South African Institute of Race Relations NPC (IRR)
Submission to the
Portfolio Committee on Home Affairs
(National Assembly)
regarding the
ELECTORAL LAWS AMENDMENT BILL [B22-2020]
Johannesburg, 30 October 2020

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1 Introduction

The Portfolio Committee on Home Affairs (National Assembly) has invited interested individuals and organisations to submit written comments on the Electoral Laws Amendment Bill [B22-2020] ('the Bill') by 16h00 on 30th October 2020.

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.

2 The importance of proper public consultation

The Bill was introduced in the National Assembly on a date which remains obscure. A call for comments on it was published in the *Sunday Times* on 11th October 2020, with the deadline for the sending in of written submissions set at 'no later than 30 October 2020 at 16:00'. This is for too short a period for adequate public consultation.

The Bill seeks to make a number of far-reaching changes to the electoral process, including amendments to the way in which South Africans are in future to vote. Yet this is a matter crucial to South Africa's democracy and to the capacity of the Independent Electoral Commission (IEC) to uphold its constitutional obligation to 'ensure' elections that are 'free and fair' at every level of government. The time given to provide comments on the Bill (less than three weeks) is particularly inadequate in these circumstances.

The Constitution requires Parliament to facilitate proper public participation in the legislative process, while the Constitutional Court has repeatedly ruled that proper public participation in the law-making process is a vital aspect of South Africa's democracy.

Relevant rulings here include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*; *Doctors for Life International* v *Speaker of the National Assembly and others*; and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*.

In these judgments, the Constitutional Court has elaborated on what is needed for proper public consultation. According to the court, citizens must be given 'a meaningful opportunity to be heard in the making of laws that will govern them'. They must also be given 'a reasonable opportunity to know about the issues and to have an adequate say'.[1]

The court has also stressed that adequate time must be allowed for the public consultation process. In the *Land Access* case, for instance, it stated that 'a truncated timeline' for the adoption of legislation may itself be 'inherently unreasonable'. If the period allowed is too short – as it was in the *Land Access* case, when roughly a month was allowed for the Restitution of Land Rights Amendment Bill of 2014 to proceed through the National Council of Provinces (NCOP) – then 'it is simply impossible...to afford the public a meaningful opportunity to participate'.[2]

In the *Doctors for Life* case, where the timeline for the adoption of the relevant Bill was also short, the court made it clear that legislative timetables cannot be allowed to trump constitutional rights. Said the court: 'The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.'[3]

In the *Land Access* case, the court cited this passage with approval and went on to say: 'In drawing a timetable that includes allowing the public to participate in the legislative process, the NCOP cannot act perfunctorily. It must apply its mind taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue'.[4]

These rulings by the Constitutional Court apply with equal force to the Bill. Elections are in many ways the backbone of democracy, while the IEC is obliged to 'ensure' free and fair elections. The public must be given reasonable time to consider the proposed amendments as well as to provide their comments. Less than three weeks is simply not enough time for citizens to apply their minds to the Bill. Nor is it sufficient time for them to be able to make considered comments on the proposed legislation.

This is especially so when the Bill amends three different statutes, each of which has to be read to understand the Bill's provisions. In addition, all three of these statutes – the Electoral Commission Act of 1996, the Electoral Act of 1998 and the Local Government: Municipal Electoral Act of 2000 – were amended in 2018 and no updated version of their current provisions is readily available. Further recent amendments were also made to the Local Government: Municipal Electoral Act in 2016, and again an integrated text incorporating these changes cannot easily be found.

All of this makes it extremely difficult for individuals and organisations outside the legal profession to read the Bill in the context of the three statutes it seeks to amend. Yet without adequate insight into these three statutes, it is impossible to grasp or evaluate the changes the Bill aims to introduce. In addition, some of the new wording used in the Bill is vague and hard to understand. This makes it still more difficult for the public and other stakeholders to assess the meaning and significance of the Bill.

Given that the time for public consultation was manifestly too short, the IRR wrote to the secretary of the committee, Mr Eddie Mathonsi, on Friday 23rd October to request a postponement of the deadline. A follow-up e-mail was sent on 29th October, but the IRR has yet to receive a reply to these requests.

3 No SEIAS assessment

Since September 2015, all new legislation and regulation in South Africa has had to be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.[5]

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once a new bill has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their

respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[6]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the bill in terms of implementation and compliance costs as well as the anticipated outcome'. This final assessment, with its comprehensive assessment of likely economic and other costs, must be attached to the bill when it is published 'for public comment and consultation with stakeholders'.[7]

However, no SEIAS assessment of this Bill has seemingly been carried out. Nor has a final SEIAS report been appended to the Bill to help inform the public and so empower it to 'know about' the issues and have a reasonable opportunity to influence the decisions to be made. This is a fundamental shortcoming which has further eroded the constitutional right to appropriate public involvement in the regulatory process.

4 The Content of the Bill

Because the time allowed for comment has been unreasonably short, the IRR cannot address all the many changes in the Bill. It must, however, highlight five issues that are deeply concerning – and on which not nearly enough information for informed evaluation has been provided.

4.1 Concurrence of finance minister on state expenditure needs excluded

Clause 6 of the Bill deletes Section 23(3) of the Electoral Commission Act of 1996. This sub-section currently provides that: 'Any regulation [made by the Commission] which affects state expenditure shall be made with the concurrence of the minister of finance.' Once the Bill is enacted, however, the need for his concurrence will fall away.

This is disturbing at a time when South Africa's public debt is mounting so rapidly that interest payments already cost the state R2.1bn a day. In addition, the ratio of total public debt to GDP is set to reach 92.9% in 2023/24 and 95.3% in 2025/26. In 2023/2024, gross loan debt is expected to amount to R5.54-trillion. [8]

However, overall debt may be very much higher by then if some R307bn in cuts to public spending cannot be achieved. There is therefore a real prospect, as finance minister Tito Mboweni has warned – most recently in his Medium Term Budget Policy Statement (MTBPS) on 28th October 2020 – that South Africa may default on the repayment of its surging public debt. This would have extremely severe economic consequences for the country and all its people. [9]

The Bill nevertheless seeks to dispense with any need to obtain the concurrence of the finance minister for the increased state spending that the Independent Electoral Commission (IEC) may in future bring about via its regulations.

This is all the more concerning when other provisions in the Bill suggest that the IEC is proposing to introduce an electronic voting method for the country at all three tiers of government. Yet electronic voting methods are not only notoriously unreliable, but also very costly.

According to Robert Duigan, who holds an MSc in Crisis and Security Management from Leiden University College, in his paper *An introduction to vulnerabilities in electronic voting*, electronic voting machines require such 'large initial investments in hardware and proprietary software' that the only way to help spread their costs is to give them 'a lifetime of 20 to 30 years'. However, 'it is almost impossible to prepare decades in advance for potential vulnerabilities, which multiply as technology advances'.[10] A variety of technical problems with either hardware or software will inevitably come to light over the years. This means that high levels of expenditure on improvements and the correction of defects are sure to be needed too.

South Africa simply cannot afford the high costs of an electronic voting system – and especially so when there is no evident need for such a new system. This unnecessary expenditure is particularly unwise at a time when the government is having to cut spending on education, healthcare, transport, housing, sanitation, policing, and other essential needs, as the MTBPS makes clear. [11]

These cuts to core needs are being implemented to shield the country from the growing risk of a sovereign debt default. The sacrifices being made to avoid this dire outcome should not be undermined by high levels of unnecessary spending on an electronic voting system – and the finance minister should not be barred from vetoing such spending by this Bill.

4.2 Introduction of 'a different voting method' for national and provincial elections

Clause 14 of the Bill seeks to add a new sub-section to Section 38 of the Electoral Act of 1998. This new sub-clause provides:
[Section 38] (9): 'Despite anything to the contrary contained in this Act or in any other law, the Commission may prescribe a different voting method.' [12]

No further explanation is provided in Clause 2.1.14 of the Memorandum on the Objects of the Bill as to why 'a different voting method' might be needed. Nor is any explanation given as to why the Commission should have the power, in introducing a new voting method, to override any contrary provisions in both the Electoral Act or 'in any other law'. A provision

with such potentially enormous ramifications must be properly explained to the public, which must also be given adequate time to grasp the full consequences of what is being proposed.

What is clear, however, from the limited information available, is that the wording used in Clause 14 would allow the Commission to introduce an electronic voting system – an option which the IEC has been actively exploring for some time.

In May 2019 deputy IEC chair Janet Love said the Commission 'had been exploring the use of electronic or digital voting systems in conjunction with their counterparts in other countries with a view to implementing that in SA. "We are working with our colleagues around the world to investigate how we can use this system of voting in our country," she said.'[13]

In July 2020 IEC chair Glen Mashinini said the Commission is 'considering an e-election', as this would supposedly 'drive down costs' and 'improve the counting and capturing of results'.[14] (Both these claimed benefits are false, however, as further described below.)

Other media reports have also confirmed that the Commission is 'considering on-line voting for South Africa', though it continues to 'keep mum about the details'.[15]

However, South Africans have the right to know about 'the details' and in full. This is all the more important now that the Bill is intent on delegating to the IEC the power to introduce an electronic voting system by regulation – and without further reference to Parliament.

Ms Love claimed in May 2019 that an electronic voting system would help overcome challenges that had emerged in the 2019 general election. These included, she said, 'double voting by some voters' and 'removable indelible ink used to mark the thumbs of votes who had already cast their ballot'.[16] But a better quality of indelible ink can easily be used. Other practical steps can also be taken to improve the voters' roll and prevent double voting.

Traditional manual voting systems are not entirely immune to irregularities, of course. However, international experience confirms that the safeguards they provide are far stronger than those available under electronic systems. In particular, traditional voting systems are far more transparent because they provide a paper trail and can be observed at every stage.

Writes Mr Duigan: 'For the classic secret ballot to function, there need only be a secret booth, a sealed box, a legible ballot, and an impartial system of oversight for counting. For an electronic system, similar concepts apply (albeit in a virtual sense), but at each stage, the "parts" of the system are far greater in quantity, and the failure of any one part can compromise the validity of a ballot, or even an entire election.'[17]

Electronic voting is thus far more vulnerable to manipulation. Writes Mr Duigan in *An introduction to vulnerabilities in electronic voting*: 'Traditional safeguards for ballot security have the advantage of being legible to the entire public, and violations of protocol are easy enough for anybody to comprehend. Violations are less ambiguous and easier to detect.'[18]

By contrast, 'electronic systems are only transparent to a tiny selection of technicians, whose access to voting procedures is controlled by the state…. In South Africa, where the government is openly hostile to checks on its power,… this is grounds enough to reject attempts to digitise future elections.' [19]

Mr Duigan's paper (attached as *Appendix 1*) provides many more insights into the ways in which electronic voting systems are vulnerable to manipulation. Relevant quotes from it include:

- electronic voting systems are vulnerable to 'overt' penetrations by actors wanting to 'discredit an election'; to 'covert' penetrations which can be used to 'intimidate' voters; and to 'surreptitious' penetrations which can be used to 'secretly defraud an election while establishing its legitimacy';[20]
- 'the vast majority of electronic voting systems do not place adequate defences in place even for ordinary commercial-grade IT infrastructure, even though in the case of political processes the stakes are significantly higher and the incentives to cheat are exponentially larger. Companies who supply the infrastructure for electronic voting have a material interest in downplaying the risks and vulnerabilities inherent in the equipment they sell';[21]
- 'the Netherlands were both early adopters (1997), and early abolishers (2008) of direct-recording electronic (DRE) voting machines…. Despite all the measures taken by producers and coordinators to ensure that votes were anonymous, reliable and encrypted, radio frequency emanations from the voting machines could be picked up by nearby listening devices. Electronic signal disturbances caused by changes in current when votes were logged allowed a security activist to read votes as they were recorded. This led to electronic voting being discontinued';[22] while
- 'in practice, whether in Latin America, the United States, India or elsewhere, electronic voting has proved to be vulnerable to just the same classes of vulnerabilities as regular elections, albeit in different ways, and also provided some novel vulnerabilities of its own'.[23]

There are also many problems specific to South Africa that further caution against the introduction of an electronic voting method. Notes Mr Duigan: 'Remote electronic voting is not feasible in a country with low internet penetration, and regions with low levels of technological literacy will encounter difficulties operating machines. Lack of available technicians also presents a problem, as does unreliable electricity supply and network access.

Inability to ensure a clean and legitimate tender procedure for the acquisition of equipment is, of course, one of the strongest and most damning objections.'[24]

4.3 New rules on determining the results at voting stations

Under the current wording of Section 50(1) of the Electoral Act, the counting officer, 'after determining the result at a voting station', must complete a form reflecting, among other things, 'the number of ballot papers supplied to the voting station', the result at the voting station, the 'number of counted ballots' that were either accepted or disputed, and the number of ballot papers that were 'rejected', 'cancelled' or 'unused'.[25] These requirements provide important safeguards against the risk of valid ballots being wrongly discarded and/or fraudulent ones being inserted instead.

Under the Bill, by contrast, Section 51(1) is to be reworded, so that it reads: 'After determining the result at a voting station, the counting officer must complete a prescribed form reflecting the result of the count in respect of each ballot conducted at the voting station'. [26]

All the references to ballot papers now contained in Section 51(1) are to be omitted, which will make it difficult, if not impossible, to achieve a proper ballot reconciliation. Confusingly, moreover, the new wording refers to 'each ballot conducted' at the voting station, rather than to 'each ballot cast' at the station. The proposed sub-section is thus difficult to understand, introducing further uncertainty. Yet vagueness of this kind is contrary to the doctrine against vagueness in laws, as stressed by the Constitutional Court in the *Affordable Medicines Trust* case. [27]

4.4 *Introduction of 'a different voting method' for local government elections too*

Clause 21 of the Bill seeks to add a new sub-section to Section 47 of the Local Government: Municipal Electoral Act of 2000. This new sub-clause provides:
[Section 47] (8): 'Despite anything to the contrary contained in this Act or in any other law, the Commission may prescribe a different voting method.'[28]

Again, no further explanation is provided in Clause 2.1.21 of the Memorandum on the Objects of the Bill, which makes no mention at all of the fact that 'a different voting method' is to be introduced into the municipal electoral system. Nor is any explanation given as to why the Commission should have the power, in introducing a new voting method, to override any contrary provisions in both the Local Government: Municipal Electoral Act or 'in any other law'.

However, all the concerns earlier outlined about the costs and vulnerabilities of electronic voting systems apply with equal, if not greater, force in the municipal context. The practical difficulties of securing adequate internet access, technical support, network access, and reliable electricity supplies are likely to be still more severe in many remote rural municipalities. This will make the costs and vulnerabilities of electronic voting at local level even greater.

4.5 Failure to compute or disclose relevant costs for the state

Clause 4 of the Memorandum on the Objects of the Bill states that 'most of the amendments proposed by this Bill relate to normal operations related to elections. For this reason, the financial implications thereof have already been taking into account when compiling the budget for those elections'.[29]

This statement brushes over the high costs of acquiring the hardware and proprietary software needed for an electronic voting system, as earlier outlined. It also brushes over the high recurring costs that will be needed in overcoming problems – and in curing fresh defects as technologies changes and additional steps must be taken to ward off new threats.

To claim, thus, that 'the financial implications for the state' from the Bill 'have already been taken into account' in the existing budget for elections is disingenuous. Existing budgets will instead have to be greatly expanded. In addition, the finance minister is to be barred from any say over this additional expenditure, whereas (under the current rules) his 'concurrence' would be required.

5 Constitutionality of the Bill

The Bill is clearly unconstitutional, both on substantive grounds and on procedural ones.

Substantively, as Advocate Paul Hoffman SC has pointed out, Section 190(1)(b) of the Constitution requires the IEC to 'ensure' that elections, at all three tiers of government, are 'free and fair'. The IEC cannot fulfil this obligation under an electronic voting system when the opportunities for the rigging of elections conducted in this manner are legion and widely known to be so.

Here, it must also be remembered that Germany's Constitutional Court, in specifying the requirements for a free and fair election, has effectively made it clear that an electronic voting system cannot meet these criteria and so cannot be lawfully introduced in that country. The same considerations must apply in South Africa. In fact, they apply with all the more force – for here the risks of an electronic voting system being manipulated are considerably higher, as outlined earlier and more fully set out in *Appendix 1*.

In addition, as the Helen Suzman Foundation has noted, it is unconstitutional for Parliament to delegate the decision to introduce an electronic voting system to the IEC. Provisions in the Bill purporting to give the IEC this power – and allowing it to do so by regulation and without further reference to Parliament – are thus invalid.

In addition, and from a procedural perspective, the time allowed for comment on the Bill has been unreasonably short. As the Constitutional Court stated in the *Land Access* case, for instance, 'a truncated timeline' for the adoption of legislation may itself be 'inherently unreasonable'. If the period allowed is too short, as it has been in relation to this Bill, then 'it is simply impossible...to afford the public a meaningful opportunity to participate'.

6 The way forward

All provisions in the Bill empowering the IEC to 'prescribe a different voting method' should be deleted. So too should the Bill's proposed changes to:

- Section 23(3) of the Electoral Commission Act, which currently requires the concurrence of the financial minister for any IEC regulations affecting state expenditure; and
- Section 50(1) of the Electoral Act of 1998, which currently contains a tried and tested system for reconciling, counting, and recording the paper ballots cast at every voting station.

A new bill, shorn of these offending and often unconstitutional provisions, should then be drawn up. This should be accompanied by a SEIAS assessment, the final report of which should be+ appended to the revised bill when it is released for public comment. The period for public comment should be at least four weeks, while updated copies of the three statutes the bill seeks to amend should be made available to make it easier for the public to get to grips with the content and significance of the new measure.

South African Institute of Race Relations NPO **30 October 2020**

[1] *Matatiele Municipality and others* v *President of the Republic of South Africa and others*; [(2006) ZACC 12] *Doctors for Life International* v *Speaker of the National Assembly and others*; [2006 (6) SA 416 (CC)] and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*. [(2016) ZACC 22]; *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630

[2] *Land Access*, paras 61, 67

[3] *Doctors for Life*, para 194

[4] *Land Access*, para 70

[5] Department of Planning, Monitoring and Evaluation, 'Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill', 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p3, May 2015

[6] *SEIAS Guidelines* p7

[7] Ibid

[8] *Business Day* 28 October 2020

[9] Ibid

[10] Robert Duigan, *An introduction to vulnerabilities in electronic voting*, unpublished paper, October 2020, p4, attached as *Appendix 1*

[11] *Business Day* 28 September 2020

[12] Clause 14, Bill

[13] *The Citizen* 9 May 2019

[14] *Business Day* 14 July 2020

[15] *Dispatch*, 14 July 2020

[16] *The Citizen* 9 May 2019

[17] Duigan, ibid, p6

[18] Duigan, ibid, pp9-10

[19] Robert Duigan, *An introduction to vulnerabilities in electronic voting*, October 2020, pp9, 10; attached as Appendix 1

[20] Duigan, p3

[21] Duigan, p5

[22] Duigan, pp3, 6

[23] Duigan, ibid, p7

[24] Duigan, p6

[25] Section 50(1), Electoral Act of 1998

[26] Clause 15, Bill

[27] *Affordable Medicines Trust and others* v *Minister of Health and others*, 2005 BCLR 529 (CC) at para 108

[28] Clause 21, Bill

[29] Clause 4, the Memorandum on the Objects of the Bill