

MEMORANDUM

for

MINISTER OF HOME AFFAIRS

on

ELECTORAL AMENDMENT BILL: PUBLIC COMMENTS ON REVISED BILL A-LIST (B1A-2022)

- 1 Our advice is sought by the Minister of Home Affairs.
- 2 In this brief memorandum we consider and address the revisions proposed in the A-List prepared by the National Assembly Portfolio Committee to revise the Electoral Amendment Bill.

REVISIONS TO BILL

- 3 The proposed revisions to the Bill demonstrate that there has been serious effort by the Portfolio Committee to consider the comments made by the public on the Bill, and of the proposals made by the Electoral Commission. The Portfolio Committee has itself debated the issues, and in the A-List has adopted substantial revisions to the Bill.

- 4 The most substantial revisions contained in the A-List are:
- 4.1 replacing the three-round system for the allocation of regional seats in the National Assembly and seats in the Provincial Legislatures, with a single-round system, where independent candidates who obtain votes in excess of two quotas forfeit such additional seat or seats and which are allocated with an amended quota (item 7 in Schedule 1A clause 11);
 - 4.2 introducing three ballot papers for use in National and Provincial Elections – one ballot for the regional seats in the National Assembly, one ballot for the compensatory seats in the National Assembly, and one ballot for the elections of each provisional legislature (item 13 in Schedule 1A clause 11);
 - 4.3 making provision to fill vacancies in seats allocated to independent candidates (item 22 in Schedule 1A in clause 11);
 - 4.4 permitting independent candidates to contest more than one region provided that where they receive more than one the region where they receive the most votes is the seat awarded to the candidate (items 3(4)(b) and 5(g)); and
 - 4.5 specifying that an independent candidate requires the signatures of voters totalling at least thirty percent of the quota for a seat that was required for a seat in the previous comparable election, to be eligible to contest an election (clause 4(3)(a)) – in the first version of the Bill, this was left to the Commission.

5 We address each in turn.

NEW SYSTEM FOR ALLOCATION OF SEATS

6 In our view, replacing the three-round system for allocating seats in favour of a single-round system is to be commended.

7 First, the three-round system created the following problem as the public comments pointed out.

7.1 In the three-round system independent candidates would have been allocated seats in the first-two rounds, and political parties in the third round.

7.2 After the first two rounds, all the votes for independent candidates would have been removed.

7.3 The upshot was the quota required for political parties to obtain a seat would have been *lower* than what independent candidates were required for the same seat.

7.4 This issue of an apparent unequal playing field, has been resolved as all political parties and independent candidates contest for the same quote in the system contained in the A-List.

8 Second, the single-round system contained in the A-List is simpler to apply and easier to understand than the three-round system. Simplicity in the electoral system promotes the rule of law.

THREE BALLOTS

- 9 The introduction of three ballots in our view promotes voters' rights to participate in elections and to make political choices.
- 10 This is because voters will be entitled to vote for both an independent candidate for the regional seats *and* for a political party at the same time for the compensatory seats.
- 11 The A-List therefore departs from the arguable dichotomy that the first version of the Bill created. Voters can thus vote for both the regional and compensatory seats. The system will at the same time permit independent candidates to contest the National Assembly.

VACANCIES

- 12 Many public comments were directed at the provision which dealt with the filling of vacancies.
 - 12.1 In respect of seats allocated to political parties, vacancies would be filled by the parties' lists as it currently is.
 - 12.2 The first version of the Bill proposed that vacancies in seats of independent candidates should be filled only at the next election. Holding by-elections would not be workable or financially feasible across an entire region or province whenever a vacancy arises.

- 13 The A-List proposes that the votes from the previous election will be used to fill the vacancy as follows:
- 13.1 the votes and seat allocated to the independent candidate causing the vacancy will be disregarded;
 - 13.2 the votes and seats allocated to the independent candidates already in office will be disregarded;
 - 13.3 the result for the region or provincial legislature would be recalculated, respectively;
 - 13.4 the vacant seat would be awarded to an eligible independent candidate or party that contested the preceding election.
- 14 This addresses the concerns that were raised in the public participation process that section 47(4) of the Constitution – that provides: “*Vacancies in the National Assembly must be filled in terms of national legislation*” – requires the vacated seat to be filled, even before the next general election.
- 15 While it is true that a seat allocated to an independent candidate that is vacated could be allocated to a political party and not another independent candidate, that is the system that best reflects the will of the voters. If, for example, the seat were to go to the next eligible independent candidate, that could in theory be a candidate who only received one or two votes, instead of a party that receive many thousands. That would evidently not fulfil the requirements of proportionality.

INDEPENDENT CANDIDATES CONTESTING MORE THAN ONE REGION

- 16 The Portfolio Committee proposed to enact a system which provides that independent candidates may participate in more than one region for election in the National Assembly.
- 17 We have previously advised that such a system would be constitutionally compliant.
- 18 We wish to note the following.
- 18.1 The A-List provides that *“If the same independent candidate receives a seat in more than one region, the candidate is awarded the seat in the region where he or she received the most votes”*.
- 18.2 We fully support the inclusion of a rule which governs the seat that would be allocated to an independent candidate in the event that they receive a seat in more than one region. It would be patently inappropriate to leave that to the individual discretion of the candidate.
- 18.3 In our view consideration should however be given to stating that the candidate would be awarded the seat in the region where he or she received the highest proportion of votes, rather than the greatest number of votes *per se*.
- 18.3.1 This is because in some regions a candidate may received a large number of votes, but proportionally receive lesser

support (in regions with larger populations, like Gauteng or KwaZulu-Natal).

18.3.2 In other regions with smaller populations (like the Northern Cape) the candidate may received fewer votes numerically, but a larger proportion of support from the electorate.

18.4 In our view, a rule that awards the seat with the greater proportion of votes better gives effect to the voice of the voters.

THE SIGNATURE REQUIREMENT

19 The Portfolio Committee has proposing that Parliament should 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, and has landed on 30%.

20 In principle, we repeat that we are of the view that using a formula would be a rational approach.

21 However, 30% appears to us to be too high.

22 The previous quota for a seat in the National Assembly was approximately 44 000.¹

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>.

23 Assuming that a similar quota would occur in future, it would require an independent candidate to demonstrate the support of 14 667 voters in order to contest an election.

24 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.

25 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.

26 By contrast in respect of political parties:

26.1 Section 15(3)(a) of the Electoral Commission Act 51 of 1996 provides that a political party's application for registration for purposes of contesting all elections "*shall be accompanied by ... that party's deed of foundation which has been adopted at a meeting of, and has been signed by the prescribed number of persons who are qualified voters*";

26.2 The Commission is empowered to prescribe the number concerned.

26.3 The relevant regulation currently provides:²

“The deed of foundation referred to in section 15 of the Act must be signed by—

² Regulation 3(1)(a) of GNR.13 of 7 January 2004: Regulations for the Registration of Political Parties (as amended).

- (i) 1, 000 registered voters for an application in respect of the entire Republic;
- (ii) 500 registered voters for an application in respect of a particular province; and
- (iii) 300 registered voters for an application in respect of a particular district or metropolitan municipality.”

26.4 Accordingly, political parties require less than 10% of the number of signatures to register than independent candidates would require to contest a single region in an election.

27 We continue to be of the view that this is an issue that is best left for the Commission to prescribe.

CONCLUSION

28 We have advised the State Attorney and Director-General that we are currently preparing a more detailed opinion concerning these issues, and others, which we hope to provide in the course of the week.

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26 September 2022