



HELENSUZMAN
FOUNDATION

For attention: Honourable Speaker, Nosiviwe Mapisa-Nqakula and Ms Siviwe Gwarube

Email: speaker@parliament.gov.za
legislation@da.org.za

25 April 2023

Submission on Notice of Introduction Constitution Nineteenth Amendment Bill, 2023, [PMB].

We attach our written submission in response to the invitation for comments on the Notice of Introduction Constitution Nineteenth Amendment Bill, 2023, [PMB].

Should you have any queries, it would be appreciated if you could contact me at the following email address: nicole@hsf.org.za.

Yours sincerely

Nicole Fritz
Director



1. Introduction

1.1. This submission serves to signal the Helen Suzman Foundation's (HSF) concern regarding the proposed Constitution Nineteenth Amendment Bill, 2023 (Bill).

1.2. HSF recognises the potential for unstable government, and its attending harmful effects, in a era of national coalition politics. However, HSF submits that the Bill's proposal – a constitutionally entrenched limit on motions of no confidence in the President and Premiers – is not the right solution.

1.3. In summary, HSF submits that the Bill falls short by:

1.3.1. failing to appreciate that motions of no confidence work best when they are perennial threats to underperforming executives – and that placing blunt limits on their frequency is an unprincipled solution to their misuse;

1.3.2. allowing for instability enough to not warrant the radical constitutional change it suggests, since it provides for motions of no confidence every twelve months from the date of the last motion;

1.3.3. allowing for motions of no confidence during intervening periods under 'exceptional circumstances', thereby duplicating the Constitution's existing mechanisms for removing the President and Premiers – this risks drawing our courts, at their peril, into political disputes over motions of no confidence; and

1.3.4. speculating that national coalition politics in South Africa will be so permanently fraught as to justify a constitutional amendment and, thereby, inviting unintended consequences in times of political change.

1.4. HSF's reasoning for these submissions follows below.



2. Motions of No Confidence as Perennial Incentives for Executive Performance

- 2.1. On several occasions, the Constitutional Court has held that motions of no confidence are an indispensable check on executive power, whose effectiveness lies crucially in being a *perennial* incentive for executives to perform their duties.¹ As such, the Bill suggests radically diminishing the Constitution's current provision for holding executive power to account by, effectively, periodically outlawing motions of no confidence.
- 2.2. Limiting the frequency of motions of no confidence necessarily provides executive power immunity from accountability in periods where motions are not allowed.² Indeed, the fewer motions of no confidence that a legislature is allowed, the greater that an executive's immunity from accountability will be.
- 2.3. Reducing the extent of that immunity from accountability by making motions of no confidence more frequent is no solution because it invites the sort of unstable government that the Bill tries to foster in the first place.
- 2.4. Indeed, the Bill itself is hardly a vision for stable government in two ways. First, in theory, it allows for four new Presidents or Premiers in a five-year administration. Second, it allows an incoming President or Premier, following a successful motion of no confidence, just a year before having to spend valuable time facing another.
- 2.5. In the result, the Bill suggests radical constitutional change only to strike an impossible balance between stable and accountable government. This is only illustrated further in the Bill's proposal for motions of no confidence under 'exceptional circumstances.'

¹ *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 43; *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21 para 43 and 47.

² The Constitution's provision for removing the President and Premiers would remain intact but they are considerably more cumbersome than the procedure for a motion of no confidence.



3. 'Exceptional Motions of No Confidence'

3.1. The Constitution currently provides no substantive constraint on the grounds for a motion of no confidence.³

3.2. By proposing motions of no confidence under exceptional circumstances, the Bill proposes a radical constitutional change: a new, self-standing 'exceptional motion of no confidence' that is subject to the following substantive constraints: "a violation of the Constitution or law, misconduct or the inability to perform the functions of office."

3.3. Such a constitutional invention cries out for an appropriate mechanism to decide whether circumstances are indeed exceptional – but there isn't one.

3.3.1. If Speakers of the national or provincial legislatures decide whether circumstances are exceptional, their adverse decisions could very well be the subject of judicial review. This risks judicialising motions of no confidence, marking a stark departure from their current design as a quintessential mode of *political* accountability.

3.3.2. Even if the national and provincial legislatures themselves decide whether circumstances are exceptional, the Bill's proposed substantive constraints effectively replicate the Constitution's existing provision for removing the President⁴ and Premiers.⁵ This may well attract the same drawn-out process now germane to the process for removing the President since *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*.⁶

3.3.3. This not only hobbles motions of no confidence as a swift mechanism of accountability but, as President Ramaphosa's recent challenge of the

³ See section 102 of the Constitution of the Republic of South Africa, 1996 (Constitution) in respect of national government and section 141 in respect of provincial government.

⁴ Section 89 of the Constitution.

⁵ Section 130 of the Constitution.

⁶ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017) para 176 – 182.



'Section 89 Independent Panel Report' has shown,⁷ also risks judicialising motions of no confidence.

4. The Bill's Untested Vision of National Coalition Politics in South Africa.

4.1. The Bill is expressly a response to South Africa's recent experience with chaotic coalition politics in certain municipal governments.

4.2. This is troubling because it is by no means proven that national coalition politics, or municipal politics for that matter, will be so permanently fraught to justify the radical constitutional change that the Bill proposes. Constitutionally entrenched limits on motions of no confidence are inherently risky because they render hostage fluid political circumstances to rigid legal rules.⁸

4.3. As such, the Bill creates the risk of unintended consequences in periods of changing political conditions.

5. Conclusion

5.1. HSF submits that the Bill hobbles the motion of no confidence as a valuable mechanism for holding executive power to account, only to manage a yet-tested era of national coalition politics in South Africa.

5.2. Further, it effectively duplicates the Constitution's existing provision for removing the President and Premiers and, thereby, risks drawing the courts into political disputes about the appropriateness of motions of no confidence.

⁷ [President Ramaphosa launches bid at ConCourt for review of Section 89 report - SABC News](#)

⁸ In terms of section 74(3) of the Constitution, the Bill – and any future bills that undo or augment its constitutional change – will require the support of two-thirds of the National Assembly and, likely, two-thirds of the National Council of Provinces as well.