

MEMORANDUM

for

MINISTER AND DEPARTMENT OF HOME AFFAIRS

on

ELECTORAL AMENDMENT BILL:

**CONSTITUTIONALITY OF INDEPENDENT CANDIDATES ONLY CONTESTING
ONE REGION**

&

**VOTER SUPPORT ELIGIBILITY REQUIREMENT PROPOSED BY
PORTFOLIO COMMITTEE**

- 1 Our advice is sought by the Minister and Department of Home Affairs.

- 2 In this brief memorandum we deal with two issues:
 - 2.1 Whether the current proposal in the Electoral Amendment Bill (B1—2022), that independent candidates may only contest one region in elections for the National Assembly (as opposed to a number of regions in the same election) is constitutionally permissible;

 - 2.2 The potential constitutional weakness of the proposal discussed by the Portfolio Committee to require independent candidates to demonstrate

the support of registered voters equal to at least 50% of the quota for a seat in the previous election, as an eligibility requirement to contest an election.

INDEPENDENT CANDIDATES CONTESTING ONE OR MORE REGIONS

3 The Bill as currently drafted only permits an independent candidate to contest a single region in order to obtain a seat in the National Assembly (see clause 4, section 31B(3)(e)).

4 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.

5 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;”

6 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.)

7 The Committee has debated and considered whether independent candidates should be permitted to contest more than one region in an election. There are practical considerations which would arise if that approach were adopted.

7.1 For example, the statute would have to provide for the situation where an independent candidate gains a seat in more than one region in the same election. Various proposals have been put forward. The Electoral Commission, for example, suggests that the candidate should obtain a seat in the region where they received the highest number of votes.

7.2 Another consequence of this approach is that it could lead to the wastage of more votes: as an independent candidate can only ever obtain a single seat, votes for them in other regions would have to be discarded.

8 We were asked to consider whether the current proposal, which permits an independent candidate to contest only a single region, is constitutionally permissible.

9 In our view, if the Act retained this approach, it would be constitutionally permissible.

9.1 It does not appear to us that a system limiting an independent candidate to contest one region only would violate the Constitution at all. It would permit independent candidates “*to stand for public office and, if elected, to hold office*” as required by section 19(3)(b) (*New*

Nation Movement NPC v President of the Republic of South Africa 2020 (6) SA 257 (CC) at para 100). It also facilitates independent candidates contesting seats in the National Assembly. It would also be permissible to treat independent candidates and political parties differently (insofar as the latter can contest multiple regions) as an independent candidate by nature can only obtain a single seat.

9.2 To the extent that such a system does limit section 19(3)(b) rights of independent candidates, in our view it would be a justifiable limitation under section 36 of the Constitution. Permitting contestation of multiple regions by independent candidates would result in a more complex electoral system, that could lead to delays in the finalisation of the election, and as we have said will result in more vote wastage. Those appear to us to be legitimate and reasonable purposes justifying any limitation of the right.

10 Ultimately, therefore Parliament has two options:

10.1 It could enact legislation which requires independent candidates to contest only one region for election in the National Assembly; or

10.2 It could enact legislation which provides that independent candidates may participate in more than one region for election in the National Assembly.

11 Both of these options are in our view constitutionally permissible, and therefore this is a policy choice for Parliament to make.

THE SIGNATURE REQUIREMENT

- 12 As presently framed, the Bill would require independent candidates to demonstrate a certain level of voter support. They would be required to provide a form with a “*prescribed minimum number of signatures of voters whose names appear on the segment of the voters’ roll for the region or province in which the candidate is standing for election.*” The Commission would be vested with the power to prescribe the number of signatures required.
- 13 Upfront we emphasise that an eligibility requirement to contest an election of showing a certain level of voter support is eminently rational, sensible, and – in principle – constitutionally permissible. If an independent candidate is unable to gather enough support to be *nominated* to contest an election, they would be highly unlikely ever to obtain enough votes to obtain the quota for a seat.
- 14 We are of the view that there are substantial advantages to vesting this decision in the Commission, as the Bill is current framed. It would avoid any complaint or perception of partisan politics attempting to thwart the participation of independent candidates in elections, and would provide a measure of flexibility so that the requirement can be adapted in accordance with experience in running elections.
- 15 The Portfolio Committee has, nevertheless, been discussing and considering various other methods of determining the number of signatures required.

- 16 The Portfolio Committee has considered proposing that Parliament could adopt a formula in the legislation to determine the required number of voter support with reference to a percentage of the quota for a seat in the previous election.
- 17 In principle, we are of the view that using a formula would be a rational approach. We are still of the view that this decision should be left to the Commission.
- 18 A difficult question, which arise from this different approach, would be to determine an appropriate percentage of the quota.
- 19 At present, we understand, that the Committee is considering adopting a percentage of 50%.
- 20 We feel it is important to highlight our view that such a high percentage risks being found unconstitutional, if the requirement were challenged in Court.
- 20.1 It is permissible for the statutory regime to adopt eligibility requirements for independent candidates. The reason is simple: if any citizen were permitted to contest an election without demonstrating support (or demonstrating their seriousness with a deposit), that could risk a situation of an unwieldy ballot, full of candidates who have no hope of being elected. It would be confusing to vote and ultimately could undermine the freeness and fairness of the election.
- 20.2 However, such eligibility requirements cannot unduly impede the participation of serious independent candidates in an election. If it did,

then the section 19 right to stand in the elections would be limited, and in our view, the limitation would not be justifiable.

20.3 Of course, drawing the line between an appropriate eligibility requirement and one which unduly limits the right is no easy task. A Court would likely show Parliament deference in making this determination.

20.4 That said, in our view a requirement of 50% of the quota for a seat in the previous elections, appears to cross the line to being unjustifiable.

20.5 For context, the previous quota for a seat in the National Assembly was approximately 44 000.¹

20.6 Assuming that a similar quota would occur in future, it would require an independent candidate to demonstrate the support of 22 000 voters in order to contest an election.

20.7 Even if this support could be obtained using electronic resources (as we understand the proposal), it may be impossible for an independent candidate to obtain such support – especially if they are only able to gather signatures in a limited time provided for in the election timetable, right before the election.

20.8 In our view, such a high threshold would arguably be an unjustifiable limit of the section 19 rights of citizens to contest an election as independent candidates.

¹ Droop quota calculated using the results of the 2019 election, see the Commission's Electoral Report available at <https://www.elections.org.za/pw/Downloads/Documents-National-And-Provincial-Election-Reports>.

20.9 A lower threshold of the previous quota – of no more than 20% – would be more likely to pass constitutional muster, in our view.

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