**Annexure A**

**Tagging of Bill**

1. Section 44[[1]](#footnote-1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), deals with the national legislative authority. Section 44(1) provides that the national legislative authority is vested in Parliament. The National Assembly has the power to amend the Constitution, to pass legislation with regard to any other matter, including a matter listed in Schedule 4 to the Constitution but excluding, subject to section 44(2) of the Constitution, a matter listed in Schedule 5 to the Constitution. The National Council of Provinces ("the NCOP") has the power to participate in the amendment of the Constitution, to pass legislation in accordance with section 75 and 76[[2]](#footnote-2) of the Constitution. Section 76(3) of the Constitution refers to the legislative procedure that must be followed when dealing with ordinary Bills affecting provinces. Section 76(3) provides that a Bill must be dealt with in accordance with the procedure established by either subsection (1) or (2) of section 76 if it falls within a functional area listed in Schedule 4 to the Constitution or provides for legislation envisaged in any of the sections mentioned in paragraphs (a) to (g) of section 76(3) of the Constitution. Schedule 4 to the Constitution lists the functional areas of national and provincial legislative competence[[3]](#footnote-3).

2.1 In **Tongoane and Others v Minister of Agriculture and Land Affairs and Others** 2010 (8) BCLR 741 (CC), the Constitutional Court gave guidance in respect of the classification of Bills. In this judgment the Constitutional Court dealt with the classifications of the Communal Land Rights Act, 2004 (Act No. 11 of 2004), and the procedure that had to be followed in enacting that Act.

2.2 The Constitutional Court confirmed and endorsed the test for tagging that was formulated in paragraph 28 in **Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill** 2000 (1) BCLR 1 (CC), where the Constitutional Court held that:

"(w)hatever the proper characterisation of the Bill … a large number of its provisions must be characterised as falling 'within a functional area listed in Schedule 4', more particularly the concurrent national and provincial legislative competences in regard to 'trade' and 'industrial promotion'." (emphasis added).

2.3 At paragraph 56 of the **Tongoane** judgment, Ngcobo CJ held that:

"the heading of section 76, namely, 'Ordinary Bills affecting provinces' provides 'a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4, be dealt with under section 76'." (footnote omitted and emphasis added).

2.4 At paragraph 58 of the **Tongoane** judgment, Ngcobo CJ furthermore held as follows:

"What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill 'in substantial measure fall within a functional area listed in Schedule 4' " (emphasis added).

2.5 The Constitutional Court also held that the tagging test focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 to the Constitution and not on whether any of the provisions of the Bill are incidental to the substance of the Bill. The process of tagging is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how the Bill must be considered by the provincial legislatures depends on whether the Bill affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content[[4]](#footnote-4).

3.1 The question is therefore whether the provisions of the Bill in "substantial measure" fall within a functional area listed in Schedule 4 to the Constitution. As indicated in the **Tongoane** judgment discussed above, the test for determining whether a Bill is an ordinary Bill affecting provinces requires that a Bill whose provisions to a substantive measure fall within a functional area listed in Schedule 4 to the Constitution must be dealt with under section 76 of the Constitution. In order to determine this, the focus must be on all the provisions of the Bill in order to determine the extent to which those provisions substantially affect functional areas listed in Schedule 4 to the Constitution.

3.2 The Bill addresses the impermissible constitutional limitations of sections 4*(b)* and 5*(b)* of the Drugs Act on the right to privacy of an adult person to use and possess cannabis or cultivate cannabis plants in private for personal use in private as per the Constitutional Court judgment in **Minister of Justice and Constitutional Development and Others v Prince**.[[5]](#footnote-5) It is submitted that none of the provisions of the Bill, as introduced in Parliament, fall within a functional area listed in Schedule 4 and the Bill must therefore be dealt with in accordance with the procedure set out in section 75 of the Constitution[[6]](#footnote-6).

1. "**National legislative authority**

   **44.** (1)  The national legislative authority as vested in Parliament—

   (a) confers on the National Assembly the power—

   (i) to amend the Constitution;

   (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

   (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

   (b) confers on the National Council of Provinces the power—

   (i) to participate in amending the Constitution in accordance with section 74;

   (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

   (iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

   (2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

   (a) to maintain national security;

   (b) to maintain economic unity;

   (c) to maintain essential national standards;

   (d) to establish minimum standards required for the rendering of services; or

   (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

   (3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

   (4)  When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution." [↑](#footnote-ref-1)
2. **Ordinary Bills affecting provinces**

   **76.** (1)  When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:

   (a) The Council must—

   (i) pass the Bill;

   (ii) pass an amended Bill; or

   (iii) reject the Bill.

   (b) If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.

   (c) If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.

   (d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on—

   (i) the Bill as passed by the Assembly;

   (ii) the amended Bill as passed by the Council; or

   (iii) another version of the Bill.

   (e) If the Mediation Committee is unable to agree within 30 days of the Bill’s referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.

   (f) If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if the Council passes the Bill, the Bill must be submitted to the President for assent.

   (g) If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.

   (h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent.

   (i) If a Bill referred to the Council in terms of paragraph ( f ) or (h) is not passed by the Council, the Bill lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members.

   (j) If a Bill referred to the Assembly in terms of paragraph (g) or (h) is not passed by the Assembly, that Bill lapses, but the Bill as originally passed by the Assembly may again be passed by the Assembly, but with a supporting vote of at least two thirds of its members.

   (k) A Bill passed by the Assembly in terms of paragraph (e), (i) or ( j) must be submitted to the President for assent.

   (2)  When the National Council of Provinces passes a Bill referred to in subsection (3), the Bill must be referred to the National Assembly and dealt with in accordance with the following procedure:

   (a) The Assembly must—

   (i) pass the Bill;

   (ii) pass an amended Bill; or

   (iii) reject the Bill.

   (b) A Bill passed by the Assembly in terms of paragraph (a) (i) must be submitted to the President for assent.

   (c) If the Assembly passes an amended Bill, the amended Bill must be referred to the Council, and if the Council passes the amended Bill, it must be submitted to the President for assent.

   (d) If the Assembly rejects the Bill, or if the Council refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill must be referred to the Mediation Committee, which may agree on—

   (i) the Bill as passed by the Council;

   (ii) the amended Bill as passed by the Assembly; or

   (iii) another version of the Bill.

   (e) If the Mediation Committee is unable to agree within 30 days of the Bill’s referral to it, the Bill lapses.

   (f) If the Mediation Committee agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.

   (g) If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.

   (h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Council and the Assembly, and if it is passed by the Council and the Assembly, it must be submitted to the President for assent.

   (i) If a Bill referred to the Assembly in terms of paragraph (f) or (h) is not passed by the Assembly, the Bill lapses.

   (3)  A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:

   (a) Section 65(2);

   (b) section 163;

   (c) section 182;

   (d) section 195(3) and (4);

   (e) section 196; and

   (f) section 197.

   (4) A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation—

   (a) envisaged in section 44 (2) or 220 (3); or

   (b) envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government.

   (5) A Bill envisaged in section 42 (6) must be dealt with in accordance with the procedure established by subsection (1), except that—

   (a) when the National Assembly votes on the Bill, the provisions of section 53 (1) do not apply; instead, the Bill may be passed only if a majority of the members of the Assembly vote in favour of it; and

   (b) if the Bill is referred to the Mediation Committee, the following rules apply:

   (i) If the National Assembly considers a Bill envisaged in subsection (1) (g) or (h), that Bill may be passed only if a majority of the members of the Assembly vote in favour of it.

   (ii) If the National Assembly considers or reconsiders a Bill envisaged in subsection (1) (e), (i) or ( j), that Bill may be passed only if at least two thirds of the members of the Assembly vote in favour of it.

   (6) This section does not apply to money Bills." [↑](#footnote-ref-2)
3. "**Schedule 4**

   **FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE**

   **PART A**

   Administration of indigenous forests

   Agriculture

   Airports other than international and national airports

   Animal control and diseases

   Casinos, racing, gambling and wagering, excluding lotteries and sports pools

   Consumer protection

   Cultural matters

   Disaster management

   Education at all levels, excluding tertiary education

   Environment

   Health services

   Housing

   Indigenous law and customary law, subject to Chapter 12 of the Constitution

   Industrial promotion

   Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence

   Media services directly controlled or provided by the provincial government, subject to section 192

   Nature conservation, excluding national parks, national botanical gardens and marine resources

   Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence

   Pollution control

   Population development

   Property transfer fees

   Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5

   Public transport

   Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law

   Regional planning and development

   Road traffic regulation

   Soil conservation

   Tourism

   Trade

   Traditional leadership, subject to Chapter 12 of the Constitution

   Urban and rural development

   Vehicle licensing

   Welfare services

   **PART B**

   The following local government matters to the extent set out in section 155 (6) (a) and (7):

   Air pollution

   Building regulations

   Child care facilities

   Electricity and gas reticulation

   Fire-fighting services

   Local tourism

   Municipal airports

   Municipal planning

   Municipal health services

   Municipal public transport

   Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law

   Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto

   Stormwater management systems in built-up areas

   Trading regulations

   Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems [↑](#footnote-ref-3)
4. Paragraphs 59 and 60 of the **Tongoane** judgment. [↑](#footnote-ref-4)
5. The Bill seeks to:

   "\* respect the right to privacy of an adult person to possess cannabis plant cultivation material; to cultivate a prescribed quantity of cannabis plants; to possess a prescribed quantity of cannabis; and to consume cannabis;

   \* regulate the possession of cannabis plant cultivation material; the cultivation of cannabis plants; the possession of cannabis; and the consumption of cannabis by an adult person;

   \* protect adults and children against the harms of cannabis;

   \* provide for the expungement of criminal records of persons convicted of possession or use of cannabis;

   \* delete and amend provisions of certain laws; and

   \* provide for matters connected therewith.". - Long title of the Bill [↑](#footnote-ref-5)
6. "**Ordinary Bills not affecting provinces**

   **75.** (1)  When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:

   (a) The Council must—

   (i) pass the Bill;

   (ii) pass the Bill subject to amendments proposed by it; or

   (iii) reject the Bill.

   (b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.

   (c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may—

   (i) pass the Bill again, either with or without amendments; or

   (ii) decide not to proceed with the Bill.

   (d) A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent.

   (2) When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead—

   (a) each delegate in a provincial delegation has one vote;

   (b) at least one third of the delegates must be present before a vote may be taken on the question; and

   (c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote.". [↑](#footnote-ref-6)