

**SUBMISSION BY THE ELECTORAL COMMISSION TO THE NATIONAL ASSEMBLY’S PORTFOLIO COMMITTEE ON HOME AFFAIRS**

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# INTRODUCTION

1. On 31 December 2021 the Minister of Home Affairs (Minister) published a notice of his intention to introduce the Electoral Amendment Bill, 2022[[1]](#footnote-2) in the National Assembly, together with an explanatory summary of the Bill.[[2]](#footnote-3) The Bill was subsequently introduced in the National Assembly on 10 January 2022 and referred to the Portfolio Committee on Home Affairs (Committee).
2. The Amendment Bill seeks to make provision for the election of independent candidates to the National Assembly and provincial legislatures and to provide for matters connected therewith.
3. The Electoral Commission (Commission) made a written submission at the request of the Committee in which it suggested certain ways in order to optimise the policy choices in the Bill.
4. The Committee has now requested the Commission to provide proposed wording for some of its legislative proposals. The purpose of this document is to propose such requested wording.
5. In this submission, the Commission makes its drafting proposals thematically.

# ACCOMODATION OF INDEPENDENT CANDIDATES IN POLITICAL LIAISON COMMITTEES

1. Presently the Electoral Act, 1998[[3]](#footnote-4) (principal Act) refers to *party liaison committees* at the national and provincial levels, of which only political parties may be members. With the envisaged change of the system to include independent candidates, there is a need to reformulate this nomenclature. It is proposed to drop the reference to *party* and to refer to these committees as *political liaison committees*.
2. This will require the amendments to sections 1, 20, 62 and 64 of the principal Act. We deal with each in turn below.

## Amendment of section 1

1. The Commission proposes the reformulation of paragraph *(c)* of clause 1 of the Bill as follows:

“*(c)* by the insertion after the definition of **‘identity document’** of the following definitions:

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

**‘Political liaison committee’** means a committee established in terms of the Regulations on Party Liaison Committees published in terms of the Electoral Commission Act;”.

1. The Commission also proposes insertion of a new paragraph *(dA)* after the existing paragraph *(d)* of clause 1 of the Bill as follows:

“*(dA)* by the deletion of the definition of **‘party liaison committee’**.”

1. These proposed amendments will have to be accompanied by a suitable amendment to the Regulations on Party Liaison Committees, 1998,[[4]](#footnote-5) to remove references to *party* and to include independent candidates in the composition of liaison committees.

## Amendment of section 20

1. The Commission proposes amendment of section 20 of the principal Act as follows:

“Section 20 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words–

“(1) The Commission must after consultation with the **[party]** national political liaison committee-””.

1. This proposed amendment will similarly have to be accompanied by a suitable amendment to the Regulations on Party Liaison Committees, 1998, to remove references to *party* and to include independent candidates in the composition of liaison committees.

## Amendment of section 62

1. The Commission proposes the following amendment of section 62 of the principal Act:

“The following section is hereby substituted for section 62 of the principal Act:

“**62. Consultation with [party] political liaison committee**

Before determining the boundaries of a voting district, the Commission may consult on the proposed boundaries of that voting district with-

(a) the municipal **[party] political** liaison committee for the municipality within which that voting district will fall; or

(b) if no municipal **[party]** political liaison committee has been established in a municipality, the provincial **[party]political** liaison committee for the province within which that voting district will fall.”.

1. This proposed amendment will have to be accompanied by a suitable amendment to the Regulations on Party Liaison Committees, 1998, to remove references to *party* and to include independent candidates in the composition of liaison committees.

## Amendment of section 64

1. The Commission proposes the following amendment of section 64 of the principal Act:

“Section 64 of the principal Act is hereby amended by the substitution for paragraphs *(a)* and *(b)* in subsection (3) of the following paragraphs–

“(a) the municipal **[party]** political liaison committee for the municipality within which that voting station will fall; or

(b) if no municipal **[party]** political liaison committee has been established in the municipality, the provincial **[party]** liaison committee for the province within which the voting station will fall.”

1. This proposed amendment will similarly have to be accompanied by a suitable amendment to the Regulations on Party Liaison Committees, 1998, to remove references to party and to include independent candidates in the composition of liaison committees.

# AGENTS

1. Presently, Chapter 5 the principal Act refers to *party agents*, since only a registered party may contest an election and therefore requires agents. There is a need to reformulate these references to include independent candidates.
2. This will require the amendments to sections 58 and 59 of the principal Act.

## Amendment of section 58

1. The Commission proposes the following amendment of section 58 of the principal Act:

“Section 58 of the principal Act is hereby amended–

(a) by the substitution for the heading of the following heading:

“**58. Appointment of [party] agents**”

(b) by the substitution for section (1) of the following subsection:

“(1) A party or an independent candidate contesting elections may appoint a number of agents for the election as prescribed”.

(c) by the substitution in subsection (2) for the words preceding paragraph *(a)* of the following words–

“(2) An **[party]** agent-”

1. This proposed amendment will also require consequential amendments to Chapter 7 of the Election Regulations, 2004.[[5]](#footnote-6)

## Amendment of section 59

1. The Commission proposes the following amendment of section 59 of the principal Act:

“Section 59 of the principal Act is hereby amended by the substitution for subparagraph (ii) of paragraph *(a)* of subsection (3) of the following subparagraph:

“(ii) the registered party or independent candidate represented by that agent; and”.”

1. This proposed amendment will also require consequential amendments to Chapter 7 of the Election Regulations, 2004.

# ELIGIBILITY OF INDEPENDENT CANDIDATES TO CONTEST MORE THAN ONE REGION

1. The current scheme gives effect to this constitutional injunction in that every citizen qualified to vote – regardless of their place of ordinary residence or where that person is registered to vote – may appear on a party’s regional lists for the National Assembly and a party’s provincial legislature list, even if that candidate does not ordinarily reside and is not registered to vote in the region or province concerned.
2. The Amendment Bill proposes to retain this system in relation to candidates nominated on a party’s regional list: the candidate need not be ordinarily resident or registered to vote in the region or province concerned, and the only requirement is that the candidate be qualified to vote in an election for the National Assembly.
3. However, the proposed section 31A(1) provides that 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 if that person 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. The Commission understands that the requirement is intended to foster better accountability in respect of independent candidates but is concerned that the same requirement does not apply to party candidates.
4. For these reasons, the Commission proposes a redraft of the proposed section 31A of the Amendment Bill as follows:

“**Nomination of independent candidate**

**31A.** (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 **[if that]** 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.

(3) An independent candidate may be nominated for more than one region for the National Assembly or provincial legislature but may be elected only to one seat in the National Assembly or provincial legislature ..”

1. We note however that the draft Item 3(4) to Schedule 1A to the principal Act provides that the name of the same party candidate may appear on a list for one region and the national list of a party but may not appear on more than one regional list. Replicating this provision in respect of independent candidates may be a viable alternative to restore parity.

# ELECTORAL DEPOSITS

1. In the current scheme of the Act, the quantum of electoral deposits for different categories of contestants are prescribed by the Commission by regulation. The Commission proposes the retention of that scheme.
2. In the event the Portfolio Committee approves the use of supporting signatures then it is proposed that quantum of signatures be determined be prescribing half the quota in the equivalent elections based on previous election results.

# NUMBER OF BALLOTS

1. The Commission recommends that the Committee considers amending this scheme to provide for three separate ballots:
   1. The first ballot will be for the election of the compensatory 200 members of the National Assembly, which is contested on a closed list basis. In keeping with the legislative proposal in the Amendment Bill that this election be contested by registered parties only, only the names of those parties who have met the requirements for contesting this election will appear on this ballot. This is crucial to meet the constitutional injunction in section 46(1)(d).
   2. The second ballot will be for the regional elections of the 200 members of the National Assembly. This ballot will vary from region to region, depending on which parties and independent candidates contest the relevant regional election. Only the names of the parties and independent candidates who have met the requirements for contesting each such regional election will appear on this ballot.
   3. To procure maximum clarity, it is proposed that the regions be given a more descriptive nomenclature. Pertinently, it is proposed that regions be referred to as multi-member regional constituencies.
   4. The third ballot will be for election of the members of the provincial legislature in each province (provincial ballot). The names of the parties and independent candidates who have met the requirements for contesting each such regional election will appear on this ballot.
2. The Commission proposes amending the existing draft wording of Item 25 to Schedule 1A to read as follows:

“**25.** (1) The Commission must produce separate ballot papers for **[the]** each multi-member regional constituency election of members of the National Assembly, the compensatory seats of members to the National Assembly and of members of **[the]** each provincial legislature**[s]**.

(2) The ballot paper to be used in each multi-member regional constituency for the election of members of the National Assembly shall include only parties and independent candidates standing in that region for election to the National Assembly. Similarly, the ballot for a provincial legislature shall include the names of parties and independent candidates standing for elections in that province”.

# MULTI-MEMBER REGIONAL CONSTITUENCY AND COMPENSATORY SEATS

1. The Amendment Bill proposes the allocation of multi-member regional constituency seats in the National Assembly using a quota system in three rounds. 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. A Hare quota is used for the quota calculation in the first two rounds, (i.e., dividing the number of valid votes - parties and independents - by the number of seats available in the region; the result, plus one, disregarding fractions is the quota to be used) and that, in the third round, a Droop quota (i.e., by dividing the total valid votes by the number of seats available plus 1 such that the result plus 1, disregarding fractions, is the proportional quota) be used.
2. The Commission recommends the simplification of the three round allocation system by adopting a single round allocation using a Droop quota and highest remainder method. By simply including the independents in the current calculation of multi-member regional constituency seats, more proportional results will be produced. The Droop quota, which is used currently, moderates the potential bias in favour of smaller parties resulting from the largest remainder system by providing for a lower quota (as opposed to the Hare system), which results in more seats being allocated to parties and independent candidates who receive a full quota and fewer being allocated by remainders. In addition, independent candidates will benefit from highest remainder allocations, which in the current Bill will not be the case.

## Allocation of multi-member regional constituency seats

1. The Commission proposes replacing items 5 to 9 of the draft bill wording of Schedule 1A with the with the following wording, which has mainly been taken from items 5 and 6 of the **existing** Schedule 1A:

“**5.** The multi-member regional constituency seats referred to in item 1 *(a)* must be allocated per multi-member regional constituency to the parties and independent candidates contesting an election, as follows:

*(a)* A quota of votes per seat must be determined in respect of each multi-member regional constituency by dividing the total number of valid votes cast in a multi-member regional constituency by the number of seats, plus one, reserved for such multi-member regional constituency under item 1 *(a)*.

*(b)* The result plus one, disregarding fractions, is the quota of votes per seat in respect of a particular multi-member regional constituency.

*(c)* The number of seats to be awarded for the purposes of paragraph *(e)* in respect of such multi-member regional constituency to a party or independent candidate, must, subject to paragraph *(d)*, be determined by dividing the total number of votes cast in favour of such party or independent candidate in a multi-member regional constituency by the quota of votes per seat indicated by paragraph *(b)* for that multi-member regional constituency.

*(d)* Where the result of the calculation referred to in paragraph *(c)* yields a surplus of seats not absorbed by the number awarded to a party concerned or independent candidate who has not been awarded a seat, such surplus competes with other similar surpluses accruing to any other party, parties or independent candidates in respect of the relevant multi-member regional constituency, and any seat or seats in respect of that multi-member regional constituency not awarded in terms of paragraph *(c)*, must be awarded to the party, parties or independent candidate concerned in sequence of the highest surplus.

*(e)* The aggregate of a party’s or independent candidate’s awards in terms of paragraphs *(c)* and *(d)* in respect of a particular multi-member regional constituency indicates that party’s or independent candidate’s provisional allocation of the seats reserved under item 1 *(a)* for that region.

*(eA)* Where an independent candidate’s award in terms of paragraph *(e)* exceeds one seat, the candidate is awarded one seat as its provisional allocation. The surplus of seats yielded must be dealt with in terms of item 7 (renumbered as per 35 below)

*(eB)* If the same independent candidate receives a seat in more than one multi-member regional constituency, the candidate is awarded the seat in the multi-member regional constituency where he or she received the most votes, as its provisional allocation. The surplus of seats yielded in other multi-member regional constituencies, must be dealt with in terms of item 7 (renumbered as per 35 below).

*(f)* The aggregate of a party’s provisional allocations for the various multi-member regional constituencies in terms of paragraph *(e)*, indicates its provisional allocation of the seats referred to in item 1 *(a)*.

*(g)* If no recalculation of provisional allocations is required in terms of item 7 (renumbered as per 35 below) or item 26 (in the draft bill, to be renumbered), in respect of the seats referred to in item 2 *(a)*, the provisional allocation of such seats in terms of paragraphs *(e)* and *(f)* becomes the final allocation of such seats to the various parties and independent candidates, and if such a recalculation is required, the provisional allocation of such seats, as adjusted in terms of item 7 (renumbered as per 35 below), becomes the final allocation of such seats to the various parties and independents. Parties’ seats shall be allocated from the relevant muti-member regional constituency lists”

1. The draft Bill wording of Item 10 will be renumbered Item 7 which is the same as Item 7 in the existing Schedule 1A and must also be amended to provide for forfeiture by independent candidates as articulated in 5*(eA)* and 5*(eB)*.

**Allocation of compensatory seats**

1. The Commission proposes amending the draft Bill wording of Item 11 to Schedule 1A with the following wording, which has mainly been taken from item 6 of the **existing** Schedule 1A:

**“6** The seats referred to in item 1 (b) must be allocated to the parties contesting an election, as follows:

(a) A quota of votes per seat must be determined by dividing the total number of votes cast for parties on both the multi-member regional constituencies’ and compensatory ballots by the total number of seats in the National Assembly, minus seats won by independents, plus one, and the result plus one, disregarding fractions, is the quota of votes per seat.

(b) The number of seats to be awarded to a party for the purposes of paragraph *(d)* must, subject to paragraph *(c)*, be determined by dividing the total number of votes cast on both the multi-member regional constituencies’ and compensatory ballots in favour of such party by the quota of votes per seat determined in terms of paragraph *(a)*.

(c) Where (the result of) the calculation in terms of paragraph *(b)* 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, and any seat or seats not awarded in terms of paragraph *(b)*, must be awarded to the party or parties concerned in sequence of the highest surplus, up to a maximum of five seats so awarded: Provided that subsequent awards of seats still remaining unawarded must be made in sequence to those parties having the highest average number of votes per seat already awarded in terms of paragraph *(b)* and this paragraph.

(d) The aggregate of a party's awards in terms of paragraphs *(b)* and *(c)* must be reduced by the number of seats provisionally allocated to it in terms of item 5 *(f)* and the result indicates that party's provisional allocation of the seats referred to in item 2 *(b)*.

(e) If no recalculation of provisional allocations is required in terms of item 7 or item 26 (in the draft bill, to be renumbered), in respect of the seats referred to in item 2 *(b)*, the provisional allocation of such seats in terms of paragraph *(d)* becomes the final allocation of such seats to the various parties and independents, and if such a recalculation is required, the provisional allocation of such seats, as adjusted in terms of item 7, becomes the final allocation of such seats to the various parties and independents.”

1. The draft bill wording of Item 11 will be renumbered Item 6.

# PROVINCIAL SEATS

1. The Commission proposes replacing items 19 to 22 of the draft Schedule 1A with the following wording:
   1. Item 10 of the **existing** Schedule 1A to be retained and renumbered Item 8. Also refer to Schedule 3, Item 3 (1) in terms of the latest amendment for the number of provincial seats.
   2. The draft wording of Items 17 and 18 to be renumbered Items 9 and Item 10 respectively.
   3. Item 13 as contextually amended to incorporate independent candidates, will be renumbered Item 11.

“13 The seats determined for a provincial legislature must be allocated to parties and independent candidates contesting an election, as follows-

*(a)* A quota of votes per seat must be determined by dividing the total number of votes cast in the province concerned by the number of seats, plus one, determined for such province and the result plus one, disregarding fractions, is the quota of votes per seat for such province.

*(b)* The number of seats to be awarded to a party or independent candidate for the purposes of paragraph *(d)* must, subject to paragraph *(c)*, be determined by dividing the total number of votes cast in the province in favour of such party or independent candidate by the quota of votes per seat determined in terms of paragraph *(a)*.

(c) Where the result of the calculation in terms of paragraph *(b)* yields a surplus not absorbed by the number of seats awarded to parties and independent candidates, such surplus competes with other similar surpluses accruing to any other party, parties or independent candidates in respect of the province concerned, and any seat or seats not awarded in terms of paragraph *(b)*, must be awarded to the party, parties or independent candidates concerned in sequence of the highest surplus.

(d) The aggregate of a party's or independent candidate’s awards in terms of paragraphs *(b)* and *(c)*, indicates that party's or independent candidate’s provisional allocation of seats in the provincial legislature in question.

*(dA)* Where an independent candidate’s award in terms of paragraph *(e)* exceeds one seat, the candidate is awarded one seat as his or her provisional allocation. The surplus of seats yielded must be dealt with in terms of item 14 (renumbered as per 38 below)

*(dB)* If the same independent candidate receives a seat in more than one province, the candidate is awarded the seat in the province where he or she received the most votes, as his or her provisional allocation. The surplus of seats yielded in other regions, must be dealt with in terms of item 14 (renumbered as per 38 below).

(e) If no recalculation of provisional allocations for a province concerned is required in terms of item 14 (renumbered as per 38 below), or item 26 (in the draft bill, to be renumbered), the provisional allocation of seats in respect of that province in terms of paragraph *(d)*, becomes the final allocation of such seats to the various parties and independent candidates, and if such a recalculation is required the provisional allocation of such seats as adjusted in terms of item 14 (renumbered as per 38 below) becomes the final allocation of such seats to the various parties and independent candidates.”

1. Item 26 in the draft bill to be renumbered (as alluded to in the three calculations) and amended to include independents. Independents may contest on both national and provincial levels which is not catered for in the current draft wording of the bill.

# FILLING OF VACANCIES IN RESPECT OF INDEPENDENT CANDIDATES

1. The Commission proposes that the Amendment Bill should be amended to provide for the filling of vacancies which become vacant during a term according to the following system:
   1. The vacant seat is allocated to the party or qualified and available independent candidate with the highest remainder of votes in the relevant regional election.
   2. The quota to fill a vacant seat is recalculated according to the same formula, except that the vacant seat(s) and the number of votes cast for the previous incumbent as well as independent candidates already holding seats, are disregarded. The same process of highest remainders will also be followed for seats not allocated during the first round.
2. Accordingly, the Commission proposes the revision of the proposed item 34 of Schedule 1A as follows:

“**34.** (1) In the event of a vacancy in a region or provincial legislature with respect to a seat allocated to an independent candidate, **[will not be filled until the next elections]**, the chief electoral officer must in writing allocate the seat by recalculating the result as follows:

*(a)* disregarding the votes and seat allocated to the independent candidate causing the vacancy;

*(b)* disregarding the votes and seats allocated to independent candidates already in office; and

*(c)* recalculating the result for the region or provincial legislature in terms of the provisions in item 7 or item 14, respectively.

(2) The vacant seat is awarded to the eligible independent candidate or party that contested the preceding election in terms of subitem 1*(c)*.

(3) Where the eligible candidate is an independent already holding office in any other region or provincial legislature, the result shall be recalculated in terms of subitem (1) by:

(a) disregarding the votes and seats for the independent candidate in addition to 1(a) and 1(b).”

1. Thus parties and independent candidates who contested the preceding election will compete equally for the vacant seat.

# CONCLUSION

1. The drafting may be adjusted based on any decision taken by the Committee including in respect of section 31A(1) requiring independent candidates to be both ordinarily resident and registered in the region and province they intend to contest. (there is no corresponding requirement for party list candidates)

1. B1 - 2022 [↑](#footnote-ref-2)
2. Under GN No. 1660 in *GG* No. 45716 of 31 December 2021 [↑](#footnote-ref-3)
3. Act No. 73 of 1998 [↑](#footnote-ref-4)
4. Published under GN R824 in GG 18978 of 19 June 1998 [↑](#footnote-ref-5)
5. Published under GN R12 in GG 25894 of 7 January 2004, as amended by GN R217 in GG 26058 of 16 February 2004, GN R344 in GG 26154 of 12 March 2004, GN R429 in GG 26207 of 29 March 2004, GenN 1206 in GG 31454 of 26 September 2008, GN R968 in GG 37132 of 6 December 2013 (as corrected by GenN 31 in GG 37259 of 23 January 2014), and GN R371 in GG 42289 of 6 March 2019 [↑](#footnote-ref-6)