

# ELECTORAL AMENDMENT BILL



**PORTFOLIO COMMITTEE ON HOME  
AFFAIRS  
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home affairs  
Department:  
Home Affairs  
REPUBLIC OF SOUTH AFRICA



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# OUTLINE OF THE PRESENTATION

- Purpose of the presentation
- Background
- Recommended Policy Options
- Cabinet Decision
- Overview of the Bill

# PURPOSE

The purpose of this presentation is to:

- Brief the Portfolio Committee on Home Affairs on the Electoral Amendment Bill.

## BACKGROUND

- In the *New Nation Movement NPC and Others v the President of South Africa* matter, 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; that is, from June 2020 to June 2022.
- Pursuant to the Constitutional Court judgement and subsequent consultations between the National Assembly (NA) and the Executive, the Honourable Minister of Home Affairs, Dr Aaron Motsoaledi, established the Ministerial Advisory Committee (MAC) in February 2021 to help develop policy options on the electoral system that address the defects of the Electoral Act 1998.
- The members were Mr Valli Moosa (Chairperson), Adv Pansy Tlakula, Dr Sithembile Mbete, Mr Norman Du Plessis, Dr Michael Sutcliffe, Adv Vincent Maleka SC, Prof Daryl Glaser and Dr Nomsa Masuku.

## BACKGROUND

- 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.
- The MAC also held three public consultations that took place on the 30 March 2021, 14 April 2021 and 6 May 2021 respectively.
- The consultations with key stakeholders involved trade unions, political parties, youth organisations, academics, NGO's, Research bodies on Electoral Reforms, Foundations, Churches and community organisations.
- The MAC provided the Minister of Home Affairs with a report on 9 June 2021.

# RECOMMENDED POLICY OPTIONS

- The MAC report notes that there **were diverse views from stakeholders** and political parties on the interpretation of the judgement and on the preferred electoral system as a result there was no emerging consensus.
- 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 of two options.
  
- **Option 1: 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, including not interfering with the constitutionally required general proportionality.
  
- **Option 2: Mixed-member option**
  - 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.

## CABINET DECISION

- The Department of Home Affairs (DHA) recommended option 1 (**minimalist option**) to Cabinet as the preferred option as it requires relatively minimal changes to the electoral system and will require less time to effect changes.
- On 24 November 2021, Cabinet approved the report of the MAC and the recommended minimalist option.

## THE MINIMALIST OPTION FOR ALLOWING INDEPENDENT CANDIDATES

- The MAC report describes the minimalist option as follows:
  - “This option entails modifying the 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.
  - The minimalist option intends to retain the current composition of seats in the National Assembly and provincial legislatures but making provision for independent candidates to contest the elections for those bodies.

## THE MINIMALIST OPTION FOR ALLOWING INDEPENDENT CANDIDATES

- 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.
- The 400 seats in the **National Assembly** will continue to be divided in two:
  - 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”.)
  - The other 200 seats will be “**200 compensatory seats**”. (These are the seats using what are sometimes called the “national to national lists”.)

## REGIONAL SEATS

- In respect of the **200 regional seats**:
  - 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.)
  - These seats will be contested by parties (through closed lists) and independent candidates.
  - Each independent candidate will only be entitled to contest seats in one province / region.
  - 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.
  - 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

## COMPENSATORY SEATS

- In respect of the **200 compensatory seats**:
  - 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.
  - Parties will be allocated seats in accordance with their proportional share of the overall vote.
  - To be clear, independents will not get to contest the 200 compensatory seats.
  - In provinces the 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.

## PROVINCIAL LEGISLATURES

- In respect of the *provincial legislatures*:
  - 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.
  - 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.
  - The legal counsel appointed has advised that in virtually any system of this sort, there is always the occurrence of what might be termed “wasted” votes.

## THE ALLOCATION OF SEATS

- When ballots are allocated for the 200 regional seats in National Assembly and seats provincial legislatures are counted, seats will be allocated **in three rounds**. This three-round approach strikes an appropriate balance between the interests of independent candidates and political parties.
  - 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.
  - In the first round, any independent candidate who satisfies the quota for a seat will be allocated a seat.
  - 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.
  - In the **third round**, political parties will be allocated their seats. All independent candidates (whether successful or unsuccessful) and all votes cast 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.

## THE EFFECT IN A HYPOTHETICAL ELECTION (GAUTENG PROVINCE)

- To demonstrate how the Bill would include independent candidates 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. The legislature has **80** seats and **4 400 000** votes were cast. Four political parties and five independent candidates contested the election. The quota will be **55 000** votes per seat (4 400 000 votes/80 seats). 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

## THE MINIMALIST OPTION FOR ALLOWING INDEPENDENT CANDIDATES

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

<b>PARTY/ CANDIDATE</b>	<b>VOTES</b>	<b>SEATS (out of 80)</b>
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

- 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.
- 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:
  - 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);
  - A residential qualification – so that an independent candidate can only contest one region or province;
  - A prescribed monetary deposit.

# **OVERVIEW OF ELECTORAL AMENDMENT BILL, 2021**

# ELECTORAL AMENDMENT BILL, 2021

## PURPOSE OF THE BILL

The Electoral Amendment Bill, 2021 (the “Bill”) amends the Act by—

- (a) inserting certain definitions consequential to the expansion of this Act to include independent candidates as contesters to elections in the National Assembly and provincial legislatures;
- (b) including a provision that registered parties must submit a declaration confirming that all its candidates are registered to vote in the region or province where the election will take place;

# ELECTORAL AMENDMENT BILL, 2021

## PURPOSE OF THE BILL (*Cont.*)

- (c) providing for the nomination of independent candidates to contest elections in the National Assembly and provincial legislatures;
- (d) providing the requirements and qualifications which must be met by persons who wish to be registered as independent candidates;
- (e) providing the procedure that must be followed in the event that a non-compliant nomination of an independent candidate is determined;

# ELECTORAL AMENDMENT BILL, 2021

## -PURPOSE OF THE BILL (*Cont.*)-

- (f) providing for the inspection of copies of lists of independent candidates and accompanying documents;
- (g) providing for objections to independent candidates;
- (h) providing for the inclusion of a list of independent candidates entitled to contest elections;
- (i) providing that independent candidates are bound by the Electoral Code of Conduct;

# ELECTORAL AMENDMENT BILL, 2021

## PURPOSE OF THE BILL (*Cont.*)

- (j) providing for the return of a deposit to independent candidates in certain circumstances;
- (k) amending Schedule 1 and substituting Schedule 1A to make provision for independent candidates; and
- (l) providing for matters connected therewith.

# ELECTORAL AMENDMENT BILL, 2021

## CLAUSE BY CLAUSE

- **Clause 1** of the Bill amends section 1 of the Act to include definitions of “candidate”, “Constitution”, “independent candidate”, “list of candidates” and “province”.
- **Clause 2** of the Bill amends section 27 of the Act which deals with the submission of lists of candidates, by providing that the list or lists must be accompanied by a 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.

# ELECTORAL AMENDMENT BILL, 2021

## CLAUSE BY CLAUSE

- **Clause 3** of the Bill amends section 28 of the Act, which provides for non-compliance concerning submission of lists of candidates, to provide for technical amendments by including reference to the newly inserted paragraph 27(2)(cA) in section 28 of the Act.

# ELECTORAL AMENDMENT BILL, 2021

## CLAUSE BY CLAUSE

- **Clause 4** of the Bill, inserts Part 3A in Chapter 3 of the Act, to provide for the nominations of independent candidates, the requirements and qualifications for independent candidates to contest elections, the process to be followed in the event of non-compliance of a nomination of an independent candidate, the inspection of copies of lists of independent candidates and accompanying documents, objections to independent candidates, and the list of independent candidates entitled to contest elections.

# ELECTORAL AMENDMENT BILL, 2021

## CLAUSE BY CLAUSE

- **Clause 5** of the Bill amends section 57A of the Act, which provides for the system of representation in the National Assembly and the provincial legislatures, by expanding the application of Schedule 1A of the Act to include candidate list and lists of independent candidates.
- **Clause 6** of the Bill substitutes section 94 of the Act, which provides for the contravention of the Electoral Code of Conduct, to expand the application of the section to independent candidates.

# ELECTORAL AMENDMENT BILL, 2021

## CLAUSE BY CLAUSE

- **Clause 7** of the Bill amends section 99 of the Act which provides for the Electoral Code of Conduct and other codes, by providing that every independent candidate, before that independent candidate may be placed on a list of independent candidates in terms of section 31F, must subscribe to the Electoral Code of Conduct.
- **Clause 8** of the Bill amends section 106 of the Act, which provides for the return and forfeiture of a deposit, to provide for the Commission to refund to an independent candidate any deposit paid by such candidate in terms of section 31B(3)(b) if the candidate is allocated a seat in the legislature whose election the independent candidate contested.

# ELECTORAL AMENDMENT BILL, 2021

## CLAUSE BY CLAUSE

- **Clause 9** of the Bill amends section 110 of the Act, which provides for the effect of certain irregularities by including reference to independent candidates.
- **Clause 10** of the Bill amends Schedule 1 of the Act, which provides for the election timetable, to include independent candidates in the election timetable.

# ELECTORAL AMENDMENT BILL, 2021

## CLAUSE BY CLAUSE

- **Clause 11** of the Bill amends Schedule 1A of the Act, which provides for the system of representation in the national assembly and provincial legislatures, by substituting the Schedule with one that includes independent candidates.
- **Clause 12** of the Bill contains the short title and provides that the Electoral Amendment Act, 2021 shall come into operation on a date determined by the President by proclamation in the *Gazette*.

# IMPACT OF ELECTORAL AMENDMENT BILL, 2021 ON THE POLITICAL PARTY FUNDING ACT 6 OF 2018 AND ROADMAP

- Electoral Amendment Bill will require consequential amendments to be enacted to the Political Party Funding Act 6 of 2018 (Funding Act). The Act came into operation after President Cyril Ramaphosa signed it on 1 April 2021.
- 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. Independent candidates will have to be catered for by the Funding Act.
- In this regard, the Minister of Home Affairs directed that a research should be commissioned to look into the current and future impact of the Political Party Funding Act (PPFA) on political activities in the country.
- The research work should be completed by the end of February 2022, in view of the looming Constitutional Court deadline of June 2022.

THANK YOU