**REVISED ISSUES: ELECTORAL AMENDMENT BILL DELIBERATIONS**

**CLSO’S INPUT**

**14 June 2022**

* Issues often overlap both policy and law and therefore it is not always possible to separate;
* Since we hold no special policy expertise we deliberately focus on legal/constitutional issues with the hope that DHA/IEC will sufficiently deal with policy issues;

**Clause 1**

1. Is the definition of “region” sufficiently clear as compared to a province?
   1. The Bill defines “region” as “means the territorial area of a province”. It must be noted that the term “region” is currently defined as is in Schedule 1A of the Electoral Act, 1998.
   2. The Bill also defines the term “province” as “means a province referred to in section 103 of the Constitution.” Section 103(1) then lists the 9 provinces; 103(2) refers to the geographical areas of the provinces as reflected in maps referred to in the listed notices; 103(3) and (4) then deals with the manner in which any redetermination of the geographical area must happen.
   3. It would appear that the term “region” also refers to an “area” of the province – which in effect refers to the province as defined.
   4. Currently, the term “region” is also defined like this in Schedule 1A of the Electoral Act.
   5. It would appear that the term “region” is defined for the purposes of allocating **regional seats** in the National Assembly. These seats would either be filled by a party candidate or an independent candidate, as per the Bill. For this purpose, according to the Bill, the provincial area would serve as a region (or constituency). Parties would be required to submit “regional lists” which is defined as “means a list of candidates in respect of a region prepared by a party for an election of the NA to reflect that party’s order of preference of candidates in respect of the allocation of regional seats in respect of each region”. Item 2 of Schedule 1A provides that the Commission must prepare a list of independent candidates contesting an election of the NA in each region in accordance with the Act.
   6. The term “province” is defined for purposes of election of the **provincial legislatures**. “Provincial list” is defined as “means a list of candidates prepared by a party for an election of a provincial legislature.”
   7. It is agreed that this terminology could cause some confusion – however, the Department is best placed to explain the distinction between these terms and whether it has caused any confusion to date.

**Note:** The term “region” is defined in clause 1 and also in Schedule 1A of the Bill – the definition needs to be removed from Schedule 1A and only be contained in clause 1. (A-list correction).

1. Is there a need to redefine “Party Liaison Committees” as “Liaison Committees” or “Electoral Liaison Committee’s” along with the inclusion of such in amendments to Sections 20, 62 and 64 of the Electoral Act as well as related Clauses in the Electoral Commission Act to allow for the inclusion of Independents Candidates in these consultative bodies?
   1. The Department as well as Members have agreed that the term “party liaison committees” needs to be amended in the Act so that the term is inclusive of independent candidates and not just restricted to “parties” as is currently depicted by its name, even though its functions are set out in the regulations meaning that the regulations too would need to be amended.
   2. What it should be renamed to is left to the Committee and Department.
   3. At present “party liaison committees” is defined in the Act as “means a committee established in terms of the Regulations on Party Liaison Committees published in terms of the Electoral Commission Act”.
   4. Should it be agreed to that this term needs to be amended, then all the sections referring to “party liaison committees” in the Act will need to be amended in the Bill to the new name (s 1, 20, 62, 64, 100, the Code, etc). The regulations too would need to be amended to be in accordance with the new name.
   5. The term “party liaison committee” does not seem to appear in the Electoral Commission Act.

**Clause 2**

Requires those on the partys’ regional list to be registered to vote but not ordinarily resident in that region.

The response from CLSO regarding this clause is dealt with under Clause 4 below.

**Clause 3:** Clause 3 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.

**Clause 4**

1. Should amendments to 31A(a) and 31B(3)(e), be revised to bring independents in line with political party candidates in clause 2 in terms of not being required to be ordinarily resident in the region in which they are registered to stand in an election?
   1. S31A(1)(a) 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-*
2. *Ordinarily resident in the region or province concerned;”.*
   1. S31B (3)(e) provides that, *“The following must be attached to a nomination when it is submitted:*

*(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;”.*

* 1. Whereas party candidates have a requirement at section 27(2)(cA) to submit, *“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.”*
  2. If the intention is for the same requirements (i.e. to be registered to vote in the region or province AND to be ordinarily resident in the region or province) to apply to both party candidates and independent candidates, then these clauses referring to party candidates should be redrafted to reflect that intention.
  3. However, it is submitted that there is no residency requirement for independent candidates intending to contest a ward in local government elections. Section 16(1)(b) of the Local Government: Municipal Electoral Act, 2000, requires a nominator of the independent candidate to be resident and registered to vote in the ward. It does not require the ward candidate to be resident in that ward that he or she wishes to contest.

1. Should there be signature requirements in 31B(3)(a) for Independents as compared to none for party candidates?
   1. The requirements set for independent candidates are not unique, as political parties also have to fulfil certain requirements (e.g. Registration and payment of deposits).
   2. Our Courts have on more than two occasions had an opportunity to consider the matter of requirements in respect of political parties – see *African Christian Democratic Party v Electoral Commission*, where it was held that “electoral deposits should evidence the seriousness of political parties’ intention of contesting elections, and ensure that the participation of political parties and candidates in the elections are not frivolous. Also see – *EFF v Electoral Commission*, where the Court confirmed the legitimacy of financial deposits as a requirement to participate in elections.
   3. Therefore, as can be seen there is nothing unconstitutional about requirements or necessary to contest elections.
   4. However, in *Richter v Minister for Home Affairs*, the Court stated that electoral law must aim at enfranchisement and not unduly restrict the rights of citizens to vote and stand for elections. Bearing this in mind, the right to equality is not being infringed, as an independent candidate and a political party will always have unequal footing due to the political nature of these institutions (independent candidates – one seat and political parties – more than one seat).
   5. Moreover, it is important to establish that where a provision differentiates between people or categories of people (in this case independent candidates’ vs political parties), the differentiation must bear a rational connection to a legitimate government purpose. Which in this case it does, the signature requirement may be necessary to determine the seriousness of an independent candidate to contest an election and to avoid a lengthy ballot paper.
2. Should the requirement for the determination of the number of signatures required or the deposit needed for independents, be left to the IEC to formulate in regulations or should the formula for the determination of signature requirements or deposits be included in the bill?
   1. *Deposits*

* At present, section 27(3)(a) of the Electoral Act, provides that the Commission may prescribe the amount of the deposit that must be paid by a registered party. Also, section 27(3)(b) then states that the amount to be deposited by a registered party contesting an election of a provincial legislature, must be less than the amount for contesting an election of the NA.
* Similarly, for Local Government elections, the deposit payable by a party or ward candidate or independent candidate is prescribed by the Commission (see sections 14 (1)(b); 17(2)(d).
* It must be noted that section 190(2) of the Constitution provides that the Electoral Commission has the additional powers and functions prescribed by national legislation.
* The reason why the amount of the deposit was left for the Commission to determine is perhaps because this amount can change over time and it is then always easier and faster to amend the regulations as opposed to having such amount put in an Act which then has to undergo the entire longer legislative process to amend.
* The IEC and Department are best placed to answer this question and inform the Committee on how frequently the regulations are amended to change the amount of the deposit required.
* Also, as a suggestion, it could be that for Independent Candidates, perhaps a lower deposit can be prescribed just like how a lower amount is prescribed for those contesting provincial elections.
  1. *Signatures*
* With regard to the amount of signatures required, section 17(2)(a) of the Local Government: Municipal Electoral Act, 2000, **expressly** stipulates that an independent ward candidate’s nomination must be accompanied by the prescribed form with the signatures **of at least 50 voters** whose names appear on the municipality’s segment of the voter’s roll for any voting district in the contested ward.
* This requirement of signatures in the Local Government: Municipal Electoral Act, 2000, is only in respect of the independent ward candidate.
* If the number of signatures required is to remain the same over a period of time as a requirement for ICs in the Bill, then in order to create certainty, such detail is best included in the Bill/Act.

1. Should the deposit for independents in 31B(3)(b) be the same as parties given that they only qualify for one seat?
   1. With regard to the argument as set out in 4.1 – 4.5, the same argument can be made for the deposit requirement, as it may be necessary to determine the seriousness of the independent candidate, and is a requirement for political parties.
   2. However, a value judgment may be needed as independent candidates lack the financial muscle.
2. Should the requirement in 31B(3)(f) of not having been a member of a political party for 3 months prior to running as an independent remain, be increased or reduced?

This remains a policy decision. The Department would need to advise herein.

**Clause 5** 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 to the Act to include candidate lists and lists of independent candidates.

**Clause 6** 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.

**Clause 7** 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**

1. Depending on decisions on point 5 above on deposits, this section on refunds may have to change.

8.1 This clause will only need to change if an Independent Candidate is NOT required to pay a deposit. Otherwise the deposit should be returned if the Independent Candidate is allocated one seat similarly to what would happen if a party is allocated a seat.

**Clause 9** amends section 110 of the Act, which provides for the effect of certain irregularities by including reference to independent candidates.

**Clause 10** amends Schedule 1 to the Act, which provides for the election timetable, to include independent candidates in the election timetable.

**Clause 11**

1. Should the clause 11(1) ratio of regional and compensatory seat to Parties remain 50/50% (200 to 200 seats) or change to 75% to 25% or to allow all candidates to contest all 400 seats?
   1. A policy decision had been taken to have a split of 200 regional and 200 compensatory seats. The justification for this decision can only be obtained from the Department.
   2. The Constitution does not provide an independent candidate with the right to be included in the compensatory seats. However, s46 of the Constitution does provide that the NA must consist of no more than 400 men and women elected by an electoral system that results in general proportional representation. The Constitution does not provide a detailed mechanism in which the electoral system of South Africa should be constructed, but does provide a guideline and one of those guidelines include an electoral system that results in general proportionality, i.e. a general reflection of proportionality.
   3. Therefore, an independent candidate does not have a right to the compensatory seats.
   4. Furthermore, it would also prove difficult to reflect general proportionality with regards to independent candidates and the compensatory seats, considering that an independent candidate can only assume one seat, there would be no further need for that independent candidate to gain access to the compensatory seats as they have already obtained their ONE seat.
2. In 11 (4 to 9) should there be reference to constituencies (66 or 200) as in the Van Zyl Slabbert report or the Lekota Bill?

This is a policy decision. The Department to provide a justification or reasoning as to why 9 constituencies have been used.

1. In clause 11(5 to 8) on regional seats should the 3 rounds remain the same or a single round according to the Droop formula as proposed by the IEC to improve proportionality and inclusion of small parties? Alternatively, a two-stage process was proposed where all who meet the full quota for one seat, be awarded a seat – whether as parties or independents. Once no one is left who is entitled to a seat based on meeting the full quota threshold, the remaining seats should then be given to the candidates that have the highest average of votes per seat won.
   1. Item 8 of Clause 11 of the Bill illustrates that the Droop Quota system is only used at round 3, in the allocation of votes for regional seats.
   2. The Department is in a better position in shedding light as to why the Droop Quota is only used in round 3.
2. Should clause 11.16 be removed in favour ensuring compliance prior to elections rather than forfeiting seats if parties don’t have enough candidates on their list after an election?

This exact section was contained in the previous Schedule 1A of the Electoral Act, under section 7 (1), but perhaps the Department or the IEC can provide input on this matter.

1. In clause 11 (11 to 16 and 25) should the IEC draft a proposal for inclusion in the bill of the 3 ballot system for National Assembly Compensatory; National Assembly Regional and Provincial Legislature either with a requirement for being ordinarily resident in the region for all candidates or a removal of this requirement for all candidates?

The IEC to attend to this question and provide guidance.

1. In Clause 11(34) how would it be responded in court to the objection that the major disadvantage of independents having their surplus votes discarded, effectively means they have no choice but to run as parties which then means the bill does not truly fairly address the Constitutional Court ruling for the inclusion of independents in the National Assembly and NCOP?
   1. The Constitutional Court in New Nation determined that everyone has not only the right to associate but also the right not to associate and to campaign in an election as an independent and not as a party.
   2. The Bill does address the Constitutional Courts ruling, in that its purpose is to encourage independent candidates to contest an election independently and to create an electoral system that is generally based on proportional representation, which accommodates independent candidates.
   3. Although proportional representation is a requirement that is not exclusively for parties, it is practically difficult to provide for proportional representation with independent candidates as they can only hold ONE seat, even though they may receive more votes than a party.
   4. Being an independent requires “not associating”, an independent candidate may only occupy one seat at a time, therefore once the minimum number of votes required to secure a seat is determined all additional votes may not practically be utilized.
   5. Furthermore, it is argued that the dignity and personhood of those voters who vote for the independent candidate are not infringed, as the will of their votes will manifests in the occupation of a seat by their chosen independent candidate, regardless of whether their vote counted towards the appointment of the independent candidate or whether their vote forms part of the excess votes that went towards the appointment of that independent candidate, but were discarded on account of their chosen independent candidate having enough votes already and gaining a seat.
   6. However, it remains a policy decision for the committee to explore other options to address the issue with regard to discarded votes, i.e. transferable votes or “running mates”.
2. In Clause 11(34) should there be by-elections for replacing independents what would this cost according to which calculation of projected number of by-elections? Alternatively, should votes be transferable as per the Lekota Bill where Independents have a list of “running mates” OR should (all or just independent) candidates with next highest number of votes in the initial election fill the seat? (If going with the DHA proposal of replacing vacant independent candidates’ seats with the candidate that received the next highest number of votes; will it not be argued that this gives political parties the benefit of replacing their seats with chosen candidates next on their list; whereas the independents and their support base could now be replaced by a political party or an independent with a completely different ideology?)
   1. This remains a policy decision, however we had pointed out that votes are an expression of the “will of the people”, parties have a party list to fill vacancies, although it may not appear practical to not fill vacancies, it is constitutionally unjustifiable that a seat must remain vacant, as section 47(4) of the Constitution provides that “vacancies in the NA must be filled in terms of national legislation.”.
   2. The Department must provide solutions with regard to options that may be considered when filling vacancies.

**Not in the Bill but to be considered for inclusion**

1. A proposed amendment to Chapter 5 (Section 68 and 69) of the Electoral Act is needed to allow for independents to have agents during elections.
   1. The Department, IEC and Members have agreed that Independent Candidates also be allowed to appoint agents to observe elections and counting, etc.
   2. In order to allow for this, sections 58 and 59 would need to be amended according to the policy and manner agreed to by the Committee.
   3. Sections that might require amendment include the definition of “agent” in section 1; sections 39(1)(b) and 66(1) and (3) as these sections in the Act refer to party agents only.
   4. Note NA Rule 286(4)(c) – where permission of the House must be sought if other provisions of the legislation is to be amended which are not in the Bill.