**OPINION**

for

**MINISTER OF HOME AFFAIRS**

on

**PUBLIC COMMENTS RECEIVED ON ELECTORAL**

**AMENDMENT BILL [B 1—2022]**

**PROPOSED AMENDMENTS TO ELECTORAL AMENDMENT BILL**

**&**

**QUESTIONS RAISED BY PORTFOLIO COMMITTEE**

**STEVEN BUDLENDER SC**

**MITCHELL DE BEER**

Chambers, Sandton & Cape Town

8 July 2022

**TABLE OF CONTENTS**

[OVERVIEW 3](#_Toc108093041)

[PROPOSED AMENDMENTS TO ELECTORAL AMENDMENT BILL 5](#_Toc108093042)

[Agents for independent candidates 5](#_Toc108093043)

[Amendments to the allocation of seats 6](#_Toc108093044)

[Retaining the requirement that independent candidates may only contest a single region 9](#_Toc108093045)

[Two ballots in elections for the National Assembly 10](#_Toc108093046)

[The filling of vacancies of independent candidates 14](#_Toc108093047)

[CONSEQUENTIAL AMENDMENTS TO THE FUNDING ACT 16](#_Toc108093048)

[CONSEQUENTIAL AMENDMENT TO THE COMMISSION ACT 18](#_Toc108093049)

[QUESTIONS RAISED BY PORTFOLIO COMMITTEE AND PARLIAMENTARY LEGAL SERVICES 20](#_Toc108093050)

[The definition of “region” 20](#_Toc108093051)

[The Commission’s role in setting the deposit and number of signature’s required for independent candidates to contest elections 21](#_Toc108093052)

[Cooling-off period 22](#_Toc108093053)

[The proportion of regional and compensatory seats 23](#_Toc108093054)

[CONCLUSION 24](#_Toc108093055)

# 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* the Constitutional Court declared the Electoral Act 73 of 1998 unconstitutional and invalid to the extent that it requires adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties.[[1]](#footnote-1)
3. We were briefed to draft an Amendment Bill to give effect to the “minimalist option” set out in a report of the Ministerial Advisory Committee (**MAC**) appointed by the Minister to investigate electoral reform. This option prefers to incorporate independent candidates into the framework of the existing electoral system. The Electoral Amendment Bill [B 1—2022] has been introduced into Parliament and is currently undergoing public participation processes by Parliament.
4. Parliament and the Minister received numerous comments on the Bill from the public, political parties, civil society organisations and the Electoral Commission. We have read and considered summaries of these comments provided to us by the Minister’s office.
5. In considering the comments on the Bill, we are of the opinion that certain amendments should be effected to the Bill to create a more straightforward electoral system than what is currently proposed in the Bill.
6. We have also prepared proposed draft amendments to the Political Party Funding Act 6 of 2018 (“*Funding Act*”), as requested by the Minister and considered that a single amendment should be made to the Electoral Commission Act 15 of 1996 (“*Commission Act*”), to address the question of liaison committees.
7. To this end, we have prepared an omnibus Electoral Matters Amendment Bill, incorporating our suggested amendments to the current Bill, and introducing the suggested amendments to the Funding Act and Commission Act. Our amendments are “tracked” into the original Bill we provided to the Minister for ease of reference.
8. In this covering opinion, we summarise and explain the changes we suggest should be adopted in respect of the Bill, as well as the suggested amendments to the Funding Act and Commission Act. We assume that the reader is familiar with the electoral system currently set out in the Electoral Act, and the system currently proposed in the Amendment Bill.
9. We do not address the import of all of the comments received during the consultation process. For instance, we do not address the desirability of adopting a single member constituency system, nor do we discuss certain proposals, such as using a ranked choice preference voting system to avoid losing votes in respect of independent candidates.
10. In this opinion, we also address certain queries raised by the Portfolio Committee of Home Affairs and Parliamentary Legal Services. Most of these questions are dealt with in our discussion of the proposed amendments to the Bill. The remaining questions are dealt with under a separate hearing below.

# PROPOSED AMENDMENTS TO ELECTORAL AMENDMENT BILL

## Agents for independent candidates

1. During the Parliamentary processes, questions were raised about whether independent candidates should also be entitled to appoint agents as parties are currently entitled to.
2. In our opinion, not making provision for the appointment of agents for independent candidates could be criticised as an irrational differentiation.
3. We understand that the Department and Portfolio Committee agree that independent candidates ought to be entitled to appoint agents.
4. We have accordingly made provision for suggested amendments to sections 39, 58, 59 and 66 of the Electoral Act to permit the appointment of agents by independent candidates.

## Amendments to the allocation of seats

1. Much criticism was levied against the three-stage system to be used to allocate seats. A primary concern is that independent candidates, under the three-stage system, will have to obtain a higher quota of votes in order to obtain a seat, than political parties.
2. This is because in the current proposed system, in the third round when seats are allocated to political parties, all votes for independent candidates are removed from the calculation, effectively reducing the quota required by political parties to obtain seats.
3. We have always been alive to this problem. Indeed, that is why it was suggested that independent candidates have two-rounds to obtain a seat: after the first round, votes in favour of independent candidates who were awarded a seat are removed, effectively reducing the quota for the second round.
4. Another criticism levied against the three-round system, is that it is complex and may be difficult to understand for voters and those contesting elections, and to implement by the Electoral Commission.
5. Having now considered the public comments and possible alternatives, we are of the opinion that there is more straightforward allocation system that can be used, that does not result in political parties obtaining seats with a lower quota than all independent candidates.
6. The suggested alternative was proposed by the Commission, which we have embraced and developed.
7. The system would work as follows.
8. Instead of having separate rounds for allocating seats to independent candidates and political parties, the same system currently used in Schedule 1A of the Electoral Act would be retained, save that independent candidates would be inserted into the system.
9. The droop formula will be used, as it is currently, to determine the quota for seats. For both political parties and independent candidates, regional seats in the National Assembly or seats in the provincial legislatures will be allocated by dividing the total number of votes for the party or candidate by the quota, as the current Schedule 1A of the Act provides.
10. Of course, an independent candidate may only receive a single seat. In circumstances where an independent candidate obtains votes in excess of two or more of the relevant quota, then our proposed model will require the independent candidate to forfeit those seats. Thereafter, the allocation of seats will be recalculated using an amended quota, removing all the votes for the independent candidate concerned as well as the single seat they obtained. The new quota will be reduced. But, importantly unlike the current system, both political parties and any remaining independent candidate who did not receive a seat already, will be able to obtain the forfeited seats.
11. We have modified the current forfeiture provision in Schedule 1A – which addresses the situation where a party’s list of candidates has fewer names than seats allocated to it – to achieve the above.
12. There are two main advantages of using this system:
	1. First, it is far simpler and more straightforward than the three-stage allocation system currently proposed in the Bill, and is familiar to votrs and the Commission being a modified version of the current system in Schedule 1A;
	2. Second, political parties and independent candidates will compete on a level playing field, in that: (a) in order to obtain seats, they all need to receive votes to satisfy the same quota; and (b) where an independent candidate receives votes which exceed multiple quotas and therefore forfeits those seats, all parties and independent candidates will be entitled to contest those forfeited seats with a reduced quota.
13. The proposed Schedule 1A we have drafted, retains provisions for the allocation of surplus seats, where – again – both political parties and independent candidates will be eligible to receive them.
14. We have included a new Schedule 1A in the omnibus bill to set out this alternative system.
15. If such a different system is not adopted and the three-round system remains, then we emphasise that the droop quota rather than using a simple quota should be adopted in the first two rounds for allocating seats to independent candidates.
	1. This is because the droop quota is generally smaller than the simple quota – the effect would be that independent candidates would have a better opportunity of being allocated seats in the first two rounds.
	2. As the droop quota is used for political parties, and political parties are allocated seats in a different round, we are of the view that using the droop quota may ameliorate some concerns raised in the public participation processes.

## Retaining the requirement that independent candidates may only contest a single region

1. A concern was raised in some public comments that independent candidates are required to contest a single region, but that the same requirement does not apply to political parties and candidates of political parties.
2. To be clear, some of comments are incorrect as the Amendment Bill in clause 2 currently provides that a party must provide the following with its list of candidates for national and provincial elections:

“(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;”

1. Accordingly, party candidates contesting regional seats in the National Assembly or provincial legislatures effectively are also only entitled to contest one province or region. (Party candidates on national lists do not have the same requirement.)
2. We would caution against permitting independent candidates to contest more than one region or province at a time, and in circumstances where they receive enough votes in multiple regions or provinces, be permitted to elect which seat to take up.
3. Such a situation would concentrate immense power in the hands of one or a few individuals, who could choose to join certain regions or provinces over others to support certain powers or politics.
4. We have accordingly not adopted such a permissive approach.
5. If the Minister or Parliament wishes to permit such an option, then our firm view is that an independent candidate contesting more than one region or province should be required to rank their preferences between regions or provinces up front and *before* the election, so that they will have no discretion to choose a region or province once the election is held.

## Two ballots in elections for the National Assembly

1. Criticisms were levied against the Bill, insofar as in the current system a vote for a political party for the National Assembly is counted twice, once for the regional seats, and once for the compensatory seats; whereas a vote for an independent candidate is counted only once for the regional seats.
2. Initially, we expressed the view that reducing the number of ballots was important to simplify voting. However, on reflection it appears to us that it is problematic that voters casting a vote for an independent candidate lose out on influencing the election of members to the compensatory seats – the intention of which is to ensure proportionality.
3. In our opinion, a similar approach to that followed in local government elections should be adopted, namely that there are two ballots for the National Assembly:
	1. a regional ballot for each region, on which all political parties and independent candidates contesting the region will appear; and
	2. a compensatory ballot, on which only political parties will appear.
4. Voters will therefore vote twice: once for the regional seats; and once for the compensatory seats.
5. Voters will then not be forced to choose between a false dichotomy between political party or independent candidate, but may for example vote for an independent candidate for their region and for a political party for the compensatory seats.
6. In addition to enabling greater voter participation, having two ballots will also aid in satisfying the requirement in section 46(1)(*d*) of the Constitution, of adopting a system which “*results, in general, in proportional representation*”.
7. Section 157(2) and (3) of the Constitution expressly contemplates an electoral system at local government level that balances participation of independent candidates and proportional party representation.
	1. Subsection (2) requires national legislation must prescribe a system for the election of members of a municipal council:

“(a) of proportional representation based on that municipality’s segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party’s order of preference; **or**

(b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll.” [Emphasis added.]

* 1. Subsection (3) requires that an “*electoral system in terms of subsection (2) must result, in general in proportional representation*.”
1. In *New Nation Movement*, Madlanga J commented on this provision when considering whether the participation of independent candidates would undermine proportional representations. He held that:[[2]](#footnote-2)

“[I]t is quite plain from the provisions of section 157(3) of the Constitution that proportional representation is quite possible where there is a combination of representation through party lists and representation by individuals who need not be attached to political parties. Here is why I say so. In respect of the election of members of a Municipal Council, section 157(2) empowers Parliament to pass legislation that prescribes a system: where members are exclusively elected through party lists (section 157(2)(a)); or where membership is drawn from a combination of party lists and ward representation (section 157(2)(b)). Read in the context of section 157(2)(a), which is specific on exclusive party representation, ward representation under section 157(2)(b) certainly does admit of independent candidate representation. That is so because in respect of ward representation the section is silent on party participation. It matters not that in ward representation some – even most – individual candidates may, in fact, be sponsored by political parties.

Section 157(3) then requires that an electoral system under section 157(2) (meaning either exclusively party based or comprising a combination of party lists and ward representation) “must result, in general, in proportional representation”. This is the clearest possible statement that dispels the notion that proportional representation is consonant only with representation through political parties.”

1. Thus, the Constitution recognises that a mixed system – of political party proportional- and independent candidate-representation – can still satisfy the requirements that the system must generally result in proportional representation.
2. Parliament enacted a mixed system at local government level. Section 22 of the Local Government: Municipal Structures Act 117 of 1998 provides the following in respect of the election of councilors to metropolitan and local municipalities:

“(1) The council of a metropolitan or local municipality consists of councillors elected in accordance with Schedule l—

(a) by voters registered on that municipality’s segment of the national common voters roll, to proportionally represent the parties that contested the election in that municipality; and

(b) by voters registered on that municipality’s segment of the national common voters roll in the respective wards in that municipality, to directly represent the wards.

(2) The number of ward councillors in a metropolitan or local council referred to in subsection (1) (b) must be equal to 50 per cent of the number of councillors determined for the municipality in terms of section 20 the number of councillors determined in terms of section 20 is an uneven number, the fraction must be rounded off upwards.

(3) The number of proportionally elected councillors in a metropolitan or local municipality referred to in subsection (1) (a) is determined by subtracting the number determined in terms of subsection (2) from the number of councillors determined for the municipality in terms of section 20.”

1. Two ballots are used to determine the votes for ward councillors and proportional representation councillors.
2. In our view, mirroring a similar system for elections of the National Assembly – including the use of two ballots – strikes a balance between permitting independent candidates to contest the election, while at the same time ensuring proportionality.
3. Consideration should also possibly be given to using the same system for provincial legislatures.

## The filling of vacancies of independent candidates

1. At the present, the Bill provides that where an independent candidate vacates their seat from the National Assembly or provincial legislature, it will remain unfilled until the next election.
2. This was criticised, although very few suggestions were put forward as to how to fill the seat in a sustainable and practical manner. We understand that holding a by-election across a region would be practically difficult and expensive every time a vacancy arises.
3. A possible alternative suggested, is to use the votes from the previous election to fill the seat.
4. It seems to us that this may be a workable solution. It does not require the Commission to hold by-elections, and still – to an extent – ensures that the membership of the National Assembly or a provincial legislature reflects the will of the voters.
5. It could, however, be argued such an approach still gives political parties the benefit of replacing their seats with chosen candidates next on their list; while the independent candidate who vacated their seat, and those who voted from them, would lose out since they would be replaced by another person (whether from a party or another independent candidate) who may even have a different ideological view.
6. In light of the Department’s view, we have incorporated the forfeiture procedure into the vacancy provision to achieve this. The proposal is that should an independent candidate vacate their seat, the votes for them will be forfeited, and all the seats in the will be reallocated (in a similar fashion to when independent candidates win more than one seat).

# CONSEQUENTIAL AMENDMENTS TO THE FUNDING ACT

1. The consequential amendments to the Funding Act we propose mostly speak for themselves.
2. There are, however, a number of policy issues that we require instructions on to finalise the amendments. Full drafting notes are specified on the omnibus bill. In summary they are the following.
3. First, in the Funding Act presently, only parties in Parliament and the provincial legislatures get funding – i.e. not parties represented in municipal councils. At the moment we have drafted this in the same way regarding independent candidates. But we require instructions as to the way forward for this policy question.
4. Second is the formula used to allocate monies from the funds. At present, under the regulations, approximately two thirds of the amounts available gets split proportionally amongst the parties. The remaining third gets divided equally among all political parties. There is an important policy choice here: do independents get to share in the equitable allocation or not? The Regulations will probably have to be changed as well.
5. Third, we draw the Minister’s attention to section 10 of the Funding Act, which provides:

“10. Prohibition on donation to member of political party.

(1) No person or entity may deliver a donation to a member of a political party other than for party political purposes.

(2) A member of a political party may only receive a donation contemplated in subsection (1) on behalf of the party.

(3) No person may circumvent subsections (1) or (2), or any of the provisions of this Chapter.”

1. The provision is unclear as to its effect. Is it meant to prohibit donations for internal party campaigns or not? Does it preclude *any* donations being made to members of political parties, even those made entirely for private purposes? This may be an opportunity to fix it but instructions will be required.
2. Fourth, is the question of accounting.
	1. In our view, requiring all independent candidates to account as political parties are required to would be unmanageable – imagine how many of them might participate in local government elections. Indeed, many may never get into power and at local government level, an independent may not have the resources to account – i.e. appointing an auditor.
	2. Assuming this is right (and we require an instruction on this score), we have adopted the approach of requiring only independents who are representative in the National Assembly and provincial legislatures to account. In section 8, independents generally are still prohibited from receiving certain donations, but simply do not have to account therefor. And in section 9(1) and (2) all other independents are required to inform the Commission of donations above a threshold as well as the donors.
	3. The calculus, however, is different at national and provincial levels.

# CONSEQUENTIAL AMENDMENT TO THE COMMISSION ACT CONCERNING LIAISON COMMITTEES

1. There is a single amendment that we propose for the Commission Act.
2. Section 5(1)(*g*) of the Commission Act provides:

“The functions of the Commission include to … establish and maintain liaison and co-operation with parties;”

1. The Commission relied on this provision to enact Regulations on Party Liaison Committees in GNR 824 of 19 June 1998.
2. Section 1 of the Electoral Act defines “*party liaison committee*” as “*a committee established in terms of the Regulations on Party Liaison Committees published in terms of the Electoral Commission Act*.”
	1. Regulation 2 of the Regulations on Party Liaison Committees provides for the establishment of party liaison committees:

“The Electoral Commission establishes the following party liaison committees:

2.1 A party liaison committee in the national sphere with not more than two representatives from every registered party represented in the National Assembly.

2.2 A provincial party liaison committee for each province with—

2.2.1 not more than two representatives from every registered party represented in the legislature of the province concerned; and

2.2.2 not more than two representatives from every registered party represented in the party liaison committee in the national sphere but not represented in the provincial party liaison committee concerned.

2.3 Municipal party liaison committees for a single municipality or a group of municipalities with—

2.3.1 not more than two representatives from every registered party represented in the municipal council or councils concerned; and

2.3.2 not more than two representatives from every registered party represented in the party liaison committee in the relevant province, but not represented in the municipal party liaison committee concerned; and

2.3.3 not more than one representative of every independent councillor represented in the municipal council or councils concerned.”

* 1. Regulation 2.3.3 already contemplates the inclusion of representatives for independent candidates in liaison committees municipal elections.
	2. We have previously advised that this regulation will have to be amended by the Commission to include independent candidates in liaison committees for national and provincial elections.
	3. As for the 2024 elections, since there would not have been any independent candidates represented in the National Assembly or provincial legislatures, we are of the view that the regulation should permit for example five representatives for independent candidates chosen at random from those contesting the election concerned.
1. The Commission has emphasised that it enacted the Regulation under section 5(1)(*g*) – which specifically requires it to maintain liaison and co-operation with political parties.
2. In our view, it is appropriate to amend section 5(1)(*g*) to specify that the Commission must also liaise and co-operate with independent candidates and representatives.
3. We have also proposed amendments to the term of “*party liaison committee*” in sections 1, 20, 62, 64 and 100 of the Electoral Act, as well as item 7(g)(iii) of Schedule 2 to the Act.

# QUESTIONS RAISED BY PORTFOLIO COMMITTEE AND PARLIAMENTARY LEGAL SERVICES

1. Most of the questions have been dealt with above. We address certain comments in what follows.

## The definition of “region”

1. Comments have been made that the use of the term “*region*” to describe the multi-member constituencies that both independent candidates and political parties may contest, could be confusing, since the area of the nine regions is synonymous with the area of the nine provinces.
2. Suggestions have been made that a better term, such as “*multi-member regional constituency*” could be used to avoid confusion.
3. The reason why the Amendment Bill uses the term “*region*” is because that is what is currently contained in the Schedule 1A to the Electoral Act, and the Bill was drafted on the basis of the MAC’s minimalist option which used this terminology.
4. There would be no problem with amending the term.

## The Commission’s role in setting the deposit and number of signature’s required for independent candidates to contest elections

1. We reiterate our view that the question of the amount of the deposit to be paid by and the number of signatures in favour of a person wishing to contest an election of the National Assembly or provincial legislature as an independent candidate, should be left to the Commission as an independent and non-partisan body.
2. It is ultimately a policy question as to whether the amount of deposit and number of signatures should be included in the Act or be left to the Commission to determine.
3. Whatever approach is adopted, we are of the firm view that the amount of the deposit for an independent candidate would have to be less than that for a political party. A single individual can only obtain a single seat, whereas a political party can obtain many. A single individual will not be able to fund raise to the same extent as a political party. So they would have to be treated differently.

## Cooling-off period

1. At present, the Bill stipulates that a former member of a political party may only contest an election as an independent candidate if he or she has not been a member of any political party for at least three months preceding the date of the nomination as an independent candidate.
2. This requirement is not unique to the Amendment Bill.
3. 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…”

1. The argument for such requirement is that, if a member of a political party loses an internal race to join 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.
2. It could however be argued that the that such a restriction may well not be constitutional.
	1. Section 47(1) of the Constitution declares that “*[e]very citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly*” save for a closed list of exceptions. Section 106(1) mirrors this provision in respect of provincial legislatures.
	2. Section 19(3)(b) guarantees the correlate right of citizens to stand for public office, which right allows citizens to stand as independent candidates according to *New Nation Movement*.
	3. Placing a restriction on former members of political parties may well be inconsistent with section 47(1) and section 19(3), and thus constitutionally invalid.
3. We raise this for the Minister’s and Department’s consideration.

## The proportion of regional and compensatory seats

1. At present, the Bill divides the number of seats in the National Assembly equally between regional and compensatory seats.
2. Various comments have been submitted that it may be more appropriate for the compensatory seats to represent a smaller proportion of the total number (say 25%) leaving the remaining seats as regional seats for independent candidates and parties to contest (for example 75%).[[3]](#footnote-3)
3. This is ultimately a policy question. The Bill follows the proposal in minimalist option presented by the MAC.

# CONCLUSION

1. We advise accordingly.

**STEVEN BUDLENDER SC**

**MITCHELL DE BEER**

Chambers, Sandton & Cape Town

8 July 2022

1. *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC). [↑](#footnote-ref-1)
2. At paras 79-80. [↑](#footnote-ref-2)
3. At local government level, for example, [↑](#footnote-ref-3)