

# WESTERN CAPE PROVINCIAL PARLIAMENT



## Constitution of the Western Cape Amendment Bill (Determination of Number of Members) As Introduced

28 July 2023



# The legal requirements for changing the number of seats

## 1 - 4

- On 4 February 1997, the Constitution of the Republic of South Africa, 1996 (“the Constitution”), came into effect.
- Section 105(2) of the Constitution provides that:
  - “A provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation.”
- Section 143(1) of the Constitution provides that:
  - “A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for – (a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter...”
- On 17 March 1999, after a process of public consultation, the Electoral Commission determined the number of members to be allocated to each provincial legislature after the election in 1999.
- This determination was based on a formula in item 2 of Schedule 3 of the Electoral Act, 1998 (“the Electoral Act”), which provides:
  - “By taking into account available scientifically based data and representations by interested parties, the number of seats of a provincial legislature must be determined by awarding one seat for every 100 000 of the population whose ordinary place of residence is within that province, with a minimum of 30 and a maximum of 80 seats.”

# The legal requirements for changing the number of seats

2 - 4

- The Electoral Commission had authority to determine the number of members allocated to provincial legislatures until 31 March 1999.
- On 16 January 1998, the Western Cape's provincial constitution ("the Provincial Constitution") came into effect.
- Section 13 of the Provincial Constitution determines that:
  - "The Provincial Parliament consists of 42 elected members."
- At the time it was not clear whether the Electoral Commission's determination in terms of national legislation (39 members) or the determination of the Provincial Constitution (42 members) should prevail.

# The legal requirements for changing the number of seats

## 3 - 4

- This uncertainty was resolved by the Constitutional Court in *Premier of the Province of the Western Cape and Another v Electoral Commission and Another*, 1999 (11) BCLR 1209 (CC) (“the judgment”). The judgment (in paragraphs 8, 9 and 10) held that:
  - “The succinct legal issue in this case, therefore, is whether section 105(2) and the legislation passed pursuant thereto, has any application to the composition of a provincial legislature which is provided for in a provincial constitution.
  - “It does not. Section 143(1) permits provincial constitutions to provide for different legislative structures and procedures for provinces that choose to establish their own distinctive legislatures ... If a provincial constitution regulates the procedures and structures of a provincial legislature and in so doing does not violate section 143(2), then the provisions of chapter 6, including section 105(2), have no application to that province. One might loosely refer to these provisions of chapter 6 as default provisions: they provide the framework for provincial legislative and executive structures and procedures where none is provided for by a provincial constitution. If section 105(2) has no application, then neither does any legislation authorised pursuant thereto ...
  - “... Once a province has determined its own legislative structures in terms of section 143, such structures cannot be altered by national legislation ...”
- There are, therefore, two ways in which the number of members of a provincial legislature can be determined.
- Firstly, in accordance with a provincial constitution where that constitution makes provision for the structure of the provincial legislature and, secondly, in accordance with national legislation pursuant to section 105(2) of the Constitution for provinces that do not have provincial constitutions.

# The legal requirements for changing the number of seats

## 4 - 4

- On 27 August 2021, the Electoral Act was amended by the Electoral Laws Amendment Act, 2021 (“the amendment Act”).
  - The amendment Act amended Schedule 3 of the Electoral Act. Items 2 and 3 of Schedule 3 of the Electoral Act now reads as follows:
    - “2. Formula for determining number of members of provincial legislatures.–
      - By taking into account available scientifically based data and representations by interested parties, the number of seats of a provincial legislature must be determined by awarding one seat for every 100 000 of the population whose ordinary place of residence is within that province, with a minimum of 30 and a maximum of 80 seats.
    - 3. Commission responsible for determination of seats.–
      - (1) The determination of seats contemplated in items 1 and 2 must be completed by the Commission before every election and the Commission must publish such a determination in the prescribed manner.
      - (2) The Commission must give notice in the *Government Gazette* of the time and date on which, and the venue where, the determination is to take place, and must afford interested parties an opportunity to make representations before the determination is made.”
- Hence, for the 2024 general election, and thereafter, the number of members in the other provincial legislatures will be determined in this manner.
- Mindful of this, on 28 March 2023, the Provincial Parliament adopted recommendations by the Standing Committee on the Premier and Constitutional Matters that section 13 of the Constitution of the Western Cape, 1997, be amended to increase the number of members of the Provincial Parliament.

# Background and development of the Bill

1 - 5

- On the 28<sup>th</sup> of March 2023, the House resolved for the Provincial Constitution to be amended 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 of section 13.
- The House also resolved for the Speaker to be the member in charge of the constitutional amendment Bill.
- The resolution also included a proposed technical draft of the required amendment.

# Background and development of the Bill

## 2 - 5

- It was the purpose of these resolutions to give effect to findings by a parliamentary committee that–
  - ‘... the number of seats allocated to the Western Cape Provincial Parliament... is no longer adequate...’; and
  - ‘The current number of seats is not sufficient to represent the people of the Western Cape optimally as accountability is compromised...’
- On the 6<sup>th</sup> of April 2023, the Legal Support Unit submitted to the Secretary a proposal for a draft ‘Constitution of the Western Cape First Amendment Bill’.
- It was the objective of the proposed draft Bill to culminate in an amendment of section 13 of the Constitution of the Western Cape, 1997, which will increase the number of members of the Western Cape Provincial Parliament.
- This proposal included a project outline and detailed narrative in respect of steps necessary and timelines to be adhered to in order to finalise amendment of the provincial Constitution in time for the next general election.

# Background and development of the Bill

## 3 - 5

- Between the 21<sup>st</sup> of April 2023 and the 11<sup>th</sup> of May 2023, the parliamentary administration consulted on the draft Bill with the following key stakeholders:
  - The Director-General for the Province of the Western Cape;
  - The Provincial Treasury;
  - The Provincial Department of Infrastructure;
  - The Provincial Department of Police Oversight and Community Safety; and
  - The Electoral Commission of South Africa.
- The key stakeholders made verbal and/or written submissions. In large part, the submissions took note of the proposed draft Bill without making material inputs.
- As proposed in the project outline, the Bill had to be published in accordance with section 10 of the Constitution of the Western Cape, 1997.



# Background and development of the Bill

## 4 - 5

- On 18 May 2023, the Bill was submitted by registered post to all municipalities in the Western Cape.
- On 19 May 2023, the Bill was published in the Provincial Gazette.
- On 19 May 2023, the Bill was published in Die Burger and The Argus.
- On 25 May 2023, the Bill was published in Vukani.
- The Bill was also published on the legislature's website and social media.
- The closing date for public comment was the 27<sup>th</sup> of June 2023.
- One comment was received as a result of this process, to the effect that the formula employed in the first draft should be one of 1:140 000, rather than 1:100 000.

# Background and development of the Bill

5 - 5

- Since then, further comments were received from:
  - The Office of the Premier;
  - The Commission for Gender Equality;
  - Provincial Treasury; and
  - The parliamentary administration (from the Chief Financial Officer and Language Services)

# Amendments to the published Bill

## 1 - 2

The Bill (as introduced) differs from the Bill as published (in accordance with section 10 of the Provincial Constitution) in the following respects:

- The title was amended:
  - As to remove the word 'DRAFT';
  - So that the expression '(DETERMINATION OF NUMBER OF MEMBERS)' was added to avoid confusion between the Bill and the Constitution of the Western Cape First Amendment Bill that was introduced by the Premier a few years ago, which latter Bill is still formally with the legislature.
- The long title was amended to give effect to proposals by Language Services as follows: to add the expression 'amend the Constitution of the Western Cape, 1997, so as to', and to add the expression '; and matters connected therewith'.
- The short title and commencement was amended to give effect to proposals by Language Services as follows: to delete the word 'Bill' and replace it with 'Act'.

# Amendments to the published Bill

## 2 - 2

- To give effect to proposals by Language Services as follows: clause 1 is amended in the proposed section 13 by the removal of the word 'seat' and by replacing it with 'member' where those words occur. This is informed by adherence to the language used in section 105(2) of the Constitution of the Republic of South Africa, 1996 and section 13 of the Constitution of the Western Cape, 1997 (rather than the word 'seat' as used in the Electoral Act).
- The short title and commencement was further amended to provide for two distinct respects in which the Act will come into effect. Section 13(2) of the Constitution of the Western Cape, 1997 (as amended) must come into effect to empower the legislature to determine the number of members before the next general election, whereas section 13(1) only comes into effect after termination of term of this legislature.
- By the inclusion of paragraph 5 in the memorandum on the objects of the Bill to refer to publication of the Bill in accordance with section 10(2) of the Constitution of the Western Cape, 1997.

# Timelines

| Project Outline for Amending Section 13 of the Provincial Constitution: |  |           |   |
|---|--|-----------|---|
|   | Activity:  | Due date: | Period to Complete:                                   |
| 1   | Conclusion of first draft Bill   | Done      |   |
| 2   | Speaker's concurrence with the first draft Bill  | Done      |   |
| 3   | Consultation with stakeholders   | Done      |   |
| 4   | Consideration of comments received during consultation; publications required by section 10(2)   | Done      |   |
| 5   | Closing date for comments from section 10 publication  | Done      | 27-Jun-23   |
| 6   | Consideration of comments received during publication, and the making of further amendments before introduction; introduction of the Bill in a manner compliant with section 10(3) | Done      | The Bill was introduced on 10 July 2023               |
| 7   | Legislative process culminating in adoption in the House   | 17-Aug-23 | Six weeks from conclusion of preceding activity       |
| 8   | Finalisation of court papers, and referral to the Constitutional Court for certification   | 31-Aug-23 | Two weeks from conclusion of preceding activity       |
| 9   | Certification by the Constitutional Court; and referral to the Premier for assent  | 23-Nov-23 | Twelve weeks from conclusion of preceding activity    |
| 10  | Assent and publication   | 30-Nov-23 | One week from conclusion of preceding activity        |
| 11  | Determining the number of seats in anticipation of section 13(2) of the Provincial Constitution  | 14-Dec-23 | Two weeks from conclusion of preceding activity       |
| 12  | Correspond with the Electoral Commission on designation of the required number of representatives  | 15-Dec-23 | One working day from conclusion of preceding activity |

# The Bill (as introduced)

1 - 2

## CONSTITUTION OF THE WESTERN CAPE AMENDMENT BILL (DETERMINATION OF NUMBER OF MEMBERS), 2023

To amend the Constitution of the Western Cape, 1997, so as to provide for the number of members of the Provincial Parliament; and to provide for matters connected therewith.

**BE IT ENACTED** by the Provincial Parliament of the Western Cape, as follows:—

### **Substitution of section 13 of the Constitution of the Western Cape, 1997**

The following section is substituted for section 13 of the Constitution of the Western Cape, 1997:

“**[Composition] Number of members of the Provincial Parliament**

**13. (1)** The Provincial Parliament consists of **[42 elected members]** one member for every 100 000 of the population whose ordinary place of residence is within the Province, but may not exceed 80 members.

**(2)** The number of members of the Provincial Parliament must be determined in the manner provided for in its rules and orders.”

# The Bill (as introduced)

2 - 2

## Short title and commencement

1. This Act is called the Constitution of the Western Cape Amendment Act (Determination of Number of Members), 2023, and in respect of:–
  - (1) section 13(1) of the Constitution of the Western Cape, 1997, takes effect on the day before the first day of polling for the next Provincial Parliament;
  - (2) section 13(2) of the Constitution of the Western Cape, 1997, takes effect on publication in the *Government Gazette*.

# Explanatory note on the Bill

1 - 2

**Clause 1** substitutes section 13 of the Constitution of the Western Cape, 1997, to provide for—

- a formula for the determination of the number of members of the Provincial Parliament;
- an upper limit for the number of members of the Provincial Parliament; and
- a mechanism for the determination of the number of members of the Provincial Parliament.



# Explanatory note on the Bill

2 - 2

**Clause 2** provides for the short title of the Act and for commencement of the Act.

- Commencement of section 13(1) of the Constitution of the Western Cape, 1997 is linked to section 108(4) of the Constitution that provides that:
- “A provincial legislature remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next legislature”.
- Commencement of section 13(2) of the Constitution of the Western Cape, 1997 precedes commencement of section 13(1) since the determined number of members must be communicated to the Electoral Commission before the next general election.

# Consultation in the memorandum

The Provincial Parliament consulted internally:

- By establishing an ad-hoc committee titled Ad-hoc Committee: WCPP Seats, which committee consisted of representatives of all political parties represented in the Provincial Parliament, and which committee further made recommendations to the House regarding the review of the number of members of the Provincial Parliament; and
- Through its Standing Committee on the Premier and Constitutional Matters, which committee made recommendations to the House regarding the review of the number of members of the Provincial Parliament.

The Provincial Parliament consulted further with:

- Its parliamentary administration;
- The Director-General for the Province of the Western Cape;
- The Provincial Treasury;
- The Provincial Department of Infrastructure;
- The Provincial Department of Police Oversight and Community Safety; and
- The Electoral Commission of South Africa.

# Public involvement in the memorandum

In accordance with section 10(2) of the Constitution of the Western Cape, 1997:

- The Bill and memorandum on the objects of the Bill was published in the Provincial Gazette on the 19<sup>th</sup> of May 2023;
- The Bill was published in Die Burger and Cape Argus on the 19<sup>th</sup> of May 2023;
- The Bill was published in Vukani on the 25<sup>th</sup> of May 2023. The Bill was also published on the Provincial Parliament's website and social media.
- The closing date for comment was the 27<sup>th</sup> of June 2023.
- One member of the public commented.

# Financial implications in the memorandum

- The Provincial Parliament will incur costs for legal representation in the Constitutional Court in respect of certification of the Bill.
- The Bill will have financial implications in respect of:
  - the total remuneration for members;
  - accommodation for members;
  - allowances to political parties;
  - enabling allowances to members;
  - support by the parliamentary administration; and
  - operational expenditure related to the work of members.
- The Provincial Parliament will be responsible to carry the costs of implementing the legislation.

# Details on financial implications

1 - 3

| <u>MTEF costs (for additional 30 Members) (Annexure B) 1:100 000</u> |                |                |                |
|--|----------------|----------------|----------------|
| Costing detail   | 2024/25        | 2025/26        | 2026/27        |
| 1. Remuneration  | R41 737 153,50 | R43 824 011,18 | R46 015 211,73 |
| 2. Parliamentary Work (Political Party Enablement)                   | R39 184 677,00 | R41 143 910,85 | R43 201 106,39 |
| 3. Members' Enabling   | R5 769 067,50  | R6 057 520,88  | R6 360 396,92  |
| 4. Administration costs  | R8 988 023,75  | R1 195 893,75  | R1 195 893,75  |
|  | R95 678 921,75 | R92 221 336,65 | R96 772 608,80 |
|  |                |                |                |
|  |                |                |                |
| <u>MTEF costs (for additional 6 Members) (Annexure B) 1:150 000</u>  |                |                |                |
| Costing detail   | 2024/25        | 2025/26        | 2026/27        |
| 1. Remuneration  | R8 347 430,70  | R8 764 802,24  | R9 203 042,35  |
| 2. Parliamentary Work (Political Party Enablement)                   | R7 836 935,40  | R8 228 782,17  | R8 640 221,28  |
| 3. Members' Enabling   | R1 153 813,50  | R1 211 504,18  | R1 272 079,38  |
| 4. Administration costs  | R4 768 004,75  | R913 578,75    | R913 578,75    |
|  | R22 106 184,35 | R19 118 667,33 | R20 028 921,76 |
|  |                |                |                |
|  |                |                |                |

# Details on financial implications

2 - 3

| <b><u>MTEF costs (for additional 9 Members) (Annexure B) 1:140 000</u></b>  |                |                |                |
|---|----------------|----------------|----------------|
| Costing detail  | 2024/25        | 2025/26        | 2026/27        |
| 1. Remuneration   | R12 521 146,05 | R13 147 203,35 | R13 804 563,52 |
| 2. Parliamentary Work (Political Party Enablement)                          | R11 755 403,10 | R12 343 173,26 | R12 960 331,92 |
| 3. Members' Enabling  | R1 730 720,25  | R1 817 256,26  | R1 908 119,08  |
| 4. Administration costs   | R5 295 507,13  | R948 868,13    | R948 868,13    |
|   | R31 302 776,53 | R28 256 501,00 | R29 621 882,64 |
|   |                |                |                |
|   |                |                |                |
| <b><u>MTEF costs (for additional 13 Members) (Annexure B) 1:130 000</u></b> |                |                |                |
| Costing detail  | 2024/25        | 2025/26        | 2026/27        |
| 1. Remuneration   | R18 086 099,85 | R18 990 404,84 | R19 939 925,08 |
| 2. Parliamentary Work (Political Party Enablement)                          | R16 980 026,70 | R17 829 028,04 | R18 720 479,44 |
| 3. Members' Enabling  | R2 499 929,25  | R2 624 925,71  | R2 756 172,00  |
| 4. Administration costs   | R5 998 843,63  | R995 920,63    | R995 920,63    |
|   | R43 564 899,43 | R40 440 279,22 | R42 412 497,14 |
|   |                |                |                |
|   |                |                |                |

# Details on financial implications

3 - 3

| <b><u>MTEF costs (for additional 18 Members) (Annexure B) 1:120 000</u></b>  |                |                |                |
|--|----------------|----------------|----------------|
| Costing detail   | 2024/25        | 2025/26        | 2026/27        |
| 1. Remuneration  | R25 042 292,10 | R26 294 406,71 | R27 609 127,04 |
| 2. Parliamentary Work (Political Party Enablement)                           | R23 510 806,20 | R24 686 346,51 | R25 920 663,84 |
| 3. Members' Enabling   | R3 461 440,50  | R3 634 512,53  | R3 816 238,15  |
| 4. Administration costs  | R6 878 014,25  | R1 054 736,25  | R1 054 736,25  |
|  | R58 892 553,05 | R55 670 001,99 | R58 400 765,28 |
|  |                |                |                |
|  |                |                |                |
| <b><u>MTEF costs (for additional 23 Members) (Annexure B) 1: 110 000</u></b> |                |                |                |
| Costing detail   | 2024/25        | 2025/26        | 2026/27        |
| 1. Remuneration  | R31 998 484,35 | R33 598 408,57 | R35 278 329,00 |
| 2. Parliamentary Work (Political Party Enablement)                           | R30 041 585,70 | R31 543 664,99 | R33 120 848,23 |
| 3. Members' Enabling   | R4 422 951,75  | R4 644 099,34  | R4 876 304,30  |
| 4. Administration costs  | R7 757 184,88  | R1 113 551,88  | R1 113 551,88  |
|  | R74 220 206,68 | R70 899 724,77 | R74 389 033,41 |
|  |                |                |                |

# Proposed amendments to the rules

## **Number of members of the Provincial Parliament**

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.
2. The number of seats of the Provincial Parliament must be determined in the manner provided for in its rules and orders.

In respect of the proposed new subsection (2) of section 13, it is suggested that the following addition to the Standing Rules be made:

To insert a new rule 210, with consequent renumbering:

## **Determining the number of seats for each parliamentary term**

1. Subject to the provisions of section 13 of the Provincial Constitution, and by no later than one year 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 evidence regarding the Province's population at the time.
3. The determination referred to in subrule (1) must be communicated to the Electoral Commission.



