

WESTERN CAPE PROVINCIAL PARLIAMENT



Drafts and Policy Options for Amending Section 13 of the Provincial Constitution

[Date: TBC]



Proposal 1

In respect of section 13 of the Provincial Constitution to:–

- add a *formula* for the determination of seats;
- add an *upper limit* for the number of seats;
- provide a *mechanism for determination* of the number of seats; and
- amend the *heading*

Technical draft:	As amended:	Discussion:
<p><i>To amend the heading of section 13 as follows:</i></p> <p>[Composition] <u>Number of members of the Provincial Parliament</u></p> <p><i>To amend the body of section 13 as follows:</i></p> <p><u>1. The Provincial Parliament consists of [42 elected members] one seat awarded for every 100 000 of the population whose ordinary place of residence is within the Province, but shall not exceed 80 seats.</u></p> <p><u>2. The number of seats of the Provincial Parliament must be determined in the manner provided for in its rules and orders.</u></p>	<p>Number of members of the Provincial Parliament</p> <p>1. The Provincial Parliament consists of one seat awarded for every 100 000 of the population whose ordinary place of residence is within the Province, but shall not exceed 80 seats.</p> <p>2. The number of seats of the Provincial Parliament must be determined in the manner provided for in its rules and orders.</p>	<p>See discussion on slides 3, 4 and 5.</p>

Discussion on incorporating the formulaic approach in the text of the Provincial Constitution

[1 – 3]

- Provincial legislative structures must be *provided* for:–
 - either in accordance with Chapter 6 of the Constitution; or
 - in accordance with the Provincial Constitution
- It cannot be *provided* for in provincial statutes, subordinate legislation, or other enabling instruments, such as rules*
- See paragraphs 9 and 10 of *Premier of the Province of the Western Cape and One Other v Electoral Commission and One Other CCT 19/99* ('the judgment')
- Section 143(1) of the Constitution, in salient part, provides that, '*A provincial constitution... may provide for – (a) provincial legislative... structures... that differ from those provided for in this Chapter...*'
- There must, however, be a *mechanism to determine* the number of seats based on a constitutionally established formula – hence, someone must, in fact, make the determination
- In respect of proposal 1, it appears as though it is the Provincial Constitution itself that *provides* for the number of seats in the legislature, whereas *the act of factually determining that number* (within the ambit of what the Provincial Constitution *provides* for) must be catered for in the rules and orders
- In respect of proposal 1, it is the rules and order that must determine *who* will determine the number of seats, and *when* this determination will happen, and *what* evidence will have to be applied to give effect to the formula provided for in the Provincial Constitution

Discussion on incorporating the formulaic approach in the text of the Provincial Constitution

[2 – 3]

Relevant amendments to the Standing Rules must probably refer to at least the following:

1. Subject to the provisions of section 13 of the Provincial Constitution, and by no later than 6 calendar months before an election for the Provincial Parliament, the number of seats of the Provincial Parliament must be determined by resolution of the House.
2. The determination referred to in subrule (1) must be based on the best available scientifically-based data regarding the Province's population at the time the resolution is made.
3. The determination referred to in subrule (1) must be communicated to the Electoral Commission.

Discussion on incorporating the formulaic approach in the text of the Provincial Constitution

[3 – 3]

Does proposal 1 ‘muddy the waters’, and is the proposal reasonably open to constitutional challenge?

- Incorporating the formulaic approach *in the text* of the Provincial Constitution risks ambiguity in respect of whom or what is *providing* for the legislative structures of the Provincial Parliament
- Is it the Provincial Constitution that is providing for the legislative structures, or is it, in fact, the House that is providing for the legislative structures?
- Where does one draw the line between *providing* for the number of seats and *determining* the number of seats?
- It is my view that proposal 1 correctly provides a system whereby the Provincial Constitution itself *provides* for the legislative structures of the Provincial Parliament in respect of the number of seats, whereas *the process of applying the formula to the facts* (hence, the process of *determining* the number of seats) is undertaken by the House
- Nevertheless, considering the significant constitutional certainty in respect of proposals 2 and 3, would one want to risk the potential ambiguity in proposal 1?
- In my view, proposal 1 involves a risk of constitutional challenge that is materially more significant than is the case with proposals 2 and 3
- This is important since proposals 2 and 3 can *also* give full effect to what is intended here – to increase the number of seats, but does so with virtually no concomitant legal risk
- If one follows the approach in proposal 2, one may provide for a formulaic approach in the rules and orders or, maybe, even in a policy document
- Hence, proposal 1 is not the recommended or preferred approach

Proposal 2

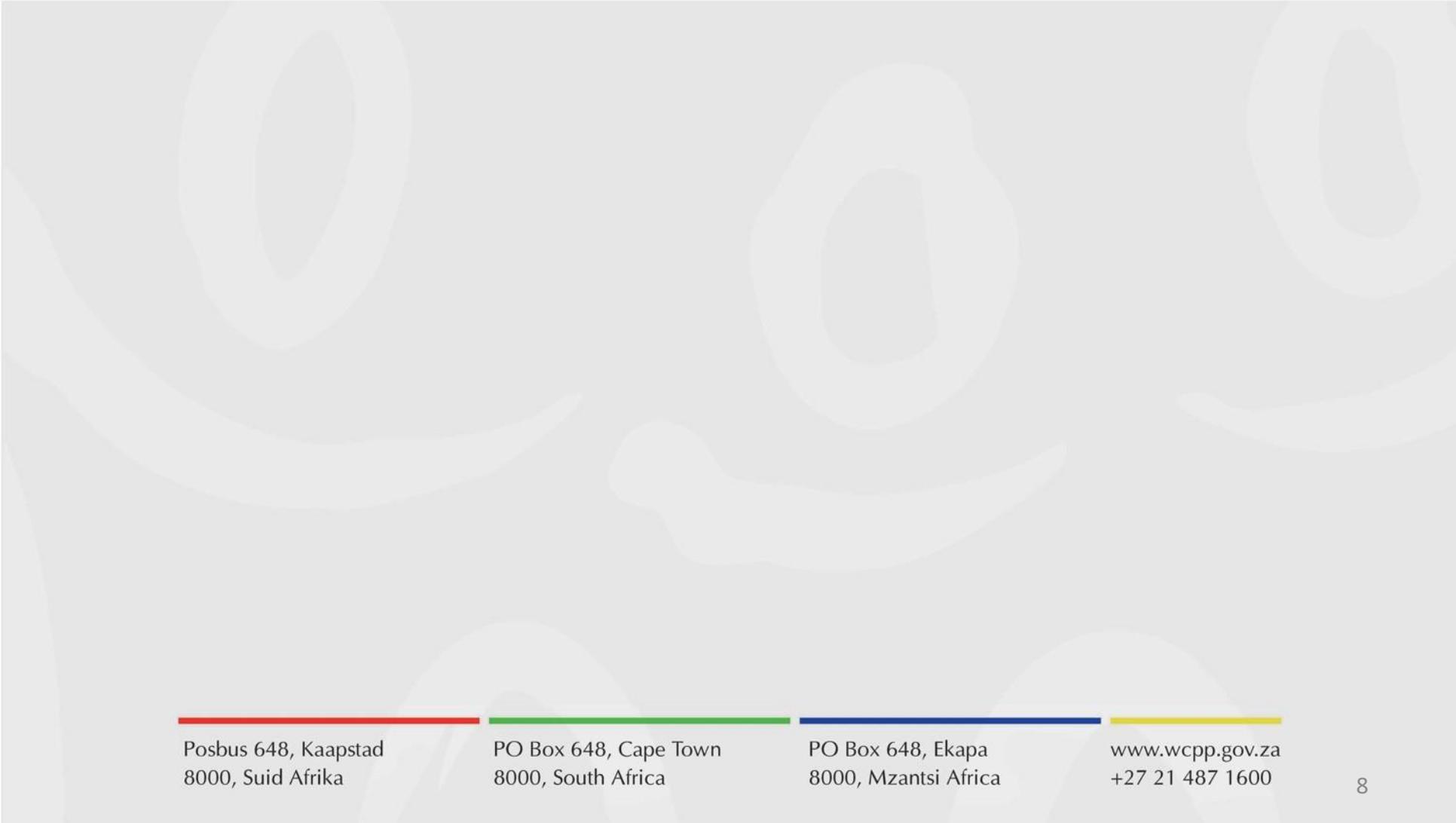
To substitute the number of seats in section 13 of the Provincial Constitution with an alternative number

Technical draft:	As amended:	Views:
<p>The Provincial Parliament consists of [42] <u>71</u> elected members.</p> <p>(Or such other number as decided on)</p>	<p>The Provincial Parliament consists of 71 elected members.</p>	<p>This approach is uncontroversial, and has already been judicially assessed and upheld by the Constitutional Court.</p> <p>See again, paragraphs 9 and 10 of the judgment.</p>

Proposal 3

To repeal section 13 of the Provincial Constitution

Technical draft:	As amended:	Views:
<p>Section 13 of the Constitution of the Western Cape, 1997 is hereby repealed.</p>	<p>Section 13 of the Constitution of the Western Cape, 1997 is hereby repealed.</p>	<p>This approach is uncontroversial, and has already been judicially assessed and upheld by the Constitutional Court (<i>obiter dictum</i>).</p> <p>See paragraph 14 of the judgment.</p>



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