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Hon. N.N. Mapisa-Nqakula
Speaker of the National Assembly
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Dear Madam Speaker

NEW NATION MOVEMENT NPC AND OTHERS V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS [2020] ZACC 11 (“NEW NATION JUDGMENT”)

1. This letter has reference to the Constitutional Court decision that “declared the Electoral Act 73 of 1998 unconstitutional to the extent that it requires that adult citizens may only be elected to the National Assembly (NA) and Provincial Legislatures (PLs) only through their membership of political parties”.
2. Further, the Constitutional Court directed Parliament to rectify the defective sections of the Electoral law within a period of 24 months; that is, from June 2020 to June 2022.
3. In response to the Constitutional Court judgement, I established the Ministerial Advisory Committee (MAC) to identify the extent of the constitutional provisions affected by the Constitutional Court’s judgement; develop policy options on the electoral system that address the defects of the Electoral Act; recommend possible options to be considered; and consult with stakeholders in the development of the options.
4. The Committee comprised of eminent academics, legal practitioners, a former member of Cabinet and former Commissioners and Officers of the Independent Electoral Commission. The members were:
 - 4.1.1. Mr Valli Moosa, Chairperson

- 4.1.2. Adv Pansy Tlakula
- 4.1.3. Dr Sithembile Mbete
- 4.1.4. Mr Norman Du Plessis
- 4.1.5. Dr Michael Sutcliffe
- 4.1.6. Adv Vincent Maleka SC
- 4.1.7. Prof Daryl Glaser
- 4.1.8. Dr Nomsa Masuku

5. The Committee provided me with a report on 09 June 2021. The MAC explored a variety of options and heard from the range of stakeholders. In the end, the MAC members were not able to reach a consensus on a single option, but did succeed in narrowing down the options to a fairly stark choice of two options, namely:

5.1. **Option 1:** The slightly modified multi-member constituency (MMC) which accommodates independents but requires relatively minimal changes to the legislation. This option favours inserting independents into the existing electoral system, enabling independents to compete with political parties for votes.

5.2. **Option 2:** The mixed-member model incorporating single-member constituencies: This option entails combining the first-past-the-post and proportional representation, making it a mixed-member proportional (MMP) system resembling the current local government electoral system, albeit with some improvements. This option involves electing MPs from 200 single-member constituencies and the remainder from a single national multi-member constituency.

6. After considering these options, I then appointed a team of counsel to draft the Amendment Bill and to advise on the Constitutional implications of the Amendment Bill. The team consists of:

- 6.1.1. Adv Steven Budlender SC
- 6.1.2. Adv Salome Manganye
- 6.1.3. Adv Mitchell De Beer
- 6.1.4. Adv Mfundo Salukazana

7. The legal team has provided me with a draft of Amendment Bill and prepared a memorandum that simplifies the Bill.

8. At the Cabinet meeting held on 24 November 2021, Cabinet considered and approved the following documents for submission to Parliament for further

processing and public consultations due to the looming Constitutional Court deadline:

- 8.1. Report by the Ministerial Advisory Committee.
- 8.2. Memorandum on the draft Electoral Amendment Bill prepared by Adv. Steven Budlender, SC; and
- 8.3. The draft Electoral Amendment Bill.

9. Kindly find attached the above mentioned documents as directed by Cabinet.

Yours sincerely



DR PA MOTSOALEDI, MP
MINISTER OF HOME AFFAIRS


DATE:

28/11/2021

CC: *Mr M Chabane, MP*
Chairperson of the Portfolio Committee on Home Affairs

Mr C Frolick, MP
House Chairperson

Adv L Louw
Office of the Speaker



REPORT OF THE MINISTERIAL ADVISORY COMMITTEE ON ELECTORAL SYSTEM REFORM

Presented to the Honourable Minister of Home Affairs

By

The Ministerial Advisory Committee on Electoral Reform

9 June 2021

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ACRONYMS

ACDP	African Christian Democratic Party
AMS	Additional Member System
ANC	African National Congress
ASRI	Auwal Socio Economic Research Institute
ATM	African Transformation Movement
AV	Alternative Voting
BUSA	Business Unity South Africa
COPE	Congress of the People
COSATU	Congress of South African Trade Unions
CSOs	Civil Society Organisations
DA	Democratic Alliance
EC	Eastern Cape Province
EFF	Economic Freedom Fighters
ETT	Electoral Task Team
FF+	Freedom Front Plus
FS	Free State Province
HSF	Helen Suzman Foundation
IEC	Electoral Commission of South Africa
IFNASA	Indigenous First Nation Advocacy South Africa
ISI	Inclusivity Society Institute
FPTP	First Past the Post
HLP	High Level Panel
MAC	Ministerial Advisory Committee
MDB	Municipal Demarcation Board
MMC	Multi member constituency
MMP	Mixed Member Proportional
MPs	Members of Parliament
MPLs	Member of Provincial Services
PR	Proportional Representation
NC	Northern Cape Province
NCOP	National Council of Provinces

NNM	New Nation Movement
NPE	National and Provincial elections
SACC	South African Council of Churches
SAFTU	South African Federation of Trade Unions
SMC	Single Member Constituency
SNTV	Single Non-transferable Votes
STV	Single Transferable Votes
UJ	University of Johannesburg
UKZN	University of Kwazulu Natal
WC	Western Cape Province

EXECUTIVE SUMMARY

Pursuant to the Constitutional Court judgement and subsequent consultations between the NA and the Executive, the Honourable Minister of Home Affairs Dr Aaron Motsoaledi established the Ministerial Advisory Committee (MAC) to help develop policy options on the electoral system that address the defects of the Electoral Act 1998. The former Minister of Constitutional Affairs, Mr Valli Moosa, was appointed as the MAC Chairperson. Members of the Committee are:

- Advocate Pansy Tlakula - the former Chairperson of the Electoral Commission of South Africa (IEC).
- Advocate Vincent Maleka - a Senior Counsel.
- Dr Michael Sutcliffe - former member of the Municipal Demarcation Board (MDB) and former Ethekewini Municipal Manager.
- Dr Nomsa Masuku - Commissioner of the Electoral Commission of South Africa (IEC).
- Dr Sithembile Mbete - Senior Lecturer at the University of Pretoria.
- Mr Norman du Plessis - former IEC Deputy Chief Elections Officer.
- Prof Daryl Glaser - Head of Department: Political Studies at Wits University.

In pursuit of its mandate, the MAC carried out its business through regular meetings, comprehensive review and analysis of existing literature and documents submitted by think tanks and other stakeholders on South Africa's electoral system and electoral systems on the African continent and beyond. It adopted the fairness, inclusiveness, simplicity, accountability, gender equality, proportionality, effective participation of independents, genuine choice, effectiveness, and legitimacy principles.

The MAC review of written submissions by electoral stakeholders, including civil society organisations (CSOs), think tanks, political parties, organised labour, and business, revealed that stakeholders welcomed the Constitutional Court judgement. Still, a few worried that a proliferation of independents would make matters worse, for example, by exacerbating patronage politics. While many expressed a desire for greater individual and local representation and accountability of members of Parliament (MPs) through the introduction of constituencies, a few questioned whether the electoral system lay at the root of the current dissatisfaction with government and worried that these changes would make little difference to democratic quality. Those supporting change in the electoral system expressed various views about preferred electoral system alternatives, with some favouring multi-member and others single-member constituencies. There were also other MMC proposals, such as the local rather than regional multi-member constituencies.

The MAC explored various options and heard from a range of public stakeholders in the course of its deliberations. But, first, it had to determine whether it should seek to satisfy the Constitutional Court requirement with little disruption to the existing electoral system or address public aspirations for an electoral system that includes a significant element of local and representation and individual accountability voters.

In the end, the MAC members could not reach a consensus on a single option but succeed in narrowing down the options to a fairly stark choice on a minority and majority split of 3:4 of the Committee members. One member of the Committee chose not to state a preferred option. These options are:

Option 1 (Minority report): The slightly modified multi-member constituency (MMC), which stakeholders referred to as the minimalist option.

This option entails modifying the existing multi-member electoral system to accommodate independent candidates in the national and provincial elections without many changes in the legislation. Those in favour of this option believe that it does not interfere with the constitutionally required general proportionality and is the best option for ensuring inclusiveness, gender representation, simplicity and fairness for independents.

Option 2 (Majority report): The mixed-member model incorporating single-member constituencies

This option entails combining the first-past-the-post and proportional representation, making it a mixed-member proportional (MMP) system resembling the current local government electoral system, albeit with some improvements. It involves electing MPs from 200 single-member constituencies and the remainder from a single national multi-member constituency. Thus, voters would vote for a single MP to represent them in single-member constituencies (their first vote) and for a party to represent them in the single national multi-member constituency based on competing for closed party lists (their second vote). Those in favour of this option believe that it does not interfere with the constitutionally required general proportionality and is the best option for ensuring inclusiveness, gender representation, simplicity and fairness for independents.

1. INTRODUCTION

The Bill of Rights in the Constitution of the Republic of South Africa 1996 assures peoples freedoms, including the freedom to partake in political and electoral processes directly or through freely chosen representatives. The country has organised five national and provincial elections (NPE) since the country's first and epoch-making 1994 elections that ushered in a democratic dispensation. It has also successfully conducted

five municipal elections since the collapse of Apartheid in 1994. Both the NPE and municipal elections follow a five-year cycle. The polls have, over the years, presented lessons and opportunities for the consolidation of electoral democracy in South Africa. While the frequency of the NPE and municipal elections is assured, there is always an increased demand on the Electoral Commission of South Africa (IEC), political parties, government, and all electoral stakeholders to ensure the integrity and quality of the electoral processes. In June 2020, the Constitutional Court released a judgement declaring the electoral law as unconstitutional.

1.1 Constitutional Court Judgement on Electoral Act

On 11 June 2020, the Constitutional Court declared that "the Electoral Act 73 of 1998 is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly (NA) and Provincial Legislatures (PLs) only through their membership of political parties". The Constitutional Court directed Parliament to rectify the defective sections of the Electoral law within a period of 24 months.

The Constitutional Court decision followed a challenge by the New Nation Movement (NNM), Ms Chantal Dawn Revell, GRO and Indigenous First Nation Advocacy South Africa (IFNASA). They contested the Electoral Act limiting of independent candidates' participation in the NPE.

Section 57A of the Electoral Act provides for the political party-based candidate lists to represent the NA and PLs. In addition, clauses 1,2 and 3, as well as clauses 11 and 12, specifically provide for the nomination of candidates by political parties contesting the NA and PLs elections, respectively.

The Constitutional Court judgement has effectively triggered the electoral system reform process ahead of the 2024 NPE. This process entails several albeit related multi-stakeholder activities. Key among these are the NA and the Executive-driven processes in response to the Constitutional Court Judgement. In addition, the Portfolio Committee on Home Affairs and the Select Committee on Security and Justice have, together with the Ministerial Advisory Committee (MAC), carried out comprehensive stakeholder consultations regarding the electoral system review.

1.2 Establishment of the Ministerial Advisory Committee

The Honourable Minister of Home Affairs, Dr Aaron Motsoaledi, established the Ministerial Advisory Committee to identify the extent of the constitutional provisions affected by the constitutional court ruling, develop policy options on the electoral system that address the defects of the Electoral Act 1998 based on a body of research that underpins policy options, and recommend possible options to be considered in the

South African setting, consult with stakeholders in the development of the options. In addition, outline clear values against which to assess each of the options, take into account the electoral implications such a policy may introduce.

The former Minister of Constitutional Affairs, Mr Valli Moosa, was appointed as the MAC Chairperson. Members of the Committee are:

- Advocate Pansy Tlakula - the former Chairperson of the IEC.
- Advocate Vincent Maleka - a Senior Counsel.
- Dr Michael Sutcliffe - former member of the Municipal Demarcation Board (MDB) and former Ethekewini Municipal Manager.
- Dr Nomsa Masuku - Commissioner of the IEC.
- Dr Sithembile Mbete - Senior Lecturer at the University of Pretoria.
- Mr Norman du Plessis - former IEC Deputy Chief Elections Officer.
- Prof Daryl Glaser - Head of Department: Political Studies at Wits University.

The Committee was administratively supported by the Home Affairs Department Secretariat led by the Chief Director, Mr Cecil Sols and technically by Dr Victor Shale, seconded to the Home Affairs Secretariat by IEC South Africa.

2. SOUTH AFRICA ELECTORAL SYSTEM OVERVIEW

2.1 National and Provincial Elections

The electoral system for the NPE elections is PR provided for under Section 46 of the Constitution for the NA election and Section 105 of the Constitution for the PLs election. The system was adopted at the advent of democracy as an ideal consociational instrument at the country's critical political transition. Thanks to a high level of proportionality and the absence of an artificial threshold for representation, the system has ensured the inclusion of minorities in South Africa's electoral politics since the dawn of democracy.

South Africa's PR system divides the country into nine multi-member constituencies that follow the lines of South Africa's nine provinces. Voters are offered competing ranked closed party lists, and voters cast one ballot for a party list of their choice. Their vote is first used to determine parties share of votes in their constituency. They are then combined nationally to determine overall proportionality, with deviations from proportionality corrected from national and/or provincial party lists. For provincial elections, a single-tier or straight proportional system applies, and in this case, a province is treated as a single constituency.

Given that the national and provincial elections are held simultaneously; the PR follows a two-tier compensatory closed party list format. A quota of the total valid number of votes per party is used in the seat calculation procedure. This means that participating parties are allocated seats in a legislature in proportion to the number of votes secured (IEC 2019 Election Report). Political parties contesting the NPE submit candidate lists for the 400-member National Assembly and provincial legislatures. The list categories are:

- A National Assembly list or national to national list comprising 200 candidates.
- A National Assembly list or province to national list comprising 200 candidates.
- Nine provincial lists or provincial to province lists comprising candidates equivalent to the number of seats available in each provincial legislature.

The IEC predetermines the number of representatives for each region for every election in accordance with the number of registered voters. The proportional allocation of members of political parties for a region from closed party lists is determined by the votes cast in a region. In that sense, each region has a separate election, and votes are not transferable between regions to determine regional outcomes. After allocating regional members of the NA the votes for all parties in all regions are aggregated to

determine each party's allocation of representatives from closed national lists to ensure overall proportionality.

The electoral system was appraised for the first time in 2002 because the Constitution did not provide the electoral system to be used beyond the 1999 NPE. Accordingly, an Electoral Task Team (ETT) was established by Cabinet in March 2002 to formulate the parameters of new electoral legislation and draft it to prepare for the NPE of 2004. The ETT report contained two recommendations. Its majority recommendation was that "...constituency representation should be built into the system", while the minority recommendation was that the electoral system existed up to 1999 should be retained unchanged. Notwithstanding the two opposing recommendations, the ETT was unanimous that:

- The core values of fairness, inclusiveness, simplicity and accountability should reflect in the electoral system.
- Preoccupation with accountability should not jeopardise the values of fairness, inclusiveness and simplicity.
- The electoral system should not be replaced or radically altered.
- The electoral system enjoyed considerable support and served South Africa well through two sets of national and provincial elections and significantly contributed towards transitional stability.

The electoral system was not changed and has since been used for 2004, 2009, 2014 and 2019 elections.

In 2017 a High-Level Panel (HLP) led by the former President of the Republic of South Africa Kgalema Motlanthe was established by Speakers' Forum to "assess the content and implementation of legislation passed since 1994 concerning its effectiveness and possible unintended consequences". Focusing on three thematic areas; (i) poverty, unemployment, and the equitable distribution of wealth, (ii) land reform: restitution, redistribution, and security of tenure; and (iii) social cohesion and nation-building, the HLP assessed implementation, identified gaps and proposed action on laws that require strengthening, amending or change.

Whilst not a central feature of their investigation, the HLP underscored the need to strengthen parliament accountability to the public through more direct linkages between Members of Parliament (MPs) and their constituencies. To achieve this, the HLP recommended the amendment of the Electoral Act to provide for an electoral system that makes MPs accountable to defined constituencies in a PR and constituency system for national elections.

2.2 Local government elections

The electoral system for local government elections must comply with Section 157 of the Constitution, allowing for either a purely PR system or a mixed-member system. However, the system must result in general proportionality.

The existing local government system defined in national legislation is a mixed-member proportional system (MMP). It is a combination of the first-past-the-post (FPTP) electoral system for Ward Councillors standing in single-member constituencies and Proportional Representation (PR) electoral system for (PR Councillors) elected from closed party lists. Voters cast separate ballots for PR and Ward Councillors. Overall proportionality is determined by parties' shares of the Ward and PR votes combined.

The system is regulated in at least four different statutes, the Electoral Act 73 of 1998, the Local Government: Municipal Structures Act 117 of 1998, the Local Government: Municipal Electoral Act 27 of 2000 and the Local Government: Municipal Systems Act 32 of 2000. The electoral system determines seat distribution for the different municipal spheres in South Africa, namely, the Category A (Metropolitan) councils, Category B (Local municipalities), and category C (District municipalities). Currently, there are eight metropolitan councils, 205 local municipalities, and 44 district municipalities.

3. THE MINISTERIAL ADVISORY COMMITTEE METHODOLOGY AND PROCESSES

In pursuit of its mandate, the MAC carried out its business through regular meetings, review of existing literature on South Africa's electoral system, and electoral systems on the African continent and beyond. It also conducted public consultations with key electoral stakeholders.

3.1 Principles

The MAC adopted the following principles to guide the assessment and choice of the electoral system.

- **Inclusiveness (national unity):** This is one of the central values enshrined in the South African Constitution. South Africa's electoral system should yield a broad representation of the South African population's demographic, ethnic, racial, and religious diversity. This remains a significant value, 27 years after Apartheid. The demarcation of constituencies must not reinforce Apartheid spatial patterns.
- **Fairness:** The system must provide for one person one vote of equal value.

- **Simplicity:** A balloting procedure that must be understandable and reduce incidents of spoilt ballots and also contribute to the credibility of the elections.
- **Accountability:** Accountability can be defined as 'the obligation of those with power or authority to explain their performance or justify their decisions. Accountability is linked to responsiveness, that government officials will listen to the grievance of the people and respond effectively. It is an essential aspect of the social contract between the people and their representatives. Essentially an accountable government is one that fully expresses the will of the people and has built-in mechanisms to prevent attempts to usurp the will of the people. Over the years, one of the prime criticisms of South Africa's ruling elite is that they are not accountable to citizens.
- **Gender Equality:** Section 1 of the Constitution enshrines equality and non-sexism as two of the founding values of the Republic. Section 9 of the Constitution enshrines the right to equality. The MAC should avoid selecting a system that will result in a reversal in gender equality.
- **Proportionality:** Whatever system is chosen must 'result, in general, in proportional representation (section 46(1)(d) and 105(1)(d) of the Constitution).
- **Effective participation of independents:** In the *New Nation* judgement, the Constitutional Court ruled that the Electoral Act should be amended to enable adult citizens to exercise their constitutional rights to stand for public office in national and provincial elections *without* joining a political party. Any system recommended by the MAC must enable the substantive participation of independent candidates.
- **Genuine choice:** Pursuant to the spirit of the Constitutional Court judgement, the electoral system should provide the voters with the chance to select not only among political parties and lists but also among individual candidates.
- **Effectiveness:** Given the likelihood of a high number of independent candidates both for the national and provincial levels, the electoral system should have the ability to generate a manageable number of candidates through an in-built threshold for candidate nomination.
- **Legitimacy:** the electoral system should reflect (much as the Constitution) genuine national consensus and not be seen by significant sectors of the population as flawed and unfair.

3.2 Review of relevant documents

In terms of the terms of reference (TORs), the Honourable Minister requested the Committee to specifically review and analyse the following documents in developing their advice:

- SA Constitution.pdf
- Presentation - Home Affairs Committee, Parliament (1) (1).pdf
- Private Members Bill - [B34-2020] (The Electoral Laws Second Amendment Bill (2020) (Cope Bill).
- Judgment - New Nation v President of SA and Others - Constitutional Court-4
- Electoral Task Team Report - Slabbert Report
- The 2017 Report of the High-Level Panel on the assessment of key legislation and the acceleration of fundamental change.
- Home Affairs submission on the electoral system and reform.

The MAC not only reviewed and analysed these documents but it also believes that its advice must be framed within the existing Constitutional architecture. In addition, the MAC also reviewed several reports and documents submitted by different organisations on the electoral system. These include:

- The Council for the Advancement of South African Constitution (CASAC) 2021 Proposal for Electoral Reform.
- The Helen Suzman Foundation (HSF) 2020 proposed National Assembly electoral reform document.
- The Inclusivity Institute (ISI) 2021 proposed electoral model for South Africa.
- The 70s Group May 2021 electoral system submission document.

These submissions were comprehensively reviewed and analysed.

3.3 Public Consultations

The MAC consulted with key stakeholders who will be directly and indirectly affected by the outcome of the exercise. A detailed list of stakeholders who made submissions to the MAC is attached as annexure 2 to this report.

4. OVERVIEW OF THE EMERGING ELECTORAL SYSTEMS OPTIONS

4.1 Stakeholder perspectives

The interpretations of what the 11 June 2020 Constitutional Court Judgement requires are as diverse as the consulted documents and electoral stakeholders CSOs, think tanks, political parties, organised labour and business. Such interpretations shaped several proposals that the MAC considered. A number of stakeholders welcomed the Constitutional Court judgement, but a few worried that a proliferation of independents would make matters worse, for example, by exacerbating patronage politics.

While many expressed a desire for greater individual and local representation and accountability of MPs through the introduction of constituencies, a few questioned whether the electoral system lay at the root of the current dissatisfaction with government and worried that these changes would make little difference to democratic quality.

Those supporting change in the electoral system expressed various views about preferred electoral system alternatives, with some favouring multi-member and others single-member constituencies.

There were also other MMC proposals by stakeholders. For example, one of the proposals was the local rather than regional multi-member constituencies. These proposals can be considered variants of the Van Zyl Slabbert model. These variants would incorporate independents (as they are required by the Constitutional Court) in various ways.

In some, independent individuals compete with other party-affiliated individuals. In other cases, where independents compete with parties, some manner is determined for rendering independents functionally interchangeable with or equivalent to parties so that they can seamlessly fit into a system based on party voting.

They propose constituencies based on the existing metropolitan or district boundaries and favour the restoration/enhancement of proportionality from national lists of candidates, whether drawn from closed party lists or standing as individuals.

On voting, some favour a situation where voters vote for individuals in the local MMCs while others prefer that the voters vote for parties. In addition, there are those that would have local-MMC votes distributed proportionately and those that would have them selected in order of how many votes they get.

Regarding proportionality, there are those who fancy a separate vote to restore national proportionality and those who think that national proportionality would be restored by aggregating a single vote across MMCs.

None of the proponents of Slabbert-inspired local-MMC variants favour a typical continental European style open party ballot, but they all prefer compensatory top-up to restore proportionality.

4.2 Multi-Member Constituency variations

The MAC acknowledges that there are too many MMC system variations, both theoretically and in practice, to be fully covered in this report. A broad but not exhaustive categorisation, would however, include systems with the following characteristics:

4.2.1 Parallel systems

Where a number of representatives are elected from multi-member constituencies and where a number are elected on a proportional basis for which a separate ballot is used. The two ballots lead to separate outcomes independent of each other. Such a system does not lead to overall proportionality and thus does not meet the requirements of our Constitution.

4.2.2 Compensatory systems

Where a number of representatives are elected from multi-member constituencies and where a number of compensatory seats are subsequently allocated in accordance with the support of each successful party to ensure proportionality. Such systems are categorised as two-tier compensatory systems, and they meet the requirements of our Constitution. Such systems fall into two broad categories.

a) The systems where boundaries are adjusted according to the number of representatives to be elected. There are two alternatives of the first category of systems where boundaries are adjusted. A widely used option has a defined number of representatives, for example, 5 per constituency.

These systems require the demarcation of constituency boundaries to ensure that each contain an approximately equal number of voters. There are, however alternatives where the number of representatives varies between set parameters, for example, between 3 and 7 representatives per constituency. Such systems also require demarcation of constituency boundaries but offer greater opportunities to keep to at least some existing legal or administrative boundaries.

- b) The systems where existing boundaries as constituency boundaries are fixed and the number of representatives to be elected are adjusted in accordance with the number of registered voters. These systems raise few or no demarcation issues.

The submissions to the Committee on multi-member constituency systems included many variations, often without defining details, and a common theme did not emerge.

A potential two-tier compensatory system with fixed boundaries is illustrated hereafter. The particular option is chosen for illustration purposes only as it expands on the current electoral system that functions on the same basis, where 200 representatives are elected from 9 multi-member constituencies with provincial boundaries as fixed boundaries. The allocation of an additional 200 compensatory seats taking overall voter support for each successful party into account ensures a proportional outcome.

The example is based on the same core principles with municipal district council and metro council boundaries as electoral boundaries and expands the current 9 multi-member constituencies to 52 constituencies. That would consequently align electoral boundaries at all three levels of government.

All two-tier compensatory systems lead to an outcome of proportional representation, in general, and the choice of which to favour would not fundamentally favour or disadvantage political parties regarding the total number of seats they attain.

5. PREFERRED OPTIONS

Guided by the 2020 Constitutional Court judgement that citizens enjoyed the right to stand for political office independently of political parties, this MAC set about finding a model for an electoral system that could accommodate independents while preserving benefits of the existing electoral system, notably the constitutional requirement of general proportionality of representation.

The MAC explored a variety of options and heard from a range of public stakeholders in the course of its deliberations. One question that confronted the MAC early on was whether the Committee should seek to satisfy the Constitutional Court requirement with as little disruption to the existing electoral system as possible, or whether it should use the occasion to attempt to address public aspirations for an electoral system that includes a greater element of local and representation and individual accountability to voters.

In the end the MAC members were not able to reach a consensus on a single option, but the Committee did succeed in narrowing down the options to a fairly stark choice on a minority and majority split of 3:4 of the Committee members. One member of the Committee chose not to state a preferred option. These options are:

- **Option 1 (Minority Report):** The slightly modified multi-member constituency (MMC) which accommodates independents but requires relatively minimal changes to the constitution. This option favours inserting independents into the existing electoral system, enabling independents to compete with political parties for votes.
- **Option 2 (Majority Report):** The single-member constituency (SMC) option: This Option favours introducing single-member constituencies, with proportionality secured via party lists. Here independents would stand as individuals in constituencies and compete together with associates for the party-list vote.

We hope that in simplifying the options to a stark choice, the MAC will have succeeded in equipping the Minister and others to choose the future electoral system.

The preferred options are discussed below regarding what they are, how the national and provincial legislatures are composed, proportionality, candidate qualification requirements, demarcation of boundaries, number of ballot papers, vacancies, and whether the option satisfies the principles adopted by the MAC. The option advocates for retaining the electoral system as provided for in sections 46 and 105 of the Constitution.

5.1 OPTION 1: A MODIFIED MULTI-MEMBER CONSTITUENCY (MMC) SYSTEM TO ACCOMMODATE INDEPENDENT CANDIDATES

This option entails modifying the existing multi-member electoral system to accommodate independent candidates in the national and provincial elections without many changes in the legislation, including not interfering with the constitutionally required general proportionality.

5.1.1 Description of the option

The option advocates for the retention of the electoral system. To accommodate independent candidates as per the Constitutional Court ruling, this option focusses primarily on the Constitutional Court judgement that independent candidates should be included in the electoral system. This should be the primary objective of any changes to the electoral system. This option states that this must also be done in the simplest possible way and be fair to independent candidates wishing to stand for elections.

Such changes would include amending the current definition of "party" in the Electoral Commission Act No 51 of 1996 such that 'party' refers to a registered political party and includes an independent candidate contesting elections, any organisation or movement

of a political nature which publicly supports or opposes the policy, candidates, or cause of any registered party, or which propagates non-participation in any election.

The option recommends that the existing system of an MMC for the NA and a straight proportional vote for the PLs should remain as that would be fairest for independent candidates. It would, for example, allow that independent candidates wishing to stand for either national or provincial are then able to gain support for their candidacy from the largest possible area (in this case, the province in which they reside). This means that:

- The province remains a "Constituency" for independents and other parties contesting for 200 seats in the NA elections, and
- The province in which the independent candidates resides becomes the "Constituency" for independents contesting the PLs elections. Those favouring this option are of the view that demarcation of possible "constituencies" below the provincial level would go against some of the MAC principles given the existing spatial inequalities in South Africa, including economic, ethnic and other disparities. These inequities would make any demarcation process always subject to complaints of gerrymandering. It must be stressed that the greater the number of constituencies, the greater is the complexity and cost in running such elections.

5.1.2 Composition of the National Assembly and the Provincial Legislatures

Under this option, the current composition of seats in the NA and PLs would remain unchanged. The NA would comprise the 200 regional seats and 200 compensatory seats (closed lists). The 200 regional MPs are elected in the nine regions (provinces/multi-member constituencies), and independent candidates would also be elected from these nine regions. The IEC determines the number of representatives for each region before an election on a proportional basis in relation to the number of registered voters in each region.

The votes cast for parties in each region determines the allocation of seats per party on a proportional basis. In essence, each region constitutes a separate election and votes cast in one region cannot be considered in any other region. As turnout varies in the different regions, the quota for determining the results in each region would also vary, resulting in a deviation from overall proportionality when the results of all nine regions are combined. In the 2019 election, this deviation came to 3,5 per cent.

The 200 Compensatory seats serve to restore overall proportionality where the votes for parties in the 9 regions are added together to determine the share of each party in the overall vote. This ensures the constitutional requirement for proportionality in general.

The allocation of seats for the independent candidates would be similar to allocating seats in municipal elections. In addition, the allocation of seats after the provisional allocation would no longer be based on the largest remainder but based on the highest average number of votes per seat already awarded. This would be fairest for independent candidates. Using the largest remainder would result in inequities when some smaller parties are elected to the NA and PLs with far fewer votes than the larger parties. This goes against the principle that there should be one person, one vote, one value.

In the case of PLs, the single ballot, including all parties (political, movement, independent), is a straight proportional election.

5.1.3 Proportionality

This option does not envisage many changes to what obtains regarding the proportionality of the current electoral system. It suggests that independent candidates would be elected if they meet the quota, and once they have secured their seat, their votes would be discarded for the determination of a new quota for the determination of representation by other parties with PR lists.

5.1.4 Candidate qualification requirements under this option

This option suggests the following qualification criterion for the NA and PL elections.

- (a) A residential qualification requirement for all candidates (independent and other parties) to restrict them to compete in more than one region.
- (b) A proof of sufficient voter support requirement for independent and unrepresented political/movement parties to manage the risk of too many names of parties on the ballots.
- (c) Satisfaction of the legal requirements for registration and proof of sufficient voter support requirement for political parties not already elected to the legislatures.

In light of the above qualifications, Parliament may have to determine whether independent candidates will pay election fees and whether they are entitled to funding be subjected to consider the issue of election fees and the funding of independent candidates once elected.

5.1.5 Demarcation of boundaries

Under this approach, the provincial boundaries are contiguous to constituency boundaries and, therefore no need for demarcation in the case of the National Assembly. In the case of the PL, there would be no "constituencies" as this is the fairest for contesting independent candidates.

As indicated above, demarcation of possible constituencies below the provincial level carries the serious risk of complaints of gerrymandering.

5.1.6 number of ballot papers

The option proposes no changes in the current number of ballot papers where a single ballot paper is used to elect political parties and independent candidates to the NA and PLs. The votes cast for parties (including independents) in each province would determine the allocation of seats per party on a proportional basis.

5.1.7 Vacancies

Vacancies under this option will be as follows:

- a) In the case of independents, vacancies for the NA and PLs would be filled by recalculating the result of the election disregarding the votes for the independent candidate.
- b) In the case of vacancies in elected party representatives, the next person on the party list of the person who vacated the seat would replace the vacancy (process that happens now).

5.1.8 Evaluation of the option in terms of the key principles adopted by the MAC

Principle	Detail
Inclusiveness (national unity)	Retaining a PR system with an MMC component for the NA vote will continue the existing inclusiveness of the electoral system, yielding a broad representation of the demographic, ethnic, racial, and religious diversity of the population. In addition, using the province as the basis for "constituency" (for NA) and the PL is the fairest to allow independents the greatest chance of gaining support within and across these potential divides.
Fairness	The option allows for independents to have a fair opportunity to enter their names onto the NA and PLs ballots.
Simplicity	Poling and seat allocation procedures are simple, and stakeholders are familiar with them, and they will be far more cost-effective than systems requiring many more separate elections and/or an additional demarcation process.
Accountability	Accountability is a post-elections issue, and Parliament should ensure that mechanisms are in place to ensure elected representatives are accountable to citizens.
Gender Equality	This option has the potential to generate the highest levels of gender representation due to it being closest to a pure PR component.
Proportionality	This option satisfies the constitutional requirement of general system proportionality.

Effective participation of independents	This option ensures the fairest chance of representation of independent candidates in NA and PLs.
Genuine choice	This option allows for the voters to have a chance to select not only among political/movement parties and lists but also among independent candidates.
Effectiveness	Introduction of minimum candidature requirements, including the proof of sufficient voter support, ensures a manageable number of candidates through an in-built threshold for candidate nomination, whether or not it is an independent or party candidate
Legitimacy	The support provided by voters through their turnout in the improvement of the already widely supported electoral system by registered voters augments its legitimacy.

5.2 OPTION 2: THE MIXED-MEMBER MODEL INCORPORATING SINGLE-MEMBER CONSTITUENCIES

This option entails combining the first-past-the-post and proportional representation, making it a mixed-member proportional (MMP) system resembling the current local government electoral system, albeit with some improvements.

5.2.1 Description of the option

This option can be understood as a member of the family of Mixed-Member Proportional (MMP) systems and as part of the sub-family of Additional Member Systems (AMS) found, for example, in Germany, New Zealand and the Scottish Parliament.

It involves electing MPs from 200 single-member constituencies and the remainder from a single national multi-member constituency. Voters would vote for a single MP to represent them in single-member constituencies (their first vote) and for a party to represent them in the single national multi-member constituency based on competing closed party lists (their second vote).

Single-member constituency vote (200 constituencies)

Two possibilities were suggested for conducting the single-member constituency elections (the first vote):

- **First-past-the-post (plurality)** - As in the local government system, the candidate that wins the most votes in a constituency wins the election.
- **Instant run-off or Alternative Vote (AV) (majority)**- Voters select first and second preference candidates in their constituency. If first preference votes

fail to yield a 50 per cent plus one majority, second preference votes will be counted. This would ensure that MPs command the support of a majority in their constituencies and that constituencies are not won by unpopular minority parties. It would also ensure that a majority of voters in a constituency have an MP they can relate to, offsetting one disadvantage of single-member constituencies relative to MMCs.

The independent candidates standing in constituencies would stand in just one constituency.

National Multi-member constituency vote (PR top-up)

In the second vote, parties compile closed lists of candidates and voters vote for the party. Seats are distributed according to the number of votes each party wins. Only the national multi-member constituency, would count towards determining overall proportionality in Parliament. Seats won outright by a party in the single-member constituencies would be subtracted from their overall seat entitlement as determined by the second vote.

Independents would be able to compete with parties as free-standing individuals in the case of the single-member constituencies and together with associates (to receive excess votes) in the single national multi-member constituency. Some system of excess vote transfer is needed on the second ballot to ensure overall proportionality in the possibility that an independent will win enough votes to justify many seats but only be able to fill one of them.

A party candidate would be able to stand simultaneously in both a constituency and on the national list. If they win a constituency, any seat they win on the national list goes to the next person down on the party list. This ensures that parties can maximise the chances that their top leaders will be elected.

5.2.2 Composition of the National Assembly and the Provincial Legislatures

National Assembly

200 MPs would be elected from single-member constituencies, and the remaining 200 from a single national multi-member constituency. A 50:50 split seems the best way of combining meaningful local constituency representation with the assurance of proportionality and options for maximising gender equity. Fewer constituencies would be too large for meaningful local representation. Our research suggests that there could be up to 265 seats without serious risk of overhang. However, it is safer to keep the number to 200, both to reduce as close as possible to zero the risk of overhang and to ensure that party leaders who favour gender equity have the option of securing it thanks to a sufficiently large number of MPs coming from closed party lists (which can be more easily gender-balanced than constituencies). The experience of local government suggests that the employment of a 50:50 ratio in South African conditions is compatible with high levels of gender equity.

Voters will vote for a single MP to represent them in single-member constituencies (their first vote) and for a party to represent them in the single national multi-member constituency based on competing closed party lists (their second vote). This is a system familiar to voters from the local government.

Only the second vote in the national multi-member constituency will count towards determining overall proportionality in Parliament. Seats won outright by a party in the single-member constituencies would be subtracted from their overall seat entitlement as determined solely by the second vote.

Provincial legislatures

A single set of constituencies would be simultaneously employed in elections for both the National Assembly and Provincial legislature. The balance of seats in each provincial legislature would be composed of closed party-list candidates. In the Northern Cape, where there would be too few such constituencies to balance the party vote, constituencies could be subdivided for provincial elections.

There will thus be inter-provincially varied ratios of constituency to list MLAs.

This system would enable national and provincial elections to be synchronised, as at present. It would also reduce the scale of the demarcation challenge.

5.2.3 Proportionality

The second vote in the national MMC to determine overall proportionality in Parliament represents this option's decisive break from the current local government model, where 'all votes count'. Seats won outright by a party in the single-member constituencies

would be subtracted from their overall seat entitlement as determined solely by the second vote.

The logic behind this is clear and twofold.

First and most importantly, it allows for an appropriate division of voting incentives. When voting for a constituency MP, voters will be choosing the person they want representing their constituency, irrespective of party affiliation. When casting the second vote, voters will be deciding which party they want to run the country (or to have a stronger voice in Parliament). Voters might choose to split their vote, voting for one party locally and another nationally. Voters would not need to worry that voting for one party locally will decrease the chances of their nationally preferred party winning overall.

Second, if 'all votes count', independents and small parties would have a much-reduced chance of winning seats as they would have to fight multiple separate constituency elections to accumulate enough votes. If the second ballot alone determines overall proportionality, independents and small parties have two routes to election: they can win a seat if they win a plurality or majority in a constituency-based on geographically concentrated local support, or they could win seats by contesting the second ballot in what amounts to a single national MMC. In that case, they would be able to gather support from across the country.

5.2.4 Candidate qualification requirements under this option

This single member option minimum candidate qualification requirements include:

- a) A proof of sufficient voter support requirement for independent and unrepresented political/movement parties to manage the risk of too many names of parties on the ballots.
- b) Satisfaction of the legal requirements for registration and proof of sufficient voter support requirement for political parties not already elected to the legislatures.
- c) The NA will decide if residency requirements could be a condition.

5.2.5 Demarcation of boundaries

Constituencies will be demarcated by combining local government wards. In order to facilitate cooperative government, they should not cross metro, district or provincial boundaries. Slight variations in numbers of voters or population per constituency would be offset by the second proportional vote.

A given candidate will be able to stand simultaneously in both a constituency and on the national list. If they win a constituency, any seat they win on the national list

goes to the next person down on the party list. We do not think it a good idea to impose constituency residency requirements at this stage. However, if such requirements are imposed, it might be better for national party leaders to take up their list seat, triggering a by election for their constituency seat.

All constituency MPs should have well-staffed constituency offices in those constituencies and regular surgeries there. A party may decide to assign a list MP to a constituency where they do not have an elected constituency MP, to provide party supporters there with additional representational options.

5.2.6 number of ballot papers

This option envisages the use of two ballot papers for the NA elections where voters would vote for a single MP to represent them in single-member constituencies (their first vote) and for a party to represent them in the single national multi-member constituency based on competing for closed party lists (their second vote).

The same will apply for PL elections.

Voters would be invited to cast four votes overall on election day - two for the National Assembly and two for the Provincial Legislature

5.2.7 Vacancies

Vacancies under this option could occur in the following manner:

- a) Death
- b) Resignation from the legislature
- c) Defection/expulsion from a party
- d) Recall of a constituency MP/MPL by a designated proportion of registered voters in their constituency.

Vacancies under this option would be addressed in the following manner:

- a) In the case of constituencies, vacancies for the NA and PLs would be filled through by-elections in the respective constituency for that seat.
- b) In the case of vacancies in elected party-list representatives, the next person on the party list of the person who vacated the seat would replace the vacancy (a process that happens now).

5.2.8 Evaluation of the option in terms of the fundamental principles adopted by the MAC

Principle	Detail
Inclusiveness (national unity)	The principle of proportionality is retained in the national multi-member constituency election, which accurately reflects the views of the electorate nationally and provincially. The demarcation of constituencies by combining local government wards can be done in a way that does not reinforce apartheid spatial patterns.
Fairness and Simplicity	It is a relatively simple voting system, familiar to voters from local government. Voters cast two votes, one for a constituency representative and one for a party (at both national and provincial level).
Accountability	<p>The option involves individual representation and accountability. Voters determine which particular candidate is elected in constituencies and pass judgement on candidate choices made by parties. Voters retrospectively hold candidates accountable at subsequent elections.</p> <p>The option also involves direct constituency representation, where voters have a 'local' MP they can approach and represent their interests.</p> <p>The option also involves direct constituency representation, where voters have a 'local' MP they can approach and represent their interests. All constituency MPs should have well-staffed constituency offices in those constituencies and regular surgeries there.</p> <p>A party may decide to assign a list MP to a constituency where they do not have an elected constituency MP, to provide party supporters there with additional representational options. If the recall option is introduced, there is a still further accountability mechanism.</p>
Gender Equality	The options 50:50 split seems to combine meaningful local constituency representation with the assurance of proportionality and options for maximising gender equity. The experience of local government suggests that the employment of a 50:50 ratio in South African conditions is compatible with high levels of gender equity.

Proportionality	The system is proportional to a significant degree due to the compensatory top-up from party lists to correct inter-party proportionality imbalances generated by constituency elections.
Effective participation of independents	<p>The option accommodates independent candidates more naturally than many MMC models, including the closed party list model. Independents can simply stand as free-standing individuals in the local constituencies (as well as, with associates, nationally).</p> <p>It also accommodates independents substantively, because they have two separate routes to winning seats.</p>
Genuine choice	Voters will have a wide range of parties and independents to choose between.
Effectiveness	The model would entail some challenge in demarcating constituencies, but these can be ameliorated by combining existing wards.
Legitimacy	<p>The system should command a wider legitimacy insofar as it meets a variety of public demands (e.g. for individual and local representation) while satisfying constitutional requirements of proportionality.</p> <p>It involves direct constituency representation, where voters have a 'local' MP who they can approach and who can represent their interests.</p> <p>It also provides two routes for independents to win seats. There is some potential complication in the possible politicisation of constituency demarcation, but this will be ameliorated by the assurance that overall proportionality will be retained.</p>

6. CONCLUSION

We would like to express our gratitude to the many stakeholders who took the trouble to provide us with verbal and written advice. We would also like to express our gratitude to the Minister for having afforded us the privilege to serve in this Committee and to make recommendations on a matter of national importance.

7. ANNEXURE 1: Consulted Stakeholders

Stakeholder category	organisations
Political parties	African Christian Democratic Party (ACDP) African National Congress (ANC) African Transformation Movement (ATM) Congress of the People (COPE) Democratic Alliance (DA) Freedom Front Plus (FF+) Economic Freedom Fighters (EFF)
Civil Society Organisations	Activate Change Drivers Corruption Watch My Vote Counts One South Africa Movement Youth Lab The 70's Group iTrends
Organised Business	Business Unity South Africa (BUSA)
Organised Labour	Congress of South African Trade Unions (COSATU) South African Council of Churches (SACC) South African Federation of Trade Unions (SAFTU)
Academia (Local and external)	University of Kwazulu Natal (UKZ) University of Johannesburg (UJ)
Research Outfits and Think Tanks (Local and external)	Helen Suzman Foundation (HSF) Inclusivity Society Institute (ISI) Auwal Socio Economic Research Institute (ASRI)
Faith Based Organisations	South African Council of Churches (SACC)



MEMORANDUM

for

MINISTER OF HOME AFFAIRS

on

ELECTORAL AMENDMENT BILL

STEVEN BUDLENDER SC

SALOME MANGANYE

MITCHELL DE BEER

MFUNDO SALUKAZANA

Chambers, Sandton & Cape Town

25 November 2021

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OVERVIEW

- 1 We are instructed by the Minister of Home Affairs.
- 2 In June 2020, in *New Nation Movement NPC v President of the Republic of South Africa*,¹ the Constitutional Court declared the Electoral Act 73 of 1998 unconstitutional and invalid to the extent that it requires that adult citizens may only be elected to the National Assembly and Provincial Legislatures through their membership of political parties.
- 3 The Court suspended the declaration of invalidity for 24 months to give Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.
- 4 In response to the Constitutional Court's judgment, the Minister of Home Affairs established a Ministerial Advisory Committee (**MAC**) to investigate and report on electoral reform.
 - 4.1 The MAC was tasked with: identifying the extent of the constitutional provisions affected by the Constitutional Court's judgment; developing policy options on the electoral system that address the defects of the Electoral Act; recommending possible options to be considered; and consulting with stakeholders in the development of the options.

¹ *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC).

- 4.2 The MAC produced a report setting out two options for electoral reform, which would permit independent candidates to run for national and provincial elections.
- 5 The Minister instructed us to draft an Electoral Amendment Bill to give effect to the “minimalist option” set out in the MAC’s report and have done so.
- 6 This memorandum is intended to provide context for the Bill. It deals with the following issues in turn:
- 6.1 what the Constitution requires of the electoral system in light of the Constitutional Court’s *New Nation Movement* judgment;
 - 6.2 our understanding of the minimalist option and what is sought to be achieved by amending the Electoral Act;
 - 6.3 how the system set out in the Bill would work in practice with reference to a hypothetical election;
 - 6.4 qualifications to run as an independent candidate;
 - 6.5 whether it is necessary to make provision for independent candidates in the National Council of Provinces; and
 - 6.6 consequential amendments to the Political Party Funding Act 6 of 2018.

THE ELECTORAL SYSTEM AND THE *NEW NATION MOVEMENT* JUDGMENT

- 7 At present, the Electoral Act provides for a proportional representation system for the National Assembly and provincial legislatures, through the use of party lists. A citizen cannot contest national and provincial elections if they are not a member of a political party.
- 8 In *New Nation Movement*, the Constitutional Court held that section 19(3)(b)² of the Constitution, read together with section 19(1)³ and the right to freely associate (section 18), requires that independent candidates must be permitted to contest the national and provincial elections.⁴ For this reason, the Court declared the Electoral Act unconstitutional.
- 9 Importantly, sections 46(1)(d) and 105(1)(d) of the Constitution require the adoption of an electoral system (as prescribed by national legislation) that “*results, in general, in proportional representation*” for the election of the National Assembly and provincial legislatures.
- 10 Our understanding of the judgment is that the Constitution requires the electoral system to balance various objectives, which include: the need to have a system

² Section 19(3)(b) provides that: “*Every adult citizen has the right ... to stand for public office and, if elected, to hold office.*”

³ Section 19(1) reads:

“Every citizen is free to make political choices, which includes the right—

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.”

⁴ *New Nation Movement* at paras 17-19, 48-49 and 59.

which generally results in proportionality; while also making provision for adult citizens to stand as independent candidates, and not as members of political parties.

- 11 The Court, however, did not specify how the electoral system must achieve these objectives and requirements. Madlanga J, who wrote the majority judgment for the Court, emphasised that those decisions are left to Parliament:⁵

“[L]et me mention that a lot was said about which electoral system is better, which system better affords the electorate accountability, etc. That is territory this judgment will not venture into. The pros and cons of this or the other system are best left to Parliament which – in terms of sections 46(1)(a) and 105(1)(a) of the Constitution – has the mandate to prescribe an electoral system. This Court’s concern is whether the chosen system is compliant with the Constitution.”

- 12 The Court nonetheless expressly recognised that proportional representation is possible where there is a combination of representation through party lists and representation by individuals who are not attached to political parties. In this regard, the Court approvingly pointed to section 157(2)(b) of the Constitution, which provides – at local government level – for members of Municipal Councils to be elected from party lists and ward representation (which may include independent candidates).⁶

- 13 We should also emphasise that while the details of the electoral system are left to Parliament,⁷ in addition to the requirements mentioned above, any electoral

⁵ *New National Party v Government of the Republic of South Africa* at para 15.

⁶ *New National Party v Government of the Republic of South Africa* at para 79.

⁷ *New National Party v Government of the Republic of South Africa* at para 14.

system must satisfy a minimum threshold of constitutional rationality.⁸ That requires a rational connection between a scheme adopted by Parliament and the achievement of a legitimate government purpose.

- 14 Having sketched out these principles, next we summarise our understanding of the minimalist option.

THE MINIMALIST OPTION FOR ALLOWING INDEPENDENT CANDIDATES

- 15 The MAC report describes the minimalist option as follows:

“This option entails modifying the existing multi-member electoral system to accommodate independent candidates in the national and provincial elections without many changes in the legislation, including not interfering with the constitutionally required general proportionality.”⁹

- 16 As we understand the report, the minimalist option intends retaining the current composition of seats in the National Assembly and provincial legislatures, while making provision for independent candidates to contest the elections for those bodies.

- 17 The 400 seats in National Assembly will continue to be divided in two:

- 17.1 Two hundred seats will be elected from the nine provinces or regions – the “200 regional seats”. (These are the seats using what are sometimes called the “province to national lists”.)

⁸ *New Nation Movement* at para 75, cited *New National Party* at paras 19-20.

⁹ MAC report para 5.1.

17.2 The other 200 seats will be “200 compensatory seats”. (These are the seats using what are sometimes called the “national to national lists”.)

18 In respect of the *200 regional seats*:

18.1 These seats will be allocated across the nine provinces / regions on a proportional basis taking into account the number of registered voters for each province / region. (That is the way the system currently works.)

18.2 These seats will be contested by parties (through closed lists) and independent candidates.

18.3 Each independent candidate will only be entitled to contest seats in one province / region.

18.4 Because there will be different independent candidates running in each province / region, there will be different ballot papers for each province / region. The ballot paper used in each province / region will include all the parties involved in the election for the National Assembly and the independent candidates for that province / region.

18.5 If an independent meets the relevant quota for a seat, they will be elected to the National Assembly. Once an independent candidate has secured a seat, any additional votes they receive will be discarded and a new quota will be used to determine the proportional representation of the political parties, and the allocation of seats to them.

19 In respect of the *200 compensatory seats*:

19.1 The votes for only the parties in the nine regions (from the same ballots used for the 200 regional seats) will be added together to determine the share of each party in an overall vote.

19.2 Parties will be allocated seats in accordance with their proportional share of the overall vote.

19.3 To be clear, independents will not get to contest the 200 compensatory seats.

20 For the provincial legislatures:

20.1 Seats will be allocated based on a single ballot for that province, which will include all parties and independent candidates. This will be a straight proportional election.

20.2 As with the 200 regional seats for the National Assembly, an independent candidate will be elected if they meet the relevant quota for a seat. Once an independent candidate has secured a seat, any additional votes they receive will be discarded and a new quota will be used to determine the proportional representation of the parties, and the allocation of seats to them.

21 In the Bill, we have designed a system which adopts this approach.

22 We note that in virtually any system of this sort, there is always the occurrence of what might be termed "wasted" votes.

- 22.1 If Candidate X stands as an independent and receives 50 000 votes, whereas the quota for a seat is only 40 000 votes, there is nowhere else for these excess 10 000 votes to go. Some might say that they are then “wasted”.
- 22.2 In our view, however, this does not render the system impermissible or unconstitutional.
- 22.3 While it is not currently part of South Africa’s current system of national and provincial elections, “wasted” or “lost” votes are a common feature of many other election systems, including single member constituency systems.
- 22.4 Moreover, the reality is that the votes cannot truly be said to be “wasted” or “lost”. If Independent Candidate X runs for the National Assembly as an independent and is elected, then both Independent Candidate X and her voters have achieved their objective. The mere fact that she could also have been elected with fewer votes (40 000) does not change that.
- 22.5 And, of course, if Candidate X considers that she will get so many votes that they will cover two more seats, then she has the right to form her own political party to run for multiple seats, rather than running for a single seat as an independent.
- 23 Nevertheless, in order to reduce the extent of “wasted votes”, we have specified that when the ballots for the 200 regional seats in National Assembly and the seats provincial legislatures are counted, seats will be allocated in three rounds.

- 23.1 In the first and second rounds, independent candidates will have an opportunity to gain a seat if they meet the quota of votes per seat.
- 23.2 In the first round, any independent candidate who satisfies the quota for a seat will be allocated a seat.
- 23.3 In the second round, any independent candidates who succeeded in the first round will be removed, along with all the votes cast for him or her. A new quota will be calculated by taking into account the remaining votes and seats. Any independent candidate who satisfies the new quota will be allocated a seat.
- 23.4 In the third round, political parties will be allocated their seats. All independent candidates (whether successful or unsuccessful) and all votes casts for independent candidates will be removed. A droop quota will be used (as is currently the case) to allocate the remaining seats in proportion to the number of votes per political party.
- 24 We are of the view that this three-round approach strikes an appropriate balance between the interests of independent candidates and political parties.

THE EFFECT IN A HYPOTHETICAL ELECTION

- 25 To demonstrate how the Bill would include independent candidates in the electoral system, we focus on a single hypothetical provincial election for a provincial legislature. The same system would apply for the 200 regional seats

in the National Assembly. We have broadly used the number of votes cast in the last election for the Gauteng Provincial Legislature in 2019.

26 The legislature has 80 seats.

27 There 4 400 000 votes were cast.

28 Four political parties and five independent candidates contested the election.

Each received the following votes:

Party / Candidate	Votes
Party A	2 400 000
Party B	1 445 000
Party C	146 000
Party D	48 000
Independent 1	220 000
Independent 2	57 000
Independent 3	54 000
Independent 4	20 000
Independent 5	10 000

29 In the first round (Schedule 1A item 20):

29.1 The quota will be 55 000 votes per seat (4 400 000 votes / 80 seats).

29.2 Independent 1 and Independent 2 will be allocated seats as they both met the quota .

Candidate	Votes	Seat
Independent 1	220 000	1
Independent 2	57 000	1
Independent 3	54 000	-
Independent 4	20 000	-
Independent 5	10 000	-

30 In the second round (Schedule 1A item 21):

30.1 Independent 1 and Independent 2 will be disregarded as they were successfully elected.

30.2 The votes cast for Independent 1 and Independent 2 will be disregarded, leaving 4 123 000 votes.

30.3 The seats allocated to Independent 1 and Independent 2 will be disregarded, leaving 78 seats.

30.4 The second quota will therefore be 52 858 votes per seat (4 123 000 / 78 disregarding factors).

30.5 Independent 3 will be allocated a seat as she satisfies the second quota

:

Candidate	Votes	Seat
Independent 3	54 000	1
Independent 4	20 000	-
Independent 5	10 000	-

31 In the third round (Schedule 1A item 22):

31.1 All independent candidates will be disregarded, including Independent 4 and Independent 5 who will not be allocated a seat.

31.2 All votes cast for independent candidates will be disregarded. In total, 361 000 votes were cast from independent candidates, leaving 4 039 000 votes cast for political parties.

31.3 The three seats allocated to Independent 1, Independent 2, and Independent 3 will be disregarded, leaving 77 seats.

31.4 The third quota of votes per seat is then calculated using the formula for determining a droop quota: $52\,455 (4\,039\,000 / 77 + 1, \text{ disregarding factors})$.

31.5 The parties each receive the following seats

Party	Votes	Seats
Party A	2 400 000	45.75
Party B	1 445 000	27.54
Party C	146 000	2.78
Party D	48 000	0.91

31.6 At this point, only 74 seats have been allocated, with a surplus of 3 seats.

31.7 The remaining three seats are allocated using the droop quota, in order of the surplus votes. Party D receives 1 seat (seat 75). Party C receives another seat (seat 76) and Party A receives another seat (seat 77).

31.8 So, the political parties receive the following seats

Party	Votes	Seats
Party A	2 400 000	46
Party B	1 445 000	27
Party C	146 000	3
Party D	48 000	1

32 The final allocation of seats will therefore be as follows:

Party / Candidate	Votes	Seats (out of 80)
Party A	2 400 000	46
Party B	1 445 000	27
Party C	146 000	3
Party D	48 000	1
Independent 1	220 000	1
Independent 2	57 000	1
Independent 3	54 000	1
Independent 4	20 000	0
Independent 5	10 000	0

QUALIFICATIONS TO RUN AS AN INDEPENDENT CANDIDATE

- 33 In order to ensure that the Electoral Commission can effectively run the national and provincial elections, it will be important to adopt qualification criteria for independent candidates to contest the 200 regional seats and provincial legislatures.
- 34 A careful balance will have to be struck between, on the one hand, ensuring that serious citizens are not precluded from contesting elections as independent candidates, while on the other hand, not making the qualification criteria too easy to meet, so that ballot papers are impractically lengthy and impossible to use in elections, whether it be by voters marking their votes, or officials of the Electoral Commission counting and processing the votes.
- 35 It seems to us that the following criteria will have to be adopted.
- 35.1 A residential qualification – so that an independent candidate can only contest one region or province;
- 35.2 A voter supporter requirement – the independent candidate would be required to satisfy the Electoral Commission that they have sufficient support of registered voters within the province / region they intend contesting (similar to the requirement for local government elections);¹⁰
and

¹⁰ Section 17(2)(a) of the Local Government: Municipal Electoral Act 27 of 2000, requires that “a prescribed form with the signatures of at least 50 voters whose names appear on the municipality’s segment of the voters’ roll for any voting district in the contested ward” be attached to the nomination of an independent candidate.

35.3 A prescribed monetary deposit.

36 The precise threshold of supporter numbers and the precise amount of the monetary deposit will have to be carefully chosen to strike an appropriate balance between facilitating participation of serious independent candidates, while not permitting too many independent candidates to contest the election such that it produces practical difficulties.

37 We have made provision for the amount of the deposit and threshold of voter support to be determined and prescribed by the Electoral Commission. We are of the opinion that the Electoral Commission is the most appropriate body to make these determinations, and which can be revised in light of changing circumstances.

38 Lastly, there is the question of whether the amended Act should adopt a restriction on the ability of members of political parties to run as independent candidates.

38.1 We have been referred to section 33(1) of the Kenya Elections Act 42 of 2011, which provides qualifications for contesting an election as an independent candidate:

“A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—

(a) has not been a member of any political party for at least three months preceding the date of the election...”

- 38.2 The argument for such requirement is that, if a member of a political party loses an internal race to be included in a party list, then it is said that they should not be able to utilise the election to achieve a similar result. That would undermine party politics.
- 38.3 We have included such a requirement in the Bill (see section 33A(3)(f)).
- 38.4 Consideration will need to be given to whether to include this provision and whether it is consistent with the Constitution.

THE POSSIBILITY OF INDEPENDENT CANDIDATES BEING ELECTED TO THE NATIONAL COUNCIL OF PROVINCES

- 39 We have further been requested to consider whether independent candidates should be appointed to the National Council of Province (**NCOP**).
- 40 We note that neither the Constitutional Court judgment in *New Nation Movement* case nor the MAC report contains any suggestion that independent candidates should be appointed to the NCOP. The Constitutional Court judgment and order is limited to the National Assembly and provincial legislatures and does not mention the NCOP.
- 41 We are nevertheless asked to consider whether it would be possible for independent candidates to be appointed to the NCOP. The answer, in our view, is that this is not constitutionally permissible and, to be achieved, would require

an amendment of the Constitution itself (as opposed to an amendment of the Electoral Act).

42 This is for the following reasons:

42.1 Section 60 of the Constitution provides for the composition of the NCOP. It provides that it is to be composed of a single delegation from each province consisting of ten delegates. The ten delegates are to be made up as follows¹¹:

42.1.1 Four special delegates; and

42.1.2 Six permanent delegates appointed in terms of section 61(2) of the Constitution.

42.2 The allocation of delegates is dealt with in section 61 of the Constitution and provides that:

“Parties represented in a provincial legislature are entitled to delegates in the province’s delegation in accordance with the formula set out in Part B of Schedule 3 of the Constitution.”
(emphasis added)

42.3 Part B of Schedule 3 deals with the formula to determine party’s participation in Provincial delegations to the National Council of Provinces. It provides as follows:

“1. The number of delegates in a Provincial delegation to the National Council of Provinces to which a party is

¹² *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC).

entitled, must be determined by multiplying the number of seats the party holds in the Provincial Legislature by ten and dividing the result by the number of seats in the legislature plus one;

2. If a calculation in terms of Item 1 yields a surplus not absorbed by the delegates allocated to a party in terms of that item, the surplus competes with similar surpluses accruing to any other party or parties, and any undistributed delegates in the delegation must be allocated to the party or parties in the sequence of the highest surplus;
3. If the competing surpluses envisaged in Item 2 are equal, the undistributed delegates in the delegation must be allocated to the party or parties with the same surplus in the sequence from the highest to the lowest number of votes that have been recorded for those parties during the last election for the Provincial Legislature concerned;
4. If more than one party with the same surplus recorded, the same number of votes during the last election for the Provincial Legislature concerned, the Legislature concerned must allocate the undistributed delegates in the delegation to the party or parties with the same surplus in the manner which is consistent with democracy.”

43 The above provisions make clear that, from a constitutional perspective, NCOP seats may only be allocated to “*parties*” – not independent candidates.

44 The Constitution therefore does not require or permit independent candidates to sit in the NCOP. Only an amendment to the Constitution (as opposed to an amendment to the Electoral Act) could achieve this.

CONSEQUENTIAL AMENDMENTS TO THE POLITICAL PARTY FUNDING ACT

- 45 Finally, we note that the Bill will require consequential amendments to be enacted to the Political Party Funding Act 6 of 2018 (**Funding Act**).
- 46 The Funding Act currently regulates the provision of public funding to political parties, as well as the restriction and disclosure of private donations made to political parties.
- 47 Independent candidates will have to be catered for by the Funding Act.
- 48 In respect of public funding:
- 48.1 The Funding Act was enacted in part in compliance with section 236 of the Constitution. The provision is headed "*Funding for political parties*" and provides:
- "To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis"
- 48.2 Therefore, section 236 of the Constitution does not itself require the provision of public funding for independent candidates.
- 48.3 Other provisions of the Constitution may, however, be said to require funding to be provided on a similar basis to independent candidates elected to the National Assembly and provincial legislatures.

48.4 The National Assembly will need to decide whether to include consequential amendments to the Funding Act so as to provide for the allocation of funds to them on a proportional basis from the two funds established in sections 2 and 3 of the Act. We will prepare the necessary draft amendments in this regard as a matter of caution.

49 In respect of private funding:

49.1 In *My Vote Counts II*,¹² the Constitutional Court explicitly declared that *“information on private funding of political parties and independent candidates must be recorded, preserved and made reasonably accessible.”*

49.2 The Funding Act does not at present regulate the private funding of independent candidates. Its provisions which prohibit donations and require the disclosure of donations to political parties, do not bind independent candidates.

49.3 That is because the Funding Act does not mention independent candidates anywhere. A “political party” is defined by section 1 to include *“any entity that accepts donations principally to support or oppose any registered political party or its candidates, in an election as defined in section 1 of the Electoral Act, 1998 (Act 73 of 1998).”* The emphasised reference to *“its candidates”* is clearly linked to the political party concerned. This appears to be a lacuna in the Funding Act given

¹² *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC).

that independent candidates can already contest local government elections.

49.4 We note that provision is already made elsewhere in the law for the recordal, preservation and disclosure of information on private funding of independent candidates.

49.4.1 Section 52A(1)(a) of the Promotion of Access to Information Act 2 of 2000 (**PAIA**) requires political parties to keep records of donations from private sources above a prescribed threshold and paragraph (b) specifies that political parties must *“make the records available on a quarterly basis, as prescribed”*.

49.4.2 Regulation 6 of the Regulations relating to the Promotion of Access to Information, 2021¹³ prescribe that access must be available at a party's physical address and online.

49.4.3 These provisions do apply to independent candidates as section 1 of PAIA defines *“political party”* to include *“a natural person who is an independent candidate”*.

49.5 Nonetheless, independent candidates should also be bound by the regulation of private donations (including restrictions) contained in the Funding Act.

¹³ Promulgated in GNR 757 of 27 August 2021 (*Government Gazette* 45057).

49.6 The National Assembly will need to decide whether to include consequential amendments to the Funding Act in this regard. We will again prepare the necessary draft amendments in this regard as a matter of caution.

STEVEN BUDLENDER SC
SALOME MANGANYE
MITCHELL DE BEER
MFUNDO SALUKAZANA

Chambers, Sandton, Pretoria & Cape Town
25 November 2021



REPUBLIC OF SOUTH AFRICA

ELECTORAL AMENDMENT BILL

(MINISTER OF HOME AFFAIRS)

[B_____—2022]

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Electoral Act, 1998, to make provision for the election of independent candidates to the National Assembly and provincial legislatures; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Amendment of section 1 of Act 73 of 1998, as amended by section 1 of Act 18 of 2013 and section 7 Act 4 of 2021

1. Section 1 of the Electoral Act 73 of 1998 (hereinafter referred to as the “principal Act”) is amended by—

- (a) the insertion after the definition of “agent” of the following definition:

“**candidate**’ means a person contesting an election, whether he or she is nominated on a list of a political party or not, as the context requires;”

- (b) the insertion after the definition of “identity document” of the following definition:

“**independent candidate**’ means a person contesting an election who is not nominated on a list of a political party;”

- (c) the insertion after the definition of “list of candidates” of the following definition:

“**list of independent candidates**’ means the list of independent candidates referred to in sections 32C and 32E;”

- (d) the insertion after the definition of “presiding officer” of the following definition:
“**province** means a province referred to in section 103 of the Constitution;”
- (e) the insertion after the definition of “registered party” of the following definition:
“**region**’ means the territorial area of a province;”

Substitution of paragraph (c) of section 27(2) of Act 73 of 1998, as repealed by section 10 (b) of Act 4 of 2021

2. The following paragraph is substituted for paragraph (c) of section 27(2) of the principal Act:

“(c) declaration, signed by each candidate appearing on the party’s regional list of candidates or provincial list of candidates referred to in Schedule 1A, confirming that he or she is registered to vote within the region or province in which the election will take place;”

Amendment of section 28 of Act 73 of 1998, substituted by section 11 of Act 1 of 2019 and section 11(a) and (b) of Act 4 of 2021

3. Section 28 of the principal Act is amended by—

- (a) the substitution for subsection (1) of the following subsection:
“(1) If a registered party that has submitted a list of candidates has not fully complied with section 27 (2) (a), (b), (c), (d) or section 27 (4), the chief electoral officer must notify that party of its non-compliance.”
- (b) the substitution for subsection (2) of the following subsection:
“(2) The notification must be given in the prescribed manner by not later than the relevant date stated in the election timetable, and must indicate that the party has an opportunity to comply with section 27 (2) (a), (b), (c), (d) or section 27 (4), by not later than the relevant date stated in the election timetable.”

Amendment of Part 4 of Chapter IV and section 32 of Act 73 of 1998, as repealed by section 8 of Act 34 of 2003

4. Part 4 of Chapter IV and section 32 of the principal Act are amended by the substitution and insertion of the following provisions:

“Part 4
Independent candidates (sections 32 to 32E)

32. Nomination of independent candidates

(1) A person may be nominated to contest an election as an independent candidate in a region for the National Assembly or for a provincial legislature by a person who is—

- (a) ordinarily resident in the region or province concerned; and
- (b) registered as a voter on the segment of the voters' roll for the region or province concerned.

(2) Provided the other provisions of this Act are complied with, a person nominated in terms of subsection (1) stands as an independent candidate in that election.”

32A. Requirements and qualifications for independent candidates to contest elections

(1) A person may contest an election as an independent candidate only if that person is nominated on a prescribed form and that form is submitted to the Commission by not later than a date stated in the timetable for the election and complies with the requirements of subsection (3).

(2) The prescribed nomination form must be submitted in the prescribed manner by not later than the relevant date stated in the election timetable.

(3) The following must be attached to a nomination when it is submitted—

- (a) a prescribed form, with at least the prescribed minimum number of signatures of voters whose names appear on the segment of the voters' roll for the region or province in which the candidate is standing for election;
- (b) a deposit equal to a prescribed amount, if any, payable in the prescribed form and manner;
- (c) a prescribed undertaking, signed by the candidate, to be bound by the Code;
- (d) a prescribed declaration, signed by the candidate, that he or she is not disqualified from standing for election in terms of the Constitution or any applicable legislation;
- (e) a prescribed declaration, signed by the candidate, confirming that his or her residential address is situated within the region or province in which the election will take place that he or she intends contesting;
- (f) a prescribed declaration, signed by the candidate, confirming that he or she has not been a member of any political party for at least three months preceding the date of the nomination; and
- (g) a recent photograph of the candidate in such form as may be prescribed.

(4) The Commission may in the form and manner as may be prescribed request—

- (a) an acceptance of nomination signed by the candidate; and
- (b) a copy of the identity card or that page of the candidate's identity document on which the candidate's photo, name and identity number appear.

(5) The Commission must accept a nomination submitted to it and allow the nominated person to stand as a candidate in the election if the provisions of section 32 and this section have been complied with.

32B. Non-compliance

(1) If the nomination of an independent candidate does not fully comply with section 32A (3) (a), (c), (d), (e), (f), (g) or section 32A (4), the chief electoral officer must notify the nominated person of the non-compliance.

(2) The notification must be given in the prescribed manner by not later than the relevant date stated in the election timetable, and must indicate that the nominated person has an opportunity to comply with section 32A (3) (a), (c), (d), (e), (f), (g) or section 32A (4), by not later than the relevant date stated in the election timetable.

(3) If a person has been nominated both as an independent candidate and by one or more parties for an election-

- (a) the chief electoral officer must, where possible, in writing, notify the person and such party or parties who have nominated such person about such state of affairs by no later than the relevant date and time stated in the election timetable; and
- (b) the party or parties to whom notice has been given in terms of paragraph (a) may, by not later than the relevant date and time stated in the election timetable, substitute such a candidate.

32C. Inspection of copies of lists of independent candidates and accompanying documents

(1) By not later than the relevant date stated in the election timetable, the chief electoral officer must-

- (a) compile a draft list of independent candidates; and
- (b) give notice that copies of the draft list of independent candidates and accompanying documents submitted in terms of section 32A, as amended and supplemented in terms of section 32B, will be available for inspection.

(2) The notice referred to in subsection (1)(b) must be-

- (a) published in the *Government Gazette*; and
- (b) publicised in the media considered appropriate by the chief electoral officer so as to ensure wide publicity of the lists.

(3) The notice referred to in subsection (1)(b) must state, and the chief electoral officer must ensure, that for the relevant period stated in the election timetable-

- (a) copies of the lists for-
 - (i) an election of the National Assembly, will be available for inspection at the Commission's head office, a place in each province designated in the notice and the office of each municipality in the country; and
 - (ii) an election of a provincial legislature, will be available for inspection at the Commission's head office, a place in the province designated in the notice and the office of each municipality in that province; and
- (b) copies of the documents accompanying the lists are available for inspection at the Commission's head office.

(4) Any person may inspect a copy of the draft list of independent candidates and accompanying documents referred to in subsection (1).

(5) The chief electoral officer must provide a certified copy of, or extract from, the draft list of independent candidates or document referred to in subsection (1), to any person who has paid the prescribed fee.

32D. Objections to independent candidates

(1) Any person, including the chief electoral officer, may object to the nomination of an independent candidate on the following grounds:

- (a) the nominated candidate is not qualified to stand in the election;
- (b) the nominated candidate has failed to submit the prescribed acceptance of nomination signed by the candidate as contemplated in section 32A (4); or
- (c) there is no prescribed undertaking, signed by the nominated candidate, that the candidate is bound by the Code.

(2) The objection must be made to the Commission in the prescribed manner by not later than the relevant date stated in the election timetable, and must be served on the nominated candidate.

(3) The Commission must decide the objection, and must notify the objector and the nominated candidate of the decision in the prescribed manner by not later than the relevant date stated in the election timetable.

(4) The objector, or the nominated candidate, may appeal against the decision of the Commission to the Electoral Court in the prescribed manner and by not later than the relevant date stated in the election timetable.

(5) The Electoral Court must consider and decide the appeal and notify the parties to the appeal and the chief electoral officer of the decision in the prescribed manner and by not later than the relevant date stated in the election timetable.

(6) If the Commission or the Electoral Court decides that a candidate's nomination does not comply with section 32A, the Commission or the Electoral Court may allow the nominated candidate an opportunity to comply with that section.

32E. List of independent candidates entitled to contest election

(1) By not later than the relevant date stated in the election timetable, the chief electoral officer must—

- (a) give effect to a decision of the Commission in terms of section 32D (3) and to a decision of the Electoral Court in terms of section 32D (5); and
- (b) compile a final list of independent candidates entitled to contest the election concerned.

(2) The chief electoral officer must provide a certified copy of, or extract from, a list mentioned in subsection (1) (b) to any person who has paid the prescribed fee.

(3) By not later than the relevant date stated in the election timetable, the chief electoral officer must issue to each independent candidate on the list of independent candidates for an election, a certificate stating that the person is an independent candidate in that election.

Amendment of section 57A of Act 73 of 1998, as inserted by section 15 of Act 34 of 2003

5. Section 57A of the principal Act is amended by—

- (a) the substitution for paragraph (a) of the following paragraph:

“(a) lists of candidates and lists of independent candidates;”

- (b) the subsection for paragraph (c) of the following paragraph:

“(c) the designation of candidates from candidate lists and independent candidate lists as representatives [in] for those seats;”

Amendment of section 94 of Act 73 of 1998

6. Section 94 of the principal Act is amended by the substitution for the section of the following section:

“No person, [or] registered party or independent candidate bound by the Code may contravene or fail to comply with a provision of that Code.”

Amendment of section 99 of Act 73 of 1998

7. Section 99 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) The Electoral Code of Conduct must be subscribed to—

- (a) by every registered party before that party is allowed to contest an election; **[and]**
- (b) by every candidate before that candidate may be placed on a list of candidates in terms of section 31[.]; and
- (c) by every independent candidate before that independent candidate may be placed on a list of independent candidates in terms of section 32E.”

Amendment of section 106 of Act 73 of 1998

8. Section 106 of the principal Act is amended by—

- (a) the insertion of the following subsection (1A) after subsection (1):

“(1A) Subject to section 96 (2) (c), the Commission must refund to an independent candidate any deposit paid by such candidate in terms of section 32A (3) (b) if the candidate is allocated a seat in the legislature whose election the independent candidate contested.”

- (b) the substitution for subsection (2) of the following subsection:

“(2) A deposit that is not refundable in terms of subsection (1) or (1A) is forfeited to the State.”

Amendment of section 110 of Act 73 of 1998

9. Section 110 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) Any mistake in the certified segment of the voters’ roll referred to in section 24, **[or]** the final list of candidates referred to in section 31 **or the final list of independent candidates referred to in section 32E** does not invalidate that voters’ roll, **[or]** that list of candidates, **or that list of independent candidates.**”

Amendment of Schedule 1 to Act 73 of 1998, as amended by section 24 of Act 34 of 2003 and section 17 of Act 1 of 2019

10. Schedule 1 to the principal Act is amended by—

(a) the substitution for item 4 of the following item:

“4 Cut-off date for submission of list of candidates and nominations of independent candidates:

(a) Registered parties that intend to contest this election must nominate and submit a list of their candidates for the election to the chief electoral officer in the prescribed manner by [day/month/year].

(b) Nominators of independent candidates that intend to contest this election must submit their nominations to the chief electoral officer in the prescribed manner by [day/month/year].”

(b) the substitution for sub-item 5 (1) of the following sub-item:

“(1) The chief electoral officer must notify a registered party that has submitted a list of candidates in terms of section 27 but has not fully complied with **[that]** section 27 (2) (a), (b), (c), (d) or section 27 (4), of that non-compliance by.....[day/month/year]”

(c) the insertion of sub-item 5 (1A) after sub-item 5 (1):

“(1A) The chief electoral officer must notify the person nominated to be an independent candidate who has not fully complied with section 32A (3) (a), (c), (d), (e), (f), (g) or section 32A (4), of that non-compliance by..... [day/month/year].”

(d) the substitution for sub-item 5 (2) of the following sub-item:

“(2) If the party or person notified **[party]** in terms of sub-item (1) or (1A) takes the opportunity to comply with section 27(2) (a), (b), (c), (d), section 27 (4), section 32A (3) (a), (c), (d), (e), (f), (g) or section 32A (4), that party or person must do so by..... [day/month/year].”

(e) the insertion of sub-item 5A (1A) after sub-item 5A (1):

“(1A) The Commission must notify a person who has been nominated both as an independent candidate and by one or more parties for an election, and all the

parties on whose party lists such a candidate appears by
[day/month/year].”

- (f) the substitution for sub-item 5A (2) of the following sub-item:

“(2) If the notified party decides to act in terms of section 28 (3) or 32B (3), that party must do so by..... (date).”

- (g) the substitution for item 6 with the following item:

“6 Inspection of lists of candidates and draft list of independent candidates and accompanying documents

The chief electoral officer must give notice by [day/month/year], that from the date of the notice until [day/month/year], copies of the following documents will be available for inspection:

- (a) The lists of candidates and accompanying documents submitted by registered parties in terms of section 27, as amended and supplemented in terms of section 28[.]; and
- (b) The draft list of independent candidates and accompanying documents submitted in terms of section 32A, as amended and supplemented in terms of section 32B.”

- (h) the substitution for item 8 of the following item:

“8 Decision of objections

The Commission must decide an objection under section 30 or 32D, and must notify the objector, **[and]** the registered party that nominated the candidate and/or the nominated independent candidate of the decision in the prescribed manner by [day/month/year].”

- (i) the substitution for item 9 of the following item:

“9 Cut-off date for appeals against decisions

(1) The objector or the registered party who nominated the candidate may appeal against a decision of the Commission in terms of section 30 (~~[3]~~4) to the Electoral Court in the prescribed manner by [day/month/year].

(2) The objector or the nominated independent candidate may appeal against a decision of the Commission in terms of section 32D (4) in the prescribed manner by [day/month/year].”

- (j) the substitution for item 10 of the following item:

“10 Deciding appeals

The Electoral Court must consider and decide an appeal brought under section 30 (4) or 32D (4) and notify the parties to the appeal, and the chief electoral officer, of the decision in the prescribed manner by [day/month/year].”

- (k) the substitution for item 11 of the following item:

“11 List of parties and candidates entitled to contest election and final list of candidates

By [day/month/year], the chief electoral officer–

- (a) must give effect to a decision of the Commission in terms of section 30 (3) or section 32D (3) or a decision of the Electoral Court in terms of section 30 (5) or 32D (5); and
- (b) must compile a list of the registered parties entitled to contest the election, **[and]** the final list of candidates for each of those parties and the list of independent candidates contesting this election.”

- (l) the substitution for item 12 of the following item:

“12 Issue of certificate to candidates

By [day/month/year], the chief electoral officer must issue in the prescribed manner to each candidate on a final list of candidates and each independent candidate on the final list of independent candidates a certificate stating that the person is a candidate in this election in terms of section 31 (3) and section 32E (3).”

Amendment of Schedule 1A to Act 73 of 1998, as inserted by section 25 of Act 34 of 2003 and amended by section 8 of Act 55 of 2008

- 11. Schedule 1A to the principal Act is substituted for the following schedule:

**“Schedule 1A
SYSTEM OF REPRESENTATION IN NATIONAL ASSEMBLY AND
PROVINCIAL LEGISLATURES
(Section 57A)**

National Assembly

1 The seats in the National Assembly are allocated as follows:

- (a) half the seats are filled by independent candidates and candidates from lists of candidates of political parties contesting the nine regions – regional seats; and
- (b) half the seats are filled by candidates from lists of candidates of political parties – compensatory seats.

2 The Commission must prepare a list of independent candidates contesting an election of the National Assembly in each region in accordance with the Act.

3 (1) Registered parties contesting an election of the National Assembly must nominate candidates on a list of candidates prepared in accordance with the Act.

(2) A party’s list of candidates must consist of–

- (a) a regional list for each region; and
- (b) a national list,

with such number of names on each list as the party may determine subject to subsection (3).

(3) The lists of candidates submitted by a party must together not contain more names than the number of seats in the National Assembly, and each such list must denote the fixed order of preference, of the names as the party may determine.

(4) The same name:

- (a) may appear on a list for one region and the national list of a party; and
- (b) may not appear on more than regional list.

Regional seats

4 The Commission must determine a fixed number of seats reserved for each region for every election of the National Assembly, taking into account available scientifically based data in respect of voters and representations by interested parties.

5 The regional seats are allocated for each region in three separate rounds.

6 In the first round:

- (a) A quota of votes per seat is determined in respect of each region by dividing the total number of votes cast in a region by the total number of seats allocated to that region and the result, disregarding fractions is the first quota of votes per seat.
- (b) Each independent candidate who receives enough votes to meet the first quota is awarded a seat.

7 In the second round:

- (a) A second quota of votes is determined in each region by—
 - (i) disregarding the independent candidates who were allocated seats in the first round;
 - (ii) disregarding the votes cast for independent candidates who were allocated seats in the first round;
 - (iii) disregarding the number of seats allocated to independent candidates in the first round;
 - (iv) dividing the remaining number of votes cast in a region by the remaining number of seats allocated to that region, and the result, disregarding fractions, is the second quota of votes per seat.
- (b) Each remaining independent candidate who receives enough votes to meet the second quota is awarded a seat.

8 In the third round:

- (a) A third quota of votes is determined in each region by—
 - (i) disregarding all independent candidates;
 - (ii) disregarding all votes cast for independent candidates;
 - (iii) disregarding the number of seats allocated to independent candidates in first and second rounds;

- (iv) dividing the remaining number of votes cast in a region, by the remaining number of seats allocated to that region, plus one,

and the result plus one, disregarding fractions, is the third quota of votes per seat.

- (b) The number of seats to be awarded for the purposes of paragraph (d) in respect of such region to a political party, subject to paragraph (c), is determined by dividing the total number of votes cast in favour of such party in a region by the third quota of votes per seat indicated by paragraph (a) for that region.
- (c) Where the result of the calculation referred to in paragraph (b) yields a surplus of seats not absorbed by the number awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties in respect of the relevant region, and any seat or seats in respect of that region not awarded in terms of paragraph (b), is awarded to the party or parties concerned in sequence of the highest surplus.
- (d) The aggregate of a party's awards in terms of paragraphs (b) and (c) in respect of a particular region is that party's allocation of regional seats for that region.

9 Regional seats are allocated to a party according to the party's regional lists for each region.

10 (1) A party that has submitted a regional list containing fewer names than the number of its allocation of seats which would have been filled from such list in terms of item 8, forfeits a number of seats equal to the deficit in that region.

(2) In the event of any forfeiture of seats in terms of subitem (1) affecting the allocation of seats in respect of any particular region in terms of item 8, such allocation is recalculated as follows:

- (a) The party forfeiting seats is disregarded in such recalculation, and the allocation of seats in terms of item 8 for the region in question, minus the number of seats forfeited by it in respect of its list for such region, is its final allocation the seats in such region.
- (b) An amended quota of votes per seat is determined in respect of such region by—
 - (i) disregarding all independent candidates;
 - (ii) disregarding all votes for independent candidates;
 - (iii) disregarding the number of seats allocated to independent candidates in first and second rounds;
 - (iv) dividing the total number of votes cast in the region; minus the number of votes cast in such region in favour of the party referred to in paragraph (a) by the number of seats, plus one, reserved for such region, minus the number of seats allocated to the said party in terms of paragraph (a),

and the result plus one, disregarding fractions, is the amended quota of votes per seat in respect of such region for purposes of the said recalculation.

- (c) The number of seats awarded for the purposes of paragraph (e) in respect of the region to a party participating in the recalculation, subject to paragraph (d), is determined by dividing the total number of votes cast in favour of such party in such region by the amended quota of votes per seat indicated by paragraph (b) for such region.
- (d) Where the result of the recalculation in terms of paragraph (c) yields a surplus not absorbed by the number of seats awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties participating in the recalculation in respect of the said region, and any seat or seats in respect of such region not awarded in terms of paragraph (c), is awarded to the party or parties concerned in sequence of the highest surplus.
- (e) The aggregate of a party's awards in terms of paragraphs (c) and (d) in respect of such region, subject to subitem (3), is that party's final allocation of regional seats for that region.

(3) In the event of a party being allocated an additional number of seats in terms of this item, and if its list in question does not contain the names of a sufficient number of candidates as set out in subitem (1), the procedure provided for in this item is repeated with the changes required by the context until all seats are allocated.

Compensatory seats

11 A quota of votes per compensatory seat is determined by—

- (a) disregarding all independent candidates who contested the election in the nine regions;
- (b) disregarding all votes for independent candidates cast in the nine regions;
- (c) dividing the total number of remaining votes cast for political parties in all nine regions, by the number of compensatory seats in the National Assembly, plus one,

and the result plus one, disregarding fractions, is the quota of votes per compensatory seat.

12 The number of seats to be awarded to a party for the purposes of item 14 subject to item 11, is determined by dividing the total number of votes cast nationally in all nine regions in favour of the party by the quota of votes per seat determined in terms of item 11.

13 Where the result of the calculation in terms of item 12 yields a surplus not absorbed by the number of seats awarded to a party concerned—

- (a) such surplus competes with other similar surpluses accruing to any other party or parties, and any seat or seats not awarded in terms of item 12, is awarded to the party or parties concerned in sequence of the highest surplus, up to a maximum of five seats so awarded;

- (b) provided that seats still remaining unawarded, are awarded in sequence to those parties having the highest average number of votes per seat already awarded in terms of item 12 and this item.

14 The aggregate of a party's awards in terms of items 12 and 13 is that party's allocation of compensatory seats.

15 Compensatory seats are allocated according to a party's national list.

16 (1) A party that has submitted a national list containing fewer names than the number of its allocation of seats which would have been filled from such list in terms of item 14, forfeits a number of seats equal to the deficit.

(2) In the event of any forfeiture of seats in terms of subitem (1) affecting the allocation of seats in terms of item 14, such allocation is recalculated as follows:

- (a) The party forfeiting seats is disregarded in such recalculation, and the allocation of seats in terms of item 14, minus the number of seats forfeited by it in respect of its national list, is its final allocation of compensatory seats.
- (b) An amended quota of votes per compensatory seat is determined by—
 - (i) disregarding all independent candidates who contested the election in the nine regions;
 - (ii) disregarding all votes for independent candidates cast in the nine regions;
 - (iii) dividing the total number of votes cast for political parties in all nine regions, minus the number of votes cast in favour of the party referred to in paragraph (a) by the number of compensatory seats, plus one, minus the number of compensatory seats allocated to the said party in terms of paragraph (a),

and the result plus one, disregarding fractions, is the amended quota of votes per compensatory seat for purposes of the said recalculation.

- (c) The number of compensatory seats to be awarded for the purposes of paragraph (e) to a party participating in the recalculation, must, subject to paragraph (d), be determined by dividing the total number of votes cast in favour of such party in all nine regions by the amended quota of votes per seat indicated by paragraph (b).
- (d) Where the result of the recalculation in terms of paragraph (c) yields a surplus not absorbed by the number of seats awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties participating in the recalculation, and any compensatory seat or seats not awarded in terms of paragraph (c), is or are awarded to the party or parties concerned in sequence of the highest surplus.
- (e) The aggregate of a party's awards in terms of paragraphs (c) and (d), subject to subitem (3), is that party's final allocation of the compensatory seats.

(3) In the event of a party being allocated an additional number of seats in terms of this item, and if its national list does not contain the names of a sufficient number of candidates as set out in subitem (1), the procedure provided for in this item is repeated with the changes required by the context until all compensatory seats are allocated.

Provincial legislatures

17 (1) Registered parties contesting an election of a provincial legislature must nominate candidates on a provincial list of candidates prepared in accordance with the Act, with such number of names on each list as the party may determine subject to subsection (3).

(2) The list of candidates submitted by a party must not contain more names than the number of seats in the provincial legislature concerned, and must denote the fixed order of preference, of the names as the party may determine.

18 The Commission must prepare a list of independent candidates contesting an election of a provincial legislature in accordance with the Act.

19 The seats in a provincial legislature are allocated in three separate rounds.

20 In the first round:

- (a) A quota of votes per seat is determined by dividing the total number of votes by the total number of seats and the result, disregarding fractions is the first quota of votes per seat.
- (b) Each independent candidate who receives enough votes to meet the first quota is awarded a seat.

21 In the second round:

- (a) A second quota of votes is determined by—
 - (i) disregarding all independent candidates who were allocated seats in the first round;
 - (ii) disregarding all votes for independent candidates who were allocated seats in the first round;
 - (iii) disregarding the number of seats allocated to independent candidates in the first round;
 - (iv) dividing the remaining number of votes cast by the remaining number of seats,
 and the result, disregarding fractions, is the second quota of votes per seat.
- (b) Each remaining independent candidate who receives enough votes to meet the second quota is awarded a seat.

22 In the third round:

- (a) A third quota of votes is determined by—
 - (i) disregarding all independent candidates;

- (ii) disregarding all votes for independent candidates;
- (iii) disregarding the number of seats allocated to independent candidates in first and second rounds;
- (iv) dividing the remaining number of votes cast, by the remaining number of seats, plus one,

and the result plus one, disregarding fractions, is the third quota of votes per seat.

- (b) The number of seats to be awarded for the purposes of paragraph (d) to a political party, must, subject to paragraph (c), be determined by dividing the total number of votes cast in favour of such party by the third quota of votes per seat indicated by paragraph (a).
- (c) Where the result of the calculation referred to in paragraph (b) yields a surplus of seats not absorbed by the number awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties, and any seat or seats not awarded in terms of paragraph (b), is or are awarded to the party or parties concerned in sequence of the highest surplus.
- (d) The aggregate of a party's awards in terms of paragraphs (b) and (c) is that party's allocation of seats for provincial legislature.

23 Seats in provincial legislatures are allocated to a party according to the party's list of candidates for the province.

24 (1) If a party has submitted a list of candidates for the province containing fewer names than the number of its allocation of seats which would have been filled from such list in terms of item 22, it forfeits a number of seats equal to the deficit.

(2) In the event of any forfeiture of seats in terms of subitem (1) affecting the allocation of seats in terms of item 22, such allocation is recalculated as follows:

- (a) The party forfeiting is to be disregarded in such recalculation, and the allocation of seats in terms of item 22, minus the number of seats forfeited by it in respect of its list for such province, becomes its allocation of seats for the provincial legislature.
- (b) An amended quota of votes per seat is determined by—
 - (i) disregarding all independent candidates;
 - (ii) disregarding all votes for independent candidates;
 - (iii) disregarding the number of seats allocated to independent candidates in first and second rounds;
 - (iv) dividing the total number of votes cast, minus the number of votes cast in favour of the party referred to in paragraph (a) by the number of seats, plus one, minus the number of seats allocated to the said party in terms of paragraph (a),

and the result plus one, disregarding fractions, is the amended quota of votes per seat for purposes of the said recalculation.

- (c) The number of seats to be awarded for the purposes of paragraph (e) to a party participating in the recalculation, must, subject to paragraph

(d), be determined by dividing the total number of votes cast in favour of such party by the amended quota of votes per seat indicated by paragraph (b).

- (d) Where the result of the recalculation in terms of paragraph (c) yields a surplus not absorbed by the number of seats awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties participating in the recalculation, and any seat or seats not awarded in terms of paragraph (c), is or are awarded to the party or parties concerned in sequence of the highest surplus.
- (e) The aggregate of a party's awards in terms of paragraphs (c) and (d), subject to subitem (3), is that party's final allocation of the seats for the provincial legislature.

(3) In the event of a party being allocated an additional number of seats in terms of this item, and if its list of candidates for the province in question does not contain the names of a sufficient number of candidates as set out in subitem (1), the procedure provided for in this item is repeated with the changes required by the context until all seats are allocated.

Ballot papers

25 (1) The Commission must produce separate ballot papers for the election of members of the National Assembly and of members of the provincial legislatures.

(2) The ballot paper to be used in each region for the election of members of the National Assembly shall include only the independent candidates standing in that region for election to the National Assembly, together with the relevant political parties.

Designation of representatives of political parties

26 (1) After the counting of votes has been concluded, the number of representatives of each party has been determined and the election result has been declared in terms of section 190 (1) (c) of the Constitution, the Commission must, within two days after such declaration, designate from each list of candidates, the representatives of each party in the legislature.

(2) Following the designation in terms of subitem (1), if a candidate's name appears on more than one list for the National Assembly or on lists for both the National Assembly and a provincial legislature (if an election of the Assembly and a provincial legislature is held at the same time), and such candidate is due for designation as a representative in more than one case, the party which submitted such lists must, within two days after the said declaration, indicate to the Commission from which list such candidate will be designated or in which legislature the candidate will serve, as the case may be, in which event the candidate's name must be deleted from the other lists.

(3) If a party fails to indicate to the Commission from which list a candidate will be designated or in which legislature a candidate will serve, such candidate's name must be deleted from all the lists.

(4) The Commission must forthwith publish the list of names of representatives in the legislature or legislatures.

Supplementation of lists of candidates of political parties

27 A political party may not supplement a list of candidates for any legislature prior to the designation of representatives in terms of item 26.

28 After the designation of representatives in terms of item 26 has been concluded, political parties may supplement their lists of candidates by the addition of an equal number of names at the end of the applicable list, if-

- (a) a representative is elected as the President or to any other executive office as a result of which he or she resigns as a representative of a legislature;
- (b) a representative is appointed as a permanent delegate to the National Council of Provinces;
- (c) a name is deleted from a list in terms of item 26 (2) or (3); or
- (d) a vacancy has occurred and the appropriate list of candidates of the party concerned is depleted.

29 A political party may supplement a list of candidates referred to in item 26 (1) on one occasion only at any time during the first 12 months following the date on which the designation of representatives in terms of item 26 has been concluded, in order to fill casual vacancies: Provided that any such supplementation must be made at the end of the list.

30 The number of names on lists of candidates as supplemented in terms of item 28 may not exceed the difference between the number of seats in the National Assembly or a provincial legislature, as the case may be, and the number of representatives of a party in any such legislature.

Review of lists of candidates by party

31 A party may review its undepleted lists as supplemented in terms of items 28, 29 and 30, within seven days after the expiry of the period referred to in item 29, and annually thereafter, until the date on which a party has to submit lists of candidates for an ensuing election, in the following manner:

- (a) all vacancies may be supplemented;
- (b) no more than 25 per cent of candidates may be replaced; and
- (c) the fixed order of lists may be changed.

Publication of supplemented and reviewed lists of candidates

32 The Secretary to Parliament and the Secretaries of the provincial legislatures must publish lists of candidates supplemented in terms of items 28 and 29 or reviewed in terms of item 31 within 10 days after the receipt of such lists from the parties concerned.

Vacancies

33 (1) In the event of a vacancy in a legislature from a seat allocated to a political party, the party which the vacating member represented must fill the vacancy by nominating a person—

- (a) whose name appears on the list of candidates from which that party's members were originally nominated; and
- (b) who is the next qualified and available person on the list.

(2) A nomination to fill a vacancy must be submitted to the Speaker of the legislature in writing.

(3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of section 47 (3) (c) or 106 (3) (c) of the Constitution, the seats in question must be allocated to the remaining parties with the changes required by the context as if such seats were forfeited seats in terms of item 16 or 24, as the case may be.

34 (1) In the event of a vacancy in a legislature in a seat allocated to an independent candidate, the seat in question will not be filled until the next elections.

Definitions

35 In this Schedule—

“**Constitution**” means the Constitution of the Republic of South Africa, 1996

‘**national list**’ means a list of candidates prepared by a party for an election of the National Assembly to reflect that party's order of preference of candidates in respect of the allocation of compensatory seats;

‘**provincial list**’ means a list of candidates prepared by a party for an election of a provincial legislature;

‘**regional list**’ means a list of candidates in respect of a region prepared by a party for an election of the National Assembly to reflect that party's order of preference of candidates in respect of the allocation of regional seats in respect of each region;

‘**votes**’ means—

- (a) where it occurs in items 6, 7, 8, 10, 11, 12, 13 and 16, votes cast in an election for the National Assembly;
- (b) where it occurs in items 20, 21, 22 and 24, votes cast in the election for the provincial legislature of a province concerned; and
- (c) where it occurs in item 26, votes cast in the election for the National Assembly and the provincial legislatures.”

Short title and commencement

12. This Act is called the Electoral Amendment Act, 2022, and comes into operation on a date determined by the President by proclamation in the *Gazette*.