote Counts (MVC)” (2022) at page 33 sets out what the main criticisms to the current electoral system were.

voters, specifically those who vote for an independent candidate, being represented in the legislature.

19. **Fairness:** The current system does not achieve its supposed purpose of making adequate provision for the participation of independent candidates in provincial and national elections. It results in a system in which votes cast for independent candidates have substantially less value than those cast for political parties. This also disturbs the constitutional requirement for proportionality insofar as votes cast for independent candidates will not result in their proportional representation in the National Assembly or provincial assemblies. The current system results in a high degree of wasted votes. This is due to an independent candidate only being awarded a single seat, even if they win more than one seat in a single / across multiple regions. The Foundation believes that a fairer system of competition would be for political party candidates to contest directly against individual independent candidates for a specific seat in the National Assembly or a provincial legislature. **The Foundation submits that it speaks volumes that not one independent candidate was able to win a seat in the National Assembly.**
20. **Accountability:** The current system also does nothing to ensure that elected representatives are more accountable to the electorate than their party (“the accountability problem”).
21. **Transparency:** The current system does not ensure greater transparency and responsiveness to the electorate, as evidenced by its inability to prevent State Capture. In this regard, former Chief Justice Zondo, in his report on State Capture,¹⁹ raised the “problem” that the Constitution allows for the executive to come to power through the legislature,²⁰ which led to former President Mbeki being recalled by his party, which elected to replace him with former President Zuma, leading to State Capture occurring. Former Chief Justice Zondo opines that former President Zuma’s coming to power under e.g. a presidential system, where the head of government is elected directly by the citizens, may have been less likely.
22. The current system fails to meet all of the Constitution’s requirements, specifically it fails to ensure accountability, responsiveness and openness.²¹

¹⁹ [Judicial Commission of Inquiry into State Capture Report: Part VI Volume 4: All the Recommendations](#) (“State Capture Report”) at paras 259 through 263.

²⁰ Section 86(1)’s and section 128(1) of the Constitution.

²¹ Section 1(d) of the Constitution.

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23. Furthermore, it fails to meet four out of the six guiding principles for evaluating an electoral system.

24. **The Foundation, thus, believes that electoral reform is justified and necessary.**

BRIEF OVERVIEW OF THREE MAIN ELECTORAL SYSTEMS:

25. For the sake of brevity, the Foundation will only provide a short overview of the pros and cons of the three main electoral systems.²²

Electoral System:	Main Advantage(s):	Main Disadvantage(s):
Proportional Representation ("PR") System	<p>This system encourages a diversity of parties to be elected to the legislature.</p> <p>It often results coalition governments.²³</p> <p>It is seen as the most suitable system to ensure the fair representation of majorities and minorities in the legislature.</p>	<p>Elected representatives are appointed by their party, making them more accountable to their political party, than to the electorate.²⁴</p>
First-Pass-The-Post Majority System	<p>This system makes elected representatives directly accountable to their electorate, resulting in greater</p>	<p>It results in parliaments that are not diverse with minorities often not being fairly represented and</p>

²² Unless specifically referenced as otherwise, all information is taken from the ACE Electoral Knowledge Network website. For a full discussion on all the different electoral systems available see <https://aceproject.org/ace-en/topics/es/esd/default>.

²³ Although the fact that PR systems tend to lead to coalitions is listed as a disadvantage, the Foundation believes that as the Government of National Unity's success proves, coalition governments are an advantage, especially in diverse societies.

²⁴ The [Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change](#) ("High Level Panel Report") at page 568 states that elected representatives are more beholden to their political party and its leadership rather than to voters. This places party politics and loyalties ahead of effectiveness and delivery. See also Dr S Mbete "[Electoral Reform Research Report](#)" at page 26 states that "*one of the prime criticisms of South Africa's ruling elite is that they are not accountable to citizens*".

	accountability. (This is because this system creates a direct connection between a district's electorate and its elected member, because each district represents a legislative seat and the candidate with the most votes in that district wins the seat.	often gives rise to single-party governments.
Mixed Member Proportional System	This system is already used in South Africa's local government elections. ²⁵ It combines proportionality with direct geographical representation.	It currently results in the votes for direct representatives counting less than the PR vote. This creates two classes of representatives in the legislature, with the PR representatives holding greater influence in practice.

PROPOSED CONSTITUTIONALLY COMPLIANT SYSTEM:

26. Due to the Constitution's requirement that an electoral system that "*results, in general, in proportional representation*",²⁶ the First-Pass-The-Post Majority System on its own is not constitutional. However, combining it with a PR system, would result in a constitutional system that also yields greater accountability.

27. The Electoral Task Team ("Slabbert Task Team") in 2003 proposed such a combination: The Slabbert Task Team's **majority recommendation** in its report ("the van Zyl Slabbert Report") proposes a **mixed-member proportional system**.²⁷ It consists of 69 multi-member constituencies that elect 300 of the National Assembly's 400 members. The remaining 100 members are elected from a compensatory national closed list to ensure overall proportionality is restored.²⁸ Importantly, the van Zyl Slabbert Report was published **before** the Constitutional Court allowed independent candidates were allowed to stand for public office in 2020.²⁹ As such, the draft bills it contains make no provision for independent candidates.

²⁵ See the Local Government: Municipal Electoral Act 27 of 2000, which makes provision for both party and ward candidates.

²⁶ Sections 46(1)(d) and 105(1)(d) of the Constitution.

²⁷ Dr S Mbete "[Electoral Reform Research Report](#)" at page 24.

²⁸ [Van Zyl Slabbert Committee's Report](#) at para 4.5.

²⁹ *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] ZACC 11.

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28. The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change in 2017 recommended that the electoral system be changed to makes elected representatives accountable to defined constituencies on a proportional representation and constituency system for national elections.³⁰
29. Former Chief Justice Zondo urged Parliament to consider such a combination in the State Capture Report. He recommended that Parliament should consider whether such an electoral system would enhance Parliament's capacity to hold the executive accountable.³¹
30. The Ministerial Advisory Committee on Electoral Reform ("the MAC") in 2021 also proposed such a combination. The MAC's **majority recommendation** in its Report of the Ministerial Advisory Committee on Electoral Systems Reform ("the MAC Report"), was based on the Slabbert Task Team's majority recommendation, but was updated to incorporate independent candidates. It also proposes a **mixed-member proportional system**.³²

EVALUATION OF THE MAC MAJORITY'S RECOMMENDATION:

31. **Inclusivity:** Independent candidates would stand in just one constituency³³ and together with associates nationally.³⁴ Party candidates would be able to stand in a single-member constituency and nationally simultaneously. Should a party candidate win a single-member constituency, any seat they win on the national list would be allocated to the next person down on the party's list, ensuring parties maximise the chances of their top leaders being elected.³⁵ This proposed system encourages wide and diverse public participation from all demographics to foster diversity of opinion and encourage representation of all.

³⁰ Recommendation 6.8 of the High Level Panel Report.

³¹ State Capture Report at para 227.2: *"It is recommended that Parliament should consider whether introducing a constituency-based (but still proportionally representative) electoral system would enhance the capacity of Members of Parliament to hold the executive accountable. If Parliament considers that introducing a constituency-based system have this advantage, it is recommended that it should consider whether, when weighed against any possible disadvantages of, this advantage justifies amending the existing electoral system."*

³² [MAC Report](#) at para 5.2 read with Dr S Mbete "[Electoral Reform Research Report](#)" at page 29.

³³ [MAC Report](#) at para 5.2 read with Dr S Mbete "[Electoral Reform Research Report](#)" at page 29.

³⁴ [MAC Report](#) at para 5.2.

³⁵ [MAC Report](#) at para 5.2.

32. **Fairness:** The MAC Majority's recommendation that political party candidates compete directly against individual independent candidates to represent a single-member constituency in the National Assembly or provincial legislature is a fairer system of competition. It ensures that, as much as possible, votes have equal value. The Foundation believes this will greatly increase the chances of an independent candidate being elected.
33. **Accountability:** Voters would be enabled to recall an underperforming representative.³⁶ This would ensure that representatives are directly answerable to their electorate, not their political party.
34. **Simplicity:** This electoral system is familiar to voters as it is the system used for local government elections. This makes the system accessible to citizens and reduces the chance of spoilt ballots.
35. **Electoral manageability:** This electoral system is already used for local government elections.
36. **Transparency:** The proposed system's processes for determining the allocation of seats is clear in that 200 MPs would be elected from single-member constituencies and the remaining 200 from a single national multi-member constituency.
37. The proposed system adheres to all the Constitution's requirements as well as satisfying the guiding principles.

RECOMMENDATIONS:

38. For the reasons set out above the Foundation supports the MAC's **majority recommendation** – except that it favours greater weighting for constituencies. For this reason, the Foundation recommends that there should be 250 single member constituencies and 150 PR representatives.³⁷
39. It is submitted that this system will also help to prevent state-capture from occurring again, because it makes Parliament directly accountable to its electorate, thereby preventing it from ever being controlled by the Executive and failing to fulfil its oversight function again.

³⁶ [MAC Report](#) at para 5.2 read with Dr S Mbete "[Electoral Reform Research Report](#)" at page 29.

³⁷ The MAC Report states that this could even go as far as 265 seats without serious risk of overhang.



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40. The Foundation also believes that because of the single-member constituencies, voters will have a direct link to the candidates running for a seat. Simultaneously they will be able to recall underperforming representatives. This will increase accountability and responsiveness, resulting in the public's trust being restored in the democratic system, which, in turn, will increase voter turnout.
41. The system, by having 250 representatives elected from single-member constituencies and 150 representatives from a single national multi-member constituency, results in overall proportional representation while allowing for independent candidates (to compete on a level playing field with political parties) and direct accountability to the electorate. This creates an inclusive and widely representative political system for our diverse society to ensure that everyone has a voice and is represented.
42. The Foundation recommends that to ensure a strict separation of powers between the executive and legislature, the Panel give serious consideration to former Chief Justice Zondo's point of moving towards a presidential system, where the head of government is elected directly by the citizens.³⁸
43. The Foundation recommends that the Panel involve the Civil Society Electoral Reform Panel (CSERP) to oversee and report to the public on its deliberations so as to ensure ongoing public involvement in this crucial democratic project.
44. Additionally, the Foundation submits that the Panel involve the youth to ensure the youth co-create and therefore, buy into, the new electoral system. To this end, the Panel can consider using vehicles such as the National Youth Debate Initiative or the National Dialogue Initiative, which ever would be more expedient, given the Panel's deadline of May 2025.

³⁸ [Judicial Commission of Inquiry into State Capture Report: Part VI Volume 4: All the Recommendations](#) ("State Capture Report") at paras 259 through 263.

45. We hope the above are constructive points and we reiterate the Foundation's willingness to engage further in with the Panel on this important topic by way of verbal submissions.

Sincerely,

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END.