

SUBMISSION BY THE DEMOCRATIC ALLIANCE TO THE MOSENEKE INQUIRY INTO ENSURING FREE AND FAIR LOCAL GOVERNMENT ELECTIONS DURING THE COVID-19 PANDEMIC

BACKGROUND

1. The Independent Electoral Commission (“the Commission”) of South Africa has appointed Judge Dikgang Moseneke to prepare a report in terms of section 14(4) of the Electoral Commission Act, Act 73 of 1998, which provides that: “The Commission may, if it deems it necessary, publish a report on the likelihood or otherwise that it will be able to ensure that any pending election will be free and fair.”

2. Political parties were consequently invited on 7 June 2021 to make submissions to the Inquiry. In this notice the “salient” features of the terms of reference of the Inquiry are identified as:

- “• To enquire into, make findings and report on, and make recommendations concerning the likelihood that the Electoral Commission would be able to ensure that the forthcoming 2021 general local government elections will be free and fair, in view of (i) the challenges posed by the COVID 19 pandemic, and (ii) the measures promulgated by the government to curb the continued spread of the pandemic; and
- To indicate additional measures that the Electoral Commission may be required to implement in order to realise free and fair elections within the context of the COVID-19 pandemic.”

3. The invitation called specifically for submissions on the following issues:

- “• Whether the current conditions under the COVID-19 pandemic are conducive or not to the holding of free and fair local government elections during October 2021;
- The constraints, if any, that the measures in place to prevent and combat the spread of COVID-19 have imposed or will likely impose on political activity and

campaigning in the lead-up to the local government elections earmarked to be held in October 2021;

- The constraints, if any, that the measures in place to prevent and combat the spread of COVID-19 are likely to impose on the proper and effective monitoring, by political party agents and independent electoral monitoring bodies, of the freeness and fairness of the local government elections earmarked to be held in October 2021; and

- Whether your party participated in by-elections that took place during the period of the COVID-19 pandemic and, if so, what was your party's experience of the by-election(s) and did you consider them to be free and fair?

In addition, you may make any other submissions that you deem necessary and appropriate, provided that they are connected to the proper conduct of local government elections.”

4. We have noted, with appreciation, that the Inquiry understands its mandate merely as advisory in nature. However, it is nonetheless important to confirm that the remit of the Inquiry should not be construed in any way or form, by anybody, as meaning that the Inquiry is to advise whether the Local Government Elections, scheduled for 27 October 2021 (LGE2021), may and/or should be postponed or not.

5. In light of the above, we deem it necessary to firstly deal with the decision of the Commission to embark on a process to publish a report as contemplated by section 14(4) of the Electoral Act.

6. Secondly, submissions will also be made in respect of the meaning of the term “free and fair elections”

7. Thirdly, submission will be made in answer to the specific issues identified in the request for submissions, as quoted above.

We also confirm our availability to make oral submissions to the Inquiry, should it be deemed necessary by the Inquiry.

THE DECISION OF THE COMMISSION TO EMBARK ON A PROCESS TO PUBLISH A REPORT AS CONTEMPLATED BY SECTION 14(4) AND RELATED MATTERS

8. The existence, functionality and independence of the Electoral Commission is one of the requirements for and safeguards of free and fair elections. This was confirmed by the Constitutional Court in *Electoral Commission v Inkatha Freedom Party 2011 (9) BCLR 943 (CC)* para 55, in which the Court also confirmed that in order to maintain the trust of voters in the Commission no party should be treated different to others:

‘It is necessary that the integrity of the electoral process be maintained. Indeed, the acceptance of the election as being free and fair depends upon that integrity. Elections must not only be free and fair but they must be perceived as being free and fair. Even-handedness in dealing with all political parties and candidates is crucial to that integrity and its perception by voters.

9. From the aforesaid passage it is clear that the duty to treat all political parties in a fair and equal manner is a duty not only aimed at ensuring the public trust and confidence in the independence of the Electoral Commission, but more importantly a duty that is aimed at ensuring the integrity of the electoral process as an essential element of free and fair elections.

10. In light hereof the decision of the Commission to embark on a process to publish a report as contemplated by section 14(4) of the Electoral Act must be scrutinised.

11. The Commission has confirmed on a number of occasions, both during meetings of the National Party Liaison Committee (NPLC) and in public, that it is not only under a Constitutional obligation to conduct LGE2021 on/before 1 November 2021, but that it is ready, willing and able to discharge this duty. We submit that this is a matter of public record, but have noted that the Commission again confirmed this in its submission to this inquiry.

12. We submit that this stance of the Commission is the result of a detailed and well-considered process in which the Commission consulted not only with political

parties (as can be seen in the minutes of the NPLC meetings attached to the submissions made by the Commission to this inquiry), but also received briefings from stake holder departments (specifically the Department of Health) and in which the Commission obtained an external legal opinion from senior counsel.

13. The position of the Commission, after this process, was that as a Constitutional amendment would be necessary in order to either extend the current term of municipal councils or to allow for LGE2021 to take place after 1 November 2021 it was under a Constitutional obligation to proceed with all preparations for LGE2021. The Commission formed the view that it would only be entitled to approach the Constitutional Court for permission to hold LGE2021 outside of the constitutionally determined timeframe in the event of an “unmanageable spike” of infections of the Covid-19 virus occurring. This position was informed, or at least confirmed, by the abovementioned legal opinion of senior counsel, the gist of which was shared by the Commission with the NPLC on 22 April 2021. We attach hereto as Annexure “A” copies of the slideshow which the Commission presented to the NPLC at said meeting.

14. We agree with the Commission that the Constitutional demand for regular elections and the requirement that elections should be free and fair do not constitute a binary choice in which one could be cast aside in order to comply with the other.

15. However, it is clear that the Commission is satisfied that it “has taken reasonable steps to ensure the delivery of free and fair elections and that the measures currently underway are on track for that purpose.” (see paragraph 32 of the submission of the Commission to this inquiry)

16. Given that the Commission has exercised due diligence in dealing with concerns raised regarding whether LGE2021 should proceed or not, and has reached a rational and Constitutionally compliant conclusion on the issue, and has satisfied itself that it has done and will be doing the necessary to ensure a free and fair election, the question must be asked why it has nonetheless chosen to embark on the current process?

17. The answer to this question is found in the media statement the Commission issued on 20 May 2021 when it announced its decision to embark on this process. The statement confirms that “it emerged that some political parties were concerned that with the trajectory of the pandemic and the holding of elections under those conditions.” (sic)

18. In this regard it is important to remember that none of the Party Liaison Committees which have been established by the Commission, as required by the Electoral Act, have any decision-making powers regarding any matters that fall within the purview and responsibility of the Commission.

19. These Liaison Committees are essentially forums to enable the Commission to consult with political parties and to convey information to political parties. The concurrence of political parties is not a prerequisite for any decision that is to be taken by the Commission.

20. In terms of the regulatory framework, applicable to decision-making by the Commission, it should therefore be stressed that the Commission is to take decisions “after consultation” with stakeholders and not “in consultation” with them. The fact that the Commission has concluded, after consultation, that it is obligated to deliver LGE2021 on/before 1 November 2021 and that it should ensure that it is free and fair, is therefore consistent with and in compliance with all of its Constitutional obligations.

21. While the Liaison Committees simultaneously enable some oversight over the Commission by political parties, it is strongly submitted that to allow a political party, or a group of political parties, undue influence in the decision-making of the Commission, will invariably undermine the independence of the Commission.

22. The danger posed by the decision of the Commission to embark on the current process is therefore both clear and serious. In having made the decision to embark on this process the Commission clearly elevates those political parties who espouse the view that LGE2021 should be postponed above those who hold the view that LGE2021 should proceed within the Constitutionally determined timelines and are prepared to

allow the Commission to proceed with the preparations for LGE2021 in order to discharge its Constitutional duty to ensure free and fair elections successfully.

23. As a Constitutional body operating in a Constitutional democracy a decision that it is “necessary” to investigate whether it is likely or not to ensure a free and fair election should never have been made on the ground that some political parties hold the view that the election should not take place within the Constitutionally prescribed timeframe. Specifically not in the circumstances where none of those political parties have attempted to initiate any process, via their representatives in Parliament, to amend the Constitution in order for LGE2021 to take place at a later stage, in a Constitutionally compliant manner.

24. Therefore, the decision to formalise a process that will further entertain the arguments of some political parties, aimed at ensuring a postponement of LGE2021, in the face of the Commission having taken a decision on the matter, after proper consultation, is at best ill-advised, and at worst a failure on the part of the Commission to uphold its own independence and the requirement to not treat some political parties differently to others (as confirmed in *Electoral Commission v Inkatha Freedom Party*, as quoted above).

25. From a legal point of view it may even be argued that if all the relevant information about the process already followed by the Commission, the information it obtained and the conclusion it reached (i.e. that it is on track to deliver LGE2021 in a free and fair manner), is taken into account, the decision to embark on this process could possibly even be viewed as unreasonable, flawed and irrational in nature.

26. In addition, any process to further entertain arguments which are either in contradiction to the relevant Constitutional provisions pertaining to the obligation of the Commission to arrange LGE2021 to take place on/before 1 November 2021, or which seeks to subvert, undermine or circumvent the Constitution and the supremacy it enjoys, must be viewed as questionable Constitutional conduct. As a Constitutional body the Commission should not have opened the door to such a process.

THE FUTURE TRAJECTORY OF THE PANDEMIC

27. It has been noted that this Inquiry have been tasked to also ask for and consider submissions from health experts on the “anticipated trajectory of the pandemic”. We hold the view that this information, although by its very nature speculative, may enable the Commission to plan optimally for LGE2021. However, not only has the Commission already sourced and considered information on this issue, but of course it would have been able to continue to source and consider new information on the anticipated trajectory of the pandemic in the absence of this inquiry.

28. Nonetheless, we have received advice that a number of unlikely events and occurrences will have to materialise in order for an “unmanageable spike” in infections to be present in the run-up to 27 October 2021. We were further advised that most scientific models, at this stage, predict that there is a very good possibility that infection rates will be stable and even low in the period immediately before and on 27 October 2021.

29. The fact that government’s vaccination programme is now finally showing some progress, also works against the possibility of an “unmanageable spike” in infections even though it is accepted that the number of people that will in all likelihood have been vaccinated by Election Day will not meet the threshold that will establish so-called “herd immunity”.

WHAT MAKES A FREE AND FAIR ELECTION?

30. Section 19(2) of the Constitution reads: “*Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.*”

31. What is the legal standard to determine whether an election is free and fair? There is no simple answer, but the Constitutional Court has identified the following pointers in ***Kham and Others v Electoral Commission and Another [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC)***.

32. First, the Constitutional Court has cautioned against applying a standard other than the Constitutional one of freeness and fairness.

33. Second, there is no checklist of requirements that must be met for an election to be free and fair. The assessment is contextual and holistic. *“The nature of the irregularities and their impact on the conduct, as well as the result of the election, so far as that can be assessed, must be measured against the Constitutional standard.”* A court *“must weigh all the evidence and, in that light, determine whether the Constitutional requirement was satisfied.”* Flaws that may render one election not free and fair may not have that effect in a different election.

34. Third, the demand for free and fair elections *“is a single requirement, not a conjunction of two separate and disparate elements.”* It encompasses *“the freedom to participate in the electoral process and the ability of the political parties and candidates, both aligned and non-aligned, to compete with one another on relatively equal terms”*.

35. Fourth, a mere doubt about freeness and fairness is inadequate. *“It is insufficient for the Court to say that it has a doubt, or a feeling of disquiet, or is uncomfortable about the freedom and fairness of the election. It must be satisfied on all the evidence placed before it that there are real – not speculative or imaginary – grounds for concluding that they were not free and fair.”*

36. Fifth, the irregularities need not affect the outcome of the election in order to conclude that the election was not free and fair.

37. Sixth, compliance with the legislative requirements for the conduct of elections is an indicator of whether they are free and fair but are not determinative. The Courts have the power to suspend the operation of legislation if it is necessary to avoid a Constitutional crisis.

38. Finally, while elections must be free and fair, they must also be regular. Section 19(2) guarantees *“free, fair and regular elections”*. Regular elections are also a founding value protected in s 1(d) of the Constitution. Regular elections are vital to ensure accountability. If those in power can postpone elections, they can retain power without a mandate from the people. They can also manipulate the timing of elections in order to suit themselves. That is why the Constitution imposes an absolute limit on

the time within which elections must be held. Free and fair elections lose much of their value if they are not regular.

39. We submit that these passages indicate that the manner in which the term “free and fair elections” is approached by our courts is consistent with international developments. The Inter-parliamentary Union, a global organisation first established in 1899 and which boasts nearly 200 members, has over the years analysed and deliberated at length on what constitutes “free and fair” elections.

40. In 2006 it published “**Free and Fair Elections**”, authored by Guy S. Goodwin-Gill, Senior Research Fellow, All Souls College, Oxford. In this publication it determines the following as the essential pre-requisites of free and fair elections:

40.1 Electoral law and system

The need for a country to have clear laws of general application which regulates all matters related to elections and the system of elections of the country.

40.2 Constituency delimitation

In the event that elections take place in geographical constituencies a fair administrative process needs to be in place to determine the boundaries of constituencies.

40.3 Election management

The management of elections is to be entrusted to an electoral commission or body that is independent from government.

40.4 The right to vote

Formal Constitutional or statutory recognition of the citizen’s right to vote, limited by only reasonable restrictions.

40.5 Voter registration

Legislative, administrative and practical arrangements to enable anyone who are entitled to register to vote to do so.

40.6 Civic education and voter information

Voter education and information programmes not to be undertaken by only the state, but also by the Election Management Body.

40.7 Candidates, political parties and political organisation

The right to contest elections as a candidate and to form political parties and take part in the activities of political parties are recognised as being firstly human rights, which are to be protected and regulated.

40.8 Electoral campaigns

A number of rights or freedoms underpin this element: Freedom of speech, freedom of association, freedom of movement and freedom of assembly.

40.8.1 Human rights and the election environment

Specific provisions to ensure that discrimination does not impede or prevent certain (groups of) people from participation.

40.8.2 Media access and coverage

No party or candidate should be prevented from disseminating party policies and programmes through the media. All parties should have equal and equitable access to public media.

40.8.3 Codes of Conduct

Parties and candidates should be required to commit to an Electoral Code of Conduct.

40.9 Balloting, monitoring and results

Parties and independent observers should be allowed to oversee voting, counting and the announcement of results.

40.10 Complaints and dispute resolution

The legislative framework of the country should provide for a proper system for complaints regarding any of these elements to be filed and dealt with, including but not limited to the courts.

41. Furthermore, it is convincingly pointed out that these markers are not only accepted by the Inter-parliamentary Union as essential to free and fair elections, but are individually and as a whole firmly rooted in a number of internal treaties and instruments aimed at the protection of the human rights of voters, going as far back as the 1948 Universal Declaration of Human Rights and including the African Charter on Human and Peoples' Rights of 1981.

42. It is submitted firstly that both our legislative framework, as well as the Bill of Rights contained in our Constitution, give proper effect to the elements calling for legislative regulation and the formal protection of rights and freedoms. Both the right to vote, the right to form and participate in the activities of political parties and the right

of individuals and political parties to contest elections are properly protected and regulated in South Africa. The management of our elections is entrusted to the Commission in terms of specific laws.

43. Furthermore, a cursory reading of the submission filed by the Commission makes it clear that it (as well as other statutory bodies like the Municipal Demarcation Board) has either already discharged its duties in order to ensure the presence of some of the elements of free and fair elections (e.g. ward delimitations), or is favourably positioned to do so (e.g. Voter Education and Registration). The Commission is on record that it will, once again, call on all political parties to sign and commit to the Electoral Code of Conduct. Our system of complaints and complaint resolution (inclusive of the right to have our courts adjudicate disputes) is still in place.

DOES THE COVID-19 PANDEMIC POSE ANY DANGER TO LGE2021 BEING FREE AND FAIR?

44. Despite our abovementioned reservations about the decision of the Commission to institute this inquiry, the balance of our submissions will deal with the issues raised in the request for submissions, as well as related matters.

THE RIGHT TO CAMPAIGN

45. It has been argued by some political parties that the Regulations issued by government in terms of the Disaster Management Act, in order to manage and limit the impact of the Covid-19 pandemic on the lives of South Africans, will unduly limit the right to political campaigning and that this will render the election to be not free and fair.

46. On a conceptual level it is pointed out by Goodwin-Gill in “**Free and Fair Elections**” (page 142) that the need for free and fair campaigning is underpinned by the idea that elections is an expression of the will of the people. Therefore, it is very important that the electorate are able to cast an informed vote.

47. From this it must follow that the right to campaign is ultimately not a right that exists for the benefit of political parties or candidates, but rather for the benefit of voters. Therefore, any assessment of limitations on political campaign events cannot centre on what is convenient for political parties and candidates, or what the views of parties and candidates are on restrictions and limitations.

48. It is strongly submitted that no political party can claim that it is unduly restricted from campaigning solely on the basis that one form of campaigning (i.e. larger and mass meetings) is prohibited by the disaster Regulations.

49. Our Constitution determines that any of the rights contained in the Bill of Rights may be lawfully limited in terms of section 36 of the Constitution. It is to be noted that it is the view of government that all restrictions imposed as part of the Disaster Regulations have been aimed solely at the management of the pandemic and limiting the spread of the corona virus.

50. It is submitted that while there is not necessarily an approving consensus around the necessity and efficacy of all of the measures that has been introduced as part of the Disaster Regulations, there is in fact a general agreement among scientists, and an acceptance by the general populace, that larger meetings do serve as what has become known as “super spreader events” of the corona virus.

51. Therefore, it is submitted that there can be no doubt that there is rational relationship between the management of the pandemic and the prohibition of mass meetings and that the imposition of this prohibition is a reasonable measure in the fight against the virus.

52. As a consequence, there is no real risk, in our view, that the prohibition on larger gatherings during the campaign period prior to LGE2021 will be viewed by any reasonable voter as a clampdown on political rights and an attempt to influence the outcome of the election in one way or the other.

53. It is accepted that some political parties will strongly argue that they rely heavily on bigger meetings as an electioneering platform. We however submit that none of the

bigger political gatherings that has been seen over the last few years have been achieved in an organic manner. Big political meetings are essentially staged events with political organisers of the relevant political parties tasked with ensuring that enough of the known supporters of a party attend in order for the attendance figures to be used to create the impression of mass support.

54. It is however submitted that even if it is accepted that this electioneering tool has been used in recent elections by some political parties to convince some voters to vote for the party in question, the limitation of the right to convene and attend mass gatherings can clearly not be deemed as a measure aimed at those political parties who make use of mass gatherings as an electioneering tool.

55. Similarly it is our submission that in this context it cannot be adjudged (by either election observers, or a court, or a political party) in a reasonable and rational manner that this prohibition will render the elections not to be free and fair given that the purpose of these Regulations are to assist in the management of the pandemic and not to restrict political campaigning.

56. Furthermore, it cannot be argued in a reasonable manner that the limitation of one of the methods that some political parties use during campaigning can objectively constitute an undue infringement on the right to campaigning. Apart from the fact that this is a general limitation which is applicable to all political parties, it is to be remembered that a magnitude of other campaign methods remain available to political parties and candidates.

57. Depending on the Regulations that are in place during the campaign period smaller indoor and outdoor meetings may still be permissible and parties and candidates will in all likelihood be able to engage voters during one on one meetings (the so-called “door to door”-visits or at so-called “information tables”), through telephone canvassing, poster messaging, leaflets and printed manifestos, as well as via the media (print media, radio and television, electronic media and communication and social media).

58. It is submitted that even if in-person political activities are prohibited for some period from now until 27 October 2021 as part of the Disaster Regulations, it will not necessarily follow that a conclusion can be reached that voters will not be able to access information on the policies and proposals of parties and candidates in order to make an informed choice on Election Day, or that political parties and candidates did not have equal and sufficient access to voters in order to try and persuade them to vote for them.

59. Importantly it is to be considered that some of the platforms which will assist voters to source information on the policies and platforms of political parties and candidates are, for all practical purposes, only available in the run-up to general elections. These platforms include free election broadcasts, as well as paid for election advertisements on public radio and television. Political parties and voters will also enjoy the benefit of election discussions and debates on all of these platforms in the run-up to LGE2021.

60. The reality is that nearly all, if not all, voters will be able to source information relevant to the choice they have to make in the run-up to LGE2021 through means that are not dependent on in-person contact with a political party or candidate. In fact it stands to be reasoned that the vast majority of voters in any event make their political choice on the basis of the information they obtain through a variety of sources and mediums, rather than depending solely on in-person contact.

61. It is submitted that all political parties and candidates are aware of these points of access to voters and have in past elections already all made use of these methods (or a combination of some of these methods) in order to try and convince voters to vote for them.

62. It is expected that some political parties, in their submissions, will argue that not all of these platforms are available to all voters and that this should lead to a conclusion that some voters, and by extension political parties, will be treated unfairly if only these platforms are available in the run-up to LGE2021. We disagree and submit that the information below indicates that the overwhelming majority of potential voters are accessible to political parties through these platforms.

63. According to the 2020 State of the ICT Sector-report, put together by the Independent Communications Authority of SA (ICASA), SA's smartphone penetration reached 91.2% in 2019, up from 81.7% in 2018. ICASA recorded 53.4 million smartphone subscriptions as at 30 September 2019, a few million shy of the country's total population size. South Africa's estimated population stood at 58.78 million, according to the 2019 mid-year population figure released by Statistics SA. As all smartphones contain browsers of the internet it must be accepted that the internet connectivity of South Africans is now in excess of 90%.

Source: <https://www.itweb.co.za/content/xA9PO7NZRad7o4J8>

64. The *State of the Broadcasting Industry Report*, released late in 2019, indicates that 14.4 million households in South Africa have a television set, with just more than half of these households having only access to the "free to air" channels provided by the public broadcaster, the SABC. The General Household Survey of Statistics SA in 2017 revealed that by then 82% of households in South Africa had television sets.

Sources: <https://themediainline.co.za/2020/06/broadcasting-by-the-numbers/> and <https://www.statssa.gov.za/publications/P0318/P03182017.pdf>

65. The official viewer numbers of the television channels of the public broadcaster, the SABC, according to its 2019-20 Annual Report indicate that the free to air channels of the public broadcaster (SABC1, SABC2 and SABC3) attract on average 28, 7 million viewers per month.

Source: <https://www.sabc.co.za/sabc/wp-content/uploads/2020/11/SABC-AR-2020.pdf>

66. The *State of the Broadcasting Industry Report*, mentioned above in paragraph 47, also revealed that the daily listening time on radio averaged out at 3h36 in 2018. A weekly audience of almost 36 million people tune into radio via a variety of devices, listening to 24 commercial stations (21 private and three SABC public/commercial), 16

SABC public service broadcasting stations (including Channel Africa) and 264 community stations.

Source: <https://themediainline.co.za/2020/06/broadcasting-by-the-numbers/>

ACCESS TO THE MEDIA

67. It is accepted that the Commission has very little authority over the way, and extent to which, media outlets give political parties and candidates access to readers, viewers and listeners for campaign purposes.

68. However, it is important to remember that in all instances the relevant complaints and dispute mechanisms, to address disputes with media outlets, are in place in the event that a party feels aggrieved about the manner in which a media outlet reports on campaigning or manages political discourse (discussions and debates).

69. The role of the public broadcaster, the SABC, will be very important in the run-up to LGE2021. Much scepticism remains among specifically opposition parties, based on past experiences, about whether they will receive even-handed and fair treatment from the public broadcaster, both in terms of news coverage and during election programming and debates.

70. It is however acknowledged that some independent analysts seem to be of the view that the editorial management of the public broadcaster now seem to indicate a greater willingness than in recent years to perform its duties and functions in an objective and impartial manner, for the benefit of the public, rather than the governing party.

Source: Herman Wasserman: The state of South African media: a space to contests democracy: <https://link.springer.com/article/10.1007/s11616-020-00594-4>

PARTICIPATION AND “FREE AND FAIR” ELECTIONS

71. The finding by the Constitutional Court in *Kham*, as discussed above, stressed that an investigation into the freeness and fairness of an election should happen in a contextual manner. It is our submission that in the context of an election affected by a pandemic the question is not whether the election is identical to an election conducted in ordinary times. The election may look very different but still be free and fair.

72. While it is clear that “free and fair” elections do not depend only on what happens on Election Day, it is accepted that serious shortcomings on Election Day will ordinarily enforce a finding that an election cannot be deemed as “free and fair”.

73. We submit that the submission of the Commission to this Inquiry convincingly illustrates that it is poised to be operationally ready to conduct elections successfully on 27 October 2021, without any serious shortcomings. This should be communicated by the Commission to potential voters in clear and unambiguous terms.

74. We accept that a widespread belief amongst voters that they will be unduly exposed to infection with the corona virus and a consequential very low turnout may cause a situation where the question will be asked whether the results of LGE2021 can be viewed as an accurate and true expression of the will of the people.

75. It is however our strong submission that no conclusion to the effect that a vast majority of voters intend not to vote in LGE2021 because of a fear of infection can be reached in a logical and reasonable manner, based on the available and relevant information.

76. As pointed out above, we believe that any doubt on whether it will be safe to vote in LGE2021 could be successfully addressed by a proper communication strategy which can form part of the communication and education to be undertaken by the Commission in the coming weeks and months.

77. The Commission, in its submission to this Inquiry, made available information on the turnout figures for each of the previous elections arranged and managed by the

Commission. It is to be noted that, for a variety of reasons, turnout in local government elections has always been lower than turnout in national and provincial elections.

78. An analysis of the by-elections held since the beginning of the start of the State of Disaster on 15 March 2020, provided by the Commission, (attached hereto as Annexure “B”) shows that the average turnout in these by-elections was 35, 35%, compared to 58, 05% turnout in the same wards during the general local government elections of 2016.

79. An analysis done by ourselves of the turnout in the by-elections that were held in the same period, more or less the last twelve months, before LGE2016 (and which is also attached hereto as Annexure “C”) shows that the average turnout in those by-elections was 39, 56 %, in contrast to the average turnout in the same wards in the preceding local government elections of 2011 of 58, 77%.

80. From this it must follow that no indication can be found in the manner in which voters have been participating in by-elections that a widespread scepticism exists around the Covid-19 protocol that has been put in place by the Commission for by-elections and which is intended to stay in place for LGE2021.

81. In light of this analysis we submit that while the turnout in the by-elections held since the start of the State of Disaster has been lower than the average turnout in LGE2016, this is not indicative of any general intention on the part of the electorate not to vote in LGE2021 because of the Corona virus pandemic.

82. We have noted that the Inquiry has *inter alia* requested the views of political parties on whether the aforesaid by-elections were “free and fair”.

83. In this regard, it is to be noted from the minutes of the meetings of the NPLC that were held after these by-elections (as attached to the submission of the Commission to this Inquiry) that both the Commission and political parties, in assessing these by-elections, were unanimous in the view that the by-elections were conducted successfully in all respects.

84. Apart from the fact that no political party expressed any view to the effect that these by-elections were not free and fair in the meetings of the NPLC, no party has aired such a view in public either immediately after the events or since then.

85. While we accept that the views of political parties, as stakeholders in elections, are of some relevance in determining whether elections were free and fair, it is strongly submitted that any arguments that these by-elections were not free and fair which are raised only now, in submission to this Inquiry, should be properly scrutinised before any reliance is placed thereon.

86. It is our strong submission that the protestations of political parties that LGE2021 should be postponed because it will lead to the infection and death of many South Africans are irresponsible and emotional statements which are not founded in any way on the analysis of these by-elections or the proposed protocol of the Commission for LGE2021.

87. We accept that exceptional care must be taken by any person or institution which performs a public function not to add in an undue manner to the exposure of South Africans to possible infection with the corona virus. But, we hold the view that an objective assessment of the manner in which the Commission has conducted the by-elections in question indicates that, if the same protocol is implemented for LGE2021, the event will not unduly expose voters to infection or lead to an increased infection rate.

88. In as far as international experiences could be relevant to determine whether elections and campaigning significantly increase potential exposure of voters to the virus, we submit that we have been advised that the only election, among a large number of elections that have taken place globally since the start of the pandemic, in respect of which there seems to be a growing consensus that campaign events have contributed to a spike in infections, is the state and council elections of India which took place in 2021. However, it is to be noted that the analyses indicate that the spike in infections was caused by mass rallies of political parties and not voting.

89. The attention of the Inquiry is however drawn to the events that has transpired on Youth Day, 16 June 2021, when the Economic Freedom Fighters (EFF) held a public gathering that did not adhere in any way or form to the prohibition on large gatherings. We submit that this is an irresponsible act that will defeat the purpose of the prohibition imposed on larger gatherings and is of relevance to this inquiry in that a failure to adhere to the Regulations could contribute to the trajectory of the pandemic. While the enforcement of Regulations is not within the authority of the Commission we are of the view that the Electoral Code of Conduct for LGE2021 should nonetheless be amended to allow for the Commission to deal with transgressions of the law that will be unique to LGE2021.

THE STATE OF READINESS OF POLITICAL PARTIES

90. Furthermore, it is submitted that while the minutes of meetings of the NPLC do not serve as a verbatim record of discussions the recordings of these meetings, which should be available to this Inquiry, will reveal that those political parties who argue for a postponement of LGE2021 have, in as many words, admitted that a major reason for their position is their own state of unpreparedness for the election.

91. However, neither the Commission nor this Inquiry are, in our view, authorised to take into account, in performing its functions, the state of readiness of political parties.

92. We submit that while the Commission initially could have created the impression that it was possibly in favour of a postponement of LGE2021, the fact that it is under a Constitutional obligation to arrange and conduct LGE2021 as prescribed by the Constitution and legislative framework and was preparing to do so, was made very clear to political parties during the meeting of the NPLC of 22 April 2021.

93. At this meeting the Commission not only presented a summary of the legal opinion it obtained from senior counsel, discussed above, but in clear and simple terms informed the NPLC that it was to continue with the ordinary preparations for LGE2021. This meeting of course followed the announcement of the election date by the

President on 21 April 2021, which also gave a clear indication that government accepted that LGE2021 was to proceed as Constitutionally required.

94. The draft timetable for LGE2021 was released by the Commission on 12 May 2021, which was yet another significant step in the formal preparations for LGE2021. A copy of the mail to all members of the NPLC and to which this draft timetable was attached is attached hereto as Annexure “D”.

95. We submit that it cannot be argued in any reasonable manner by any political party that it was, after these events, either under any misapprehension about the Constitutional duty of the Commission and its intention to proceed to conduct LGE2021 on 27 October 2021, or the concomitant responsibility of political parties to ensure that their own internal arrangements are made in a timely manner in order to enable them to comply with the legally prescribed deadlines set by the Commission.

96. It is important to also note that the Disaster Regulations relevant to this process at no stage made it impossible for political parties to attend to these internal matters.

97. The attention of the Inquiry is drawn to the following passages from the judgement of the Electoral Court in the case of ***National Freedom Party v Electoral Commission and Another (006/2016 EC) [2016] ZAEC 2*** which, in our view, give very clear guidance in respect of any arguments from those parties who are ill-prepared for LGE2021 that the election should be postponed, as well as any arguments that their possible absence from the ballot for LGE2021, must lead to a postponement of the election failing which the election will not be free and fair:

“[29] The NFP finally advised that the relief as set out in the heads of argument would be competent due to the provisions of **s 11(2)(b)** of the **Municipal Electoral Act in** that by the inclusion of the NFP in the elections it would lead to a free and fair election but that its exclusion would not. I do not agree. The freeness and fairness of elections commence when it is first called. From that date the prospective participants are required to observe the prescripts. Individuals or parties who fail to act fairly and correctly may pay the price by

exclusion. Those who did act according to the prescripts acted fairly. They are entitled to complain of an unfair election should non-compliant candidates and parties be allowed to join in the process despite their failure to comply with the prescripts. If those who disregarded the prescripts are allowed to join in on the basis contended for by the NFP I am of the view that the inclusion would be unfair vis-à-vis those participants who acted lawfully. The election timetable being law, the NFP is not pursuing the application for condonation as there is no provision for such condonation, it is asking for the law to be bent in its favour so that it need not have complied with the relevant prescripts.

[30] The election timetable is a regulatory mechanism to ensure free and fair elections. It cannot and should not be changed at the whim of an individual or party – if it is changed to suit individuals, the timetable becomes an inefficient electoral tool.

[31] The electoral process as a whole must be free and fair. It must be free and fair for all parties and not advance the interests of one party only.

[32] The ad hoc amendment of the election timetable will unfairly prejudice those parties who complied with its provisions.”

ELECTION OBSERVATION AND MONITORING

98. The Inquiry has also invited submissions on “the constraints, if any, that the measures in place to prevent and combat the spread of COVID-19 are likely to impose on the proper and effective monitoring, by political party agents and independent electoral monitoring bodies, of the freeness and fairness of the local government elections earmarked to be held in October 2021”.

99. It is our submission that the protocol put in place by the Commission for the abovementioned by-elections and which is to apply to LGE2021 in no way unduly prohibits the monitoring and oversight of either political parties or independent election monitors.

100. The authority given in this protocol to Presiding Officers to determine that party agents and monitors, in specific circumstances, may be asked to be present in the voting station on a rotational basis is not new or unique to this protocol. It has always been within the authority of Presiding Officers to make such a determination in the event that the available space in a voting station makes it difficult or impossible to allow all party agents to observe the work of the electoral officials.

101. We submit that it is of greater importance for the sake of free and fair elections that all Presiding Officers properly understand and embrace the rights of party agents and election observers to properly observe certain key events in the voting station – specifically whether every aspirant voter who arrives to vote is in fact the person whose ID is presented and the voter whose details are scratched from the voters' roll.

102. Historically many Presiding Officers have refused party agents to be positioned in such a way in voting stations that will enable proper observation of this activity. If the Commission could ensure that this right is properly respected and allow for one party agent at a time, on a rotational basis, to observe this event, observation of voting will be enhanced in LGE2021 despite the restrictions caused by the Covid-19 protocol.

POSSIBLE ADDITIONAL MEASURES TO ENSURE FREE AND FAIR ELECTIONS AMIDST THE PANDEMIC

103. This Inquiry is also tasked “to indicate additional measures that the Electoral Commission may be required to implement in order to realise free and fair elections within the context of the COVID-19 pandemic.”

104. We are of the view, for the reasons set out above, that no additional measures to the measures already announced by the Commission will be necessary to conduct LGE2021 in a safe and free and fair manner. Additional measures that are to be proposed in order to further safeguard the elections, should therefore be made mindful of the additional financial burdens it may place on the Commission.

105. We have noted that a proposal has been made that the Commission should consider to add Sunday, 24 October 2021 as an additional special voting day on which

all voters over the age of 50 years and all other voters who have so-called “co-morbidities” should be allowed to vote. The proposers of this proposal mentioned that, in their analysis, this would mean that as many as 30% of those voters who will ultimately cast their ballot in LGE2021 will then do so before the “main” voting day of 27 October 2021.

106. As has become standard practice special votes for the infirm, who are dependent on being visited at home by the Commission, and those who are unable to vote on 27 October 2021, but who are able to vote on the day before, will then be allowed on 25 October 2021 and 26 October 2021 respectively.

107. We are of the view that this proposal should not be implemented unless the Commission is of the view that it, within its current budgetary allowance, will be able to absorb the additional expenses that implementation of this proposal will cause, including the additional costs to ensure safe storage of the larger number of cast ballots than would ordinarily be the case on the special voting days.

108. It is our submission that it is to be considered that although the turnout in LGE2021 will in all likelihood be higher than during the by-elections that have been conducted since the start of the State of Disaster, Election Day, 27 October 2021 will most probably – as has become the custom – be declared as a public holiday.

109. This would mean that the time of day during which voters typically arrive at voting stations to cast their ballots will be spread out more evenly than during a typical by-election, when many voters only have the opportunity to cast their ballot after working hours.

110. In addition, we submit that in order to ensure an even spread of voters throughout Election Day, the Commission may request voters of specific age groups to preferably vote during specific time slots.

111. However, it needs to be pointed out, as can be seen from the analysis of the turnout figures for the by-elections that have been conducted since the start of the State of Disaster and which is attached hereto as an annexure, that in some of the by-

elections turnout figures have been attained similar to what was achieved, on average, during LGE2016. Despite this there is no indication that these by-elections in any way or form contributed to the spread of corona virus infections.

112. However, if it is contemplated by the Inquiry to recommend to the Commission that more effective measures need to be introduced to spread out the arrival of voters at voting stations, we submit that rather than adding Sunday, 24 October 2021 as another voting day, it should be considered to allow for all voters above 50 years of age and those with “co-morbidities”, to vote on 26 October 2021 which historically would have been the special voting day for all those who are unable to vote on Election Day.

113. In respect of the possibility that some parties may choose not to adhere to the limitation on larger public gatherings that have been imposed as part of the Disaster Regulations, we submit that this Inquiry should consider proposing that the Electoral Code of Conduct and the ability of the Commission to enforce this Code of Conduct should be amended and strengthened for the purposes of LGE2021 in order to enable the Commission to effectively and timely deal with the failure of parties and candidates to adhere to the Code.

CONCLUDING REMARKS

114. These submissions are made mindful of the difficulties facing this Inquiry. Ordinarily the value judgement that is necessary in order to determine whether an election has been “free and fair” is made after the fact. In such circumstances it remains a complex evaluation, despite having the benefit of being able to analyse all aspects relevant to an election, after it has taken place and therefore being able to properly consider and contextualise all of these elements.

115. The provisions enabling this inquiry of course contemplated the type of circumstances that would typically and clearly bring into question whether an election could be “free and fair”: Intimidation and suppression of the rights of some political parties and candidates to either register to contest elections and/or to nominate candidates, or to campaign on a relatively equal platform.

116. This inquiry is to be completed more than three months before LGE2021 and calls for a determination of what the likelihood is of the Commission being able to ensure a free and fair election amidst the relative uncertainty caused by the Covid-19 pandemic and the Disaster Regulations government has introduced in order to try and manage the pandemic and the infection rate of the corona virus.

117. In light of the fourth consideration regarding an assessment of elections to determine whether it has been free and fair (identified above, on the basis of ***Kham***), that mere doubt about the freeness and fairness is not sufficient to sustain a finding, after an election, that the election was not free and fair, we submit that the same approach is to be followed during this inquiry.

118. The use of the word “likelihood” in section 14(4) of the Electoral Act makes it clear that while this inquiry is not performing a judicial function it nonetheless needs to determine and weigh probabilities in the same manner than would be applicable in civil proceedings.

119. In the final analysis we are of the view that the Inquiry is constrained to find that no reliable information is available at this stage to indicate that the Commission will not be able to ensure that LGE2021 is free and fair, specifically if the measures that the Commission has introduced during the by-elections that have been conducted since the State of Disaster are taken into account. We believe that in fact, the information relevant to the inquiry indicates a finding that the likelihood is that the Commission will be able to ensure a free and fair election.

120. We submit that the limitation on larger public meetings, that has been part of the Disaster Regulations since March 2020, has neither led to any allegation of the by-elections that have taken place since then not having been free and fair, nor can it properly substantiate a pre-emptive finding that this limitation will cause LGE2021 not to be free and fair.

121. Sufficient alternative methods of communicating with voters are still freely at the disposal of political parties and candidates, which will be supplemented in the run-up to LGE2021 with additional ones (free election broadcasts on TV and radio as well

as election programming and debates facilitated and broadcast by the public broadcaster) which was not available to political parties and candidates in the run-up to any of the said by-elections.

122. If the likelihood of ensuring free and fair elections is dependent on the assessment of whether voting will expose voters to an undue or unreasonable risk of contracting the virus, it is our view that no reliable information to point to such a situation is available. A proper evidence-based assessment of the risk involved will not only take into account that the vast majority of, if not all, possible voters have, since the lifting of the so-called “hard lockdown”, which was in place for the month of April 2020, continued with most of their day to day activities.

123. Voting in elections should be considered as an important, but ordinary activity in a Constitutional democracy and it should be accepted, based on a proper analysis of the turnout figures in recent by-elections, that voters in fact do see voting as an ordinary activity which do not expose them to possible infection with the virus in any way different to other ordinary activities.

125. Simultaneously, it is to be remembered that the obligation to ensure a free and fair election is systemic, not individual. An election is not rendered not free and fair because some people feel unwilling to cast their votes if the risks are objectively reasonable. A contextual analysis of the likelihood or not of LGE2021 amidst the Covid-19 pandemic is to be cognisant of the following passage from “**Free and Fair Elections**” (as referred to in detail above) on page 144:

“Just as democracy is not founded on a single ballot, so an election does not become unfree or unfair solely by reason of one or more breaches of international standards. In many cases, too, the observer’s task will be to help establish the range of permissible variation from the standard norm, applying the relevant international standards to particular local circumstances.”

Annexure “A”

BACKGROUND

- Section 24 (1) of the Local Government: Municipal Structures Act 117 of 1998 states that the term of municipal councils is five years calculated from the day following the date set for the previous election of all municipal councils.
- The date of LGE 2016 was 3 August 2016. The current terms of office of municipal councils thus expire on 3 August 2021, with the 90 day period ending on 1 November 2021.



CONSTITUTIONAL FACTORS

- Section 159 (2) of the Constitution requires that, when the term of a municipal council expires or if it is dissolved in terms of national legislation, an election must be held within 90 days.
- The constitutional provisions must be read with section 24 of the Local Government: Municipal Structures Act 117 of 1998 (MSA). Section 24 (1) of MSA provides that the term of a municipal council is five years. Section 24 (2) stipulates that municipal elections must be held whenever necessary and in any event within 90 days of expiry of the term of a municipal council.



CONSTITUTIONAL FACTORS

- While the constitutional rules that govern municipal elections are slightly more flexible (compared with Constitutional rules for National and Provincial Elections) in that they allow greater scope for regulation by national legislation, the Constitution nonetheless, imposes an outer limit of five years on the term of municipal councils.
- It is evident from the foregoing that the life of municipal councils cannot be extended beyond the deadline of five years without amending the Constitution and section 24 (1) of the MSA.



CONSTITUTIONAL FACTORS

- It is notionally possible to amend the Constitution to lengthen the permissible term of office of municipal councillors and thus extend the actual terms of office of incumbent councillors.
- Such amendments and extension of term will also constitute a “limitation of the founding value of regular elections” guaranteed under section 1 (d) of the Constitution.
- Amending the Constitution to enable elections to be held beyond 90 day period has the effect of extending the term of incumbents in an undemocratic manner and to the exclusion of mandate givers.



CONCLUSION

- The Electoral Commission is constrained by the constitutional scheme to stand ready to administer elections whenever, they are lawfully called.
- This is the basis of the planning by the Electoral Commission. If however, mechanisms are derived to facilitate an election lawfully beyond the 90 day period, the Electoral Commission will adjust its plans accordingly.
- In case of unmanageable spike in Covid-19 infections, it may be possible for an application to be made to the Constitutional Court for authorisation to hold elections beyond the constitutionally determined timeframe. The postponement would have to be for a limited duration and as close to the 90 days as possible.



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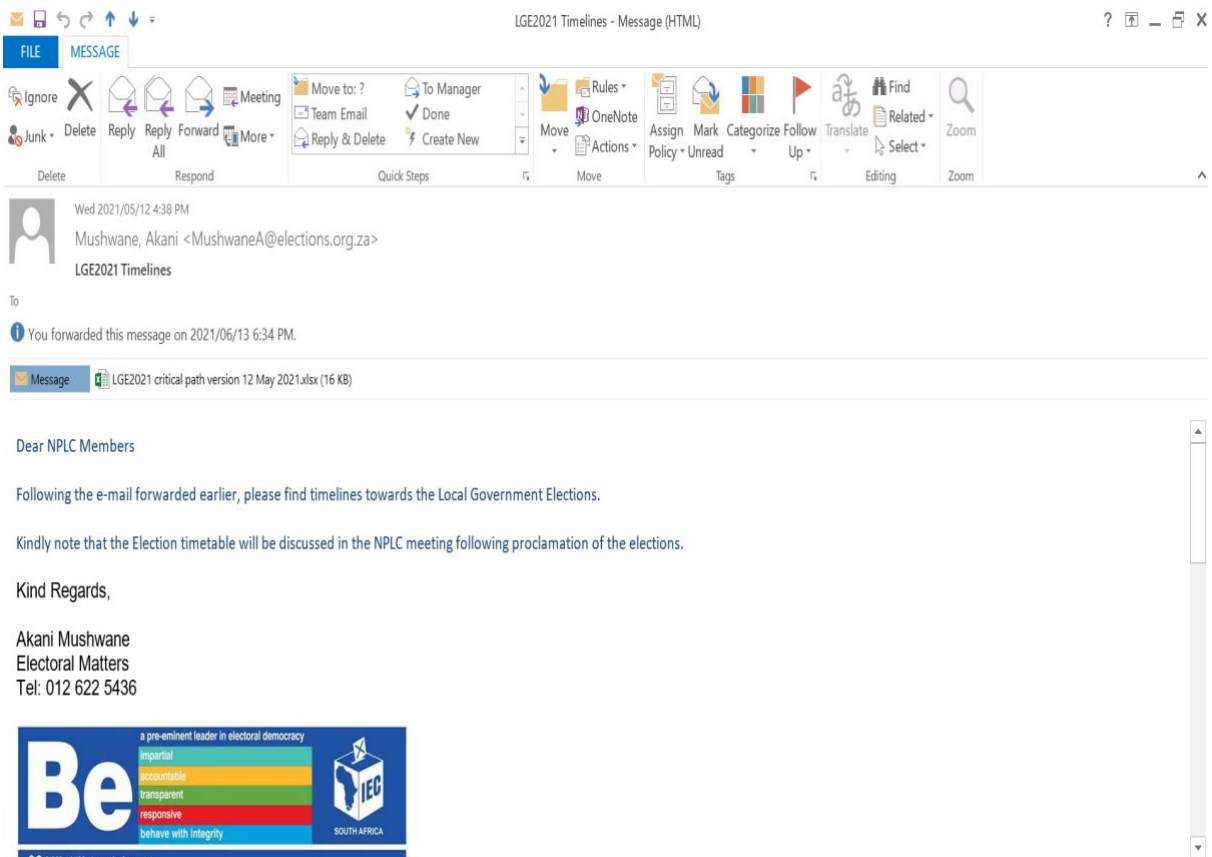
Annexure “B”

Attached as a separate excel spreadsheet

Annexure “C”

Attached as a separate excel spreadsheet

Annexure “D”



The screenshot shows an Outlook email window titled "LGE2021 Timelines - Message (HTML)". The interface includes a ribbon with "FILE" and "MESSAGE" tabs, and a ribbon menu with various actions like Ignore, Delete, Reply, Forward, Meeting, Move to, To Manager, Done, Create New, Rules, OneNote, Assign, Mark, Categorize, Follow Up, Translate, Find, Related, and Select. The email content is as follows:

Wed 2021/05/12 4:38 PM
Mushwane, Akani <MushwaneA@elections.org.za>
LGE2021 Timelines

To

You forwarded this message on 2021/06/13 6:34 PM.

Message: LGE2021 critical path version 12 May 2021.xlsx (16 KB)


Dear NPLC Members

Following the e-mail forwarded earlier, please find timelines towards the Local Government Elections.

Kindly note that the Election timetable will be discussed in the NPLC meeting following proclamation of the elections.

Kind Regards,

Akani Mushwane
Electoral Matters
Tel: 012 622 5436



FILE HOME INSERT PAGE LAYOUT FORMULAS DATA REVIEW VIEW

Normal Page Break Preview Page Layout Views Custom Views

Ruler Formula Bar Gridlines Headings

Zoom 100% Zoom to Selection

New Window Arrange All Freeze Panes

Split Hide Unhide

Window

N9

	A	B	C	E	F	G	H	I	
1									
2		DRAFT CRITICAL PATH - LGE 2021 - PLANNING ELECTION DATE 27 OCTOBER 2021							
3		Activity description	Responsible	Planned Start	Planned End				
4		Targeted Communication and Registration of voters in Voting districts whose boundaries have changed following the ward demarcation process		2021/06/04	2021/06/30				
5		REGISTRATION WEEKEND	IEC	2021/07/17	2021/07/18				
6		PROCLAMATION DATE (86 DAY TIMETABLE)	Minister CoGTA	2021/08/02	2021/08/02				
7		Candidate Nomination Open							
8		Inspection Voters' roll available for objections	IEC	2021/08/04	2021/08/11				
9		Commission considers objections to inspection v roll	Commission	2021/08/12	2021/08/18				
10		Cut off date for submission of candidates	Parties/ Candidates	2021/08/16	2021/08/16				
11		Cut-off parties/candidates to comply	Parties/ Candidates	2021/08/27	2021/08/27				
12		Certify & publish voters roll	IEC	2021/09/01	2021/09/01				
13		Special votes application period	IEC	2021/09/03	2021/09/17				
14		Final lists of candidates compiled	IEC	2021/09/07	2021/09/07				
15		Certificates issued to candidates	IEC	2021/09/13	2021/09/13				
16		Special voting days	IEC	2021/10/	2021/10/26				
17		LGE 2021 - VOTING DAY	IEC	2021/10/27	2021/10/27				
18		Publish Election Results	IEC	2021/11/03	2021/11/03				
19		Election of LC reps to the DCs	IEC	2021/11/03	2021/11/17				
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Sheet1