

REPUBLIC OF SOUTH AFRICA

ELECTORAL MATTERS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill and prior notice of its introduction published in Government Gazette No. 49836 of
7 December 2023)
(The English text is the official text of the Bill)*

(MINISTER OF HOME AFFAIRS)

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Political Party Funding Act, 2018, so as to provide for the regulation of the private and public funding of independent candidates and independent representatives and matters incidental thereto; to amend the title, long title and preamble; to insert and substitute definitions; to amend the names of the Funds; to preclude the Electoral Commission from accepting donations to the Multi-Party and Independents Democracy Fund which it has reason to believe is the proceeds of crime; to empower the Commission to invest money in the Funds in any bank registered in terms of the Banks Act, 1990; to proscribe the attachment of money in the Funds by certain persons; to provide for the right of political parties, independent candidates and independent representatives to refuse donations; to provide for prohibition on donations to a member of a political party; to amend the provisions relating to the accounting obligations of represented and unrepresented political parties; to provide for independent representatives and independent candidates to account for income; to provide for the offence of making a donation to a political party, a member of a political party, an independent candidate or an independent representative in the expectation that the party, member, candidate or representative will influence the award of benefits or relaxation of conditions; to provide for the offence of making a donation to a member of a political party to circumvent the provisions of Chapter 3; to provide for offences by a member of a political party of accepting a donation to circumvent the provisions of Chapter 3 or appropriating the donation for themselves; to amend the powers of the President to make regulations on certain matters; to amend Schedule 2 in respect of the formula for the allocation of money in the Funds on a proportional and equitable basis, in respect of the upper limit of donations and the disclosure limit for donations; and to amend the Electoral Act, 1998, the Electoral Commission Act, 1996, the Electronic Communications Act, 2005, and the Financial Management of Parliament and Provincial Legislatures Act, 2009, so as to make consequential amendments resulting from the introduction of independent candidates to contest elections of the National Assembly and provincial legislatures.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Substitution of long title of Act 6 of 2018

1. The following long title is hereby substituted for the long title of the Political Party Funding Act, 2018:

“To provide for, and regulate, public and private funding of political parties, independent candidates and independent representatives, in particular; the establishment and management of Funds to fund represented political parties”

and independent representatives sufficiently; to prohibit certain donations made directly to political parties, independent candidates and independent representatives; to regulate disclosure of donations accepted; to determine the duties of political parties, independent candidates and independent representatives in respect of funding; to provide for powers and duties of the Commission; to provide for administrative fines; to create offences and penalties; to repeal the Public Funding of Represented Political Parties Act, 1997, to provide for transitional matters; and to provide for related matters.” 5

Amendment of Preamble of Act 6 of 2018

2. The Preamble to the Political Party Funding Act, 2018, is hereby amended by the substitution of the sixth and seventh paragraphs of the following paragraphs: 10

- “AND WHEREAS section 44 of the Constitution affords Parliament legislative authority to pass legislation with regard to any matter, which would include to regulate public and private funding of political parties as well as the public and private funding of independent candidates and independent representatives; 15
AND WHEREAS effect is given to this by—
- establishing an additional fund to receive funding from private sources subject to certain restrictions;
 - prohibiting certain donations being made directly to political parties, independent candidates and independent representatives; and 20
 - providing for the disclosure of donations.”.

Amendment of section 1 of Act 6 of 2018

3. Section 1 of the Political Party Funding Act, 2018, is hereby amended—

- (a) by the insertion before the definition of “chief executive officer” of the following definition: 25
“**‘Banks Act’** means the Banks Act, 1990 (Act No. 94 of 1990);”;
- (b) by the substitution for the definition of “Funds” of the following definition:
“**‘Funds’** mean the *Multi-Party and Independents Democracy Fund* and the **[Represented] Political [Party] Representatives Fund**”; 30
- (c) by the insertion after the definition of “Funds” of the following definitions: 30
“**‘independent candidate’** includes any person nominated to contest or intending to contest an election for the National Assembly, provincial legislatures and municipal councils, who is not a member of or is not nominated by a political party;
‘independent representative’ means any person who is a member of the National Assembly or a provincial legislature who is not a member of or is not nominated by a political party;” 35
- (d) by the substitution for the definition of “Multi-Party Democracy Fund” of the following definition:
“**‘Multi-Party and Independents Democracy Fund’** means the Multi-Party and *Independents Democracy Fund* established in terms of section 3(1);” and 40
- (e) by the substitution for the definition of “Represented Political Party Fund” of the following definition:
“**‘[Represented] Political [Party] Representatives Fund’** means the **[Represented] Political [Party] Representatives Fund** established in terms of section 2(1);” 45

Amendment of section 2 of Act 6 of 2018

4. Section 2 of the Political Party Funding Act, 2018, is hereby amended—

- (a) by the substitution for the heading of the section of the following heading: 50
“**Establishment of [Represented] Political [Party] Representatives Fund**”; and
- (b) by the substitution for subsection (1) of the following subsection:
“(1) A **[Represented] Political [Party] Representatives Fund** is hereby established for the purpose of enhancing multi-party democracy by providing for the funding of represented political parties and independent representatives.”. 55

Amendment of section 3 of Act 6 of 2018

5. Section 3 of the Political Party Funding Act, 2018, is hereby amended—
- (a) by the substitution for the heading of the section of the following heading:
“Establishment of Multi-Party and Independents [Democracy] Fund”; 5
- (b) by the substitution for subsection (1) of the following subsection:
 “(1) A Multi-Party and Independents Democracy Fund is hereby established for the purpose of funding represented political parties and independent representatives from private sources.”; and
- (c) by the substitution for subsection (4) of the following subsection: 10
 “(4) The Commission may not accept money received in terms of subsection (3)(a) **[from any]**—
- (a) from any organ of state;
- (b) from any state owned enterprise; **[or]**
- (c) from any foreign government or foreign government agency[.]; or 15
- (d) which the Commission has reason to believe is the proceeds of crime.”.

Substitution of section 4 of Act 6 of 2018

6. The following section is hereby substituted for section 4 of the Political Party Funding Act, 2018: 20

“Investment of money in Funds

- 4.** (1) Any money in the Funds that is not required immediately for making an allocation to represented political parties or independent representatives in terms of section 6 may be invested with—
- (a) the Public Investment Corporation in terms of the Public Investment Corporation Act, 2004 (Act No. 23 of 2004); or 25
- (b) any bank registered as a bank in terms of the Banks Act.
- (2) The Commission may, with the approval of the Minister of Finance, carry forward any money standing to the credit of the Political Representatives Fund at the end of the financial year to the next financial year as a credit balance. 30
- (3) The Commission must carry forward any money standing to the credit of the Multi-Party and Independents Democracy Fund at the end of the financial year to the next financial year as a credit balance.”. 35

Substitution of section 6 of Act 6 of 2018

7. The following section is hereby substituted for section 6 of the Political Party Funding Act, 2018 :

“Allocation and payment of money to represented political [party] parties and independent representatives

- 6.** (1) The Commission may allocate money from the Funds to represented political parties and independent representatives only. 40
- (2) Any allocation from the Funds must be made to a represented political party or independent representative in accordance with the prescribed formula.
- (3) The formula prescribed in subsection (2) must be based on— 45
- (a) in part, an equitable allocation taking into account a weighted scale of representation for allocations to represented political parties and independent representatives; and
- (b) in part, a proportional allocation taking into account— 50
- (i) in the case of a political party, the relationship that the number of a represented political party’s representatives in the National Assembly and the provincial legislatures bears to the

- sum of the seats in the legislature concerned; and
- (ii) in the case of an independent representative, the relationship that the independent representative's seat bears to the sum of the seats in the National Assembly or provincial legislature concerned.
- (4) The Commission must apply the formula prescribed in subsection (2) taking into account the number of representatives of each represented political party and each independent representative and the number of seats in the respective legislatures based on the results of the election.
- (5) The Commission may not take into account any money carried forward in terms of section 13(1) when it determines the allocation of money to a represented political party or an independent representative.
- (6) Any allocation of money from the Funds—
- (a) to a represented political party ends when the party ceases to be a party with representation as contemplated in subsection (1); and
- (b) to an independent representative ends when the independent representative vacates his or her seat in the National Assembly or provincial legislature concerned.
- (7) The Commission must pay the allocated amounts to each of the represented political parties and independent representatives at prescribed intervals.”.

Insertion of section 6A in Act 6 of 2018

8. The following section is hereby inserted in the Political Party Funding Act, 2018, after section 6:

“Money in Funds may not be attached 25

6A. (1) Money in the Funds may not be attached by any creditor of any political party or independent representative.

(2) Section 179 of the Tax Administration Act, 2011 (Act No. 28 of 2011), does not apply to money held by the Commission in the Funds.”.

Amendment of section 7 of Act 6 of 2018 30

9. Section 7 of the Political Party Funding Act, 2018, is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
- “Subject to subsection (2), the money paid in terms of section 6(7) may be used by that represented political party or independent representative for any purpose compatible with [its] the functioning [as] of a political party or independent representative in a modern democracy including—”;
- (b) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
- “(b) bringing the political party's or independent representative's influence to bear on the shaping of public opinion;”;
- (c) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:
- “The money paid in terms of section 6(7) may not be used by [that] a represented political party—”;
- (d) by the addition after subsection (2) of the following subsection:
- “(3) The money paid in terms of section 6(7) may not be used by an independent representative—
- (a) for the purpose of directly or indirectly paying any remuneration, fee, reward, perquisite or other benefit to any person who is appointed by or in the service of the State and receives remuneration for that appointment or service;
- (b) to finance or contribute, whether directly or indirectly, to any matter, cause, event or occasion, in contravention of any code of

- ethics binding on the members of Parliament or members of a provincial legislature;
- (c) directly or indirectly for the purpose of establishing any business, or acquiring or maintaining any right of financial interest whatsoever in any business, or in any immovable property; and
- (d) for a purpose as may be prescribed: Provided that any money received from the Fund may not be used for personal use or to cover any costs related to any litigation against the political party or independent representatives.”.

Amendment of heading of Chapter 3 to Act 6 of 2018 10

10. The following heading is hereby substituted for the heading of Chapter 3 of the Political Party Funding Act, 2018:

“DIRECT FUNDING OF POLITICAL PARTIES, INDEPENDENT REPRESENTATIVES AND INDEPENDENT CANDIDATES”

Amendment of section 8 of Act 6 of 2018 15

11. Section 8 of the Political Party Funding Act, 2018, is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
“Political parties, independent representatives and independent candidates may not accept a donation from any of the following sources:”; 20
- (b) by the substitution for subsection (3) of the following subsection:
“(3) A political party, independent representative or independent candidate may not accept a donation that it knows or ought reasonably to have known, or suspected, originates from the proceeds of crime and must report that knowledge or suspicion to the Commission.”; and 25
- (c) by the substitution for subsection (4) of the following subsection:
“(4) Subject to subsection (5), nothing in subsection (1)(b) prevents a political party, independent representative or independent candidate from accepting donations from foreign entities for the purpose of—
 (a) training or skills development of a member of a political party or independent representative or independent candidate; or 30
 (b) policy development by a political party, independent representative or independent candidate.”.

Insertion of section 8A in Act 6 of 2018

12. The following section is hereby inserted after section 8 of the Political Party Funding Act, 2018: 35

“Right to refuse donation or allocation

8A. Political parties, independent candidates and independent representatives may, for any reason, refuse to accept a donation from any person or an allocation from the Multi-Party and Independent Democracy Fund.”. 40

Amendment of section 9 of Act 6 of 2018

13. Section 9 of the Funding Act, 2018, is hereby amended—

- (a) by the substitution for the heading of the section of the following heading:
“Disclosure of donations to political [party] parties, independent candidates and independent representatives”; 45
- (b) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
“A political party, independent representative or independent candidate must disclose to the Commission all donations received—”; and
- (c) by the substitution for subsection (2) of the following subsection: 50

“(2) A juristic person or entity that makes a donation to a political party, independent representative or independent candidate above the threshold prescribed in terms of subsection (1)(a) must disclose that donation to the Commission in the prescribed form and manner.”.

Substitution of section 10 of Act 6 of 2018

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14. The following section is hereby substituted for section 10 of the Political Party Funding Act, 2018:

“Prohibition on donation to member of political party

10. (1) No person or entity may make a donation to a political party or, a member of a political party, in the expectation that the party or member concerned will influence the awarding of a tender, licence, approval, consent or permission, or the relaxation of a condition or restriction in relation thereto, in the said person or entity’s favour. 10

(2) No person may make a donation to a member of a political party instead of the political party concerned, to circumvent the provisions of Chapter 3. 15

(3) No member of a political party may—
 (a) accept a donation to circumvent the provisions of Chapter 3; or
 (b) appropriate for himself or herself a donation intended to be made to his or her political party.”. 20

Substitution of heading of Chapter 4 to Act 6 of 2018

15. The following heading is hereby substituted for the heading of Chapter 4 of the Political Party Funding Act, 2018:

“DUTIES OF POLITICAL PARTIES, INDEPENDENT REPRESENTATIVES AND INDEPENDENT CANDIDATES” 25

Substitution of section 11 of Act 6 of 2018

16. The following section is hereby substituted for section 11 of the Political Party Funding Act, 2018:

Political party, independent representative and independent candidate to furnish information to Commission 30

11. In order for the Commission to monitor compliance with this Act, a political party, independent representative and independent candidate must, at the prescribed times, furnish the Commission with any information and documentation that is prescribed, or required in terms of a direction issued under section 15.”. 35

Amendment of section 12 of Act 6 of 2018

17. Section 12 of the Political Party Funding Act, 2018, is hereby amended—

(a) by the substitution in subsection (1) for paragraph (d) of the following paragraph:

“(d) if it is represented in the National Assembly or a provincial legislature, appoint an auditor registered and practising as such in terms of the Auditing Professions Act, 2005 (Act No. 26 of 2005), to audit its books and financial statements.”; 40

(b) by the deletion in subsection (2) of the word “and” at the end of paragraph (c);

(c) by the insertion in paragraph (d) of subsection (2) after subparagraph (i) of the word “and”; 45

(d) by the deletion in paragraph (d) of subsection (2) of subparagraph (iii);

(e) by the insertion in subsection (2) of the following paragraphs:

- “(e) if the political party is represented in the National Assembly or a provincial legislature, submit those statements and the books and records of account to an auditor appointed in terms of subsection (1)(d); and
- (f) if the political party is not represented in the National Assembly or a provincial legislature, submit those statements and the books and records of account together with a prescribed confirmation letter from its bank and affidavit confirming the correctness of their contents to the Commission in the prescribed form and within the prescribed period.”;
- (f) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:
 “On receipt of the statements, books and records contemplated in subsection (2)[(d)(iii)](e), the auditor must perform an audit of the financial statements and express an opinion on those statements—”;
- (g) by the substitution for subsection (4) of the following subsection:
 “(4) The accounting officer of a political party represented in the National Assembly or a provincial legislature must submit the auditor’s opinion and audited financial statements to the Commission within the prescribed period.”;
- (h) by the insertion after subsection (4) of the following subsection:
 “(4A) Where a political party that previously was not represented in the National Assembly or a provincial legislature, becomes represented after an election of the legislature concerned—
 (a) its accounting officer must submit the statements and the books and records of account contemplated in subsection (2)(c) and (d) for the previous two financial years to an auditor appointed in terms of subsection (1)(d);
 (b) the auditor must perform an audit of the financial statements and express an opinion on those statements in compliance with subsection (3); and
 (c) its accounting officer must submit the auditor’s opinion and audited financial statements to the Commission within the prescribed period.”; and
- (i) by the substitution for subsection (5) of the following subsection:
 “(5) The Auditor-General may at any reasonable time audit any represented political party’s books, records of account and financial statements relating to money allocated to the party from the Political Representatives Fund.”.

Insertion of section 12A in Act 6 of 2018

18. The following section is hereby inserted after section 12 of the Political Party Funding Act, 2018:

“Independent representative and independent candidate to account for income

- 12A.** (1) An independent representative must—
- (a) deposit all donations received into an account with a bank registered as a bank in terms of the Banks Act, in the independent representative’s name;
- (b) keep a separate account with a bank registered as a bank in terms of the Banks Act, into which all money allocated to him or her from the Funds must be deposited;
- (c) appoint an auditor registered and practising as such in terms of the Auditing Professions Act, 2005 (Act No. 26 of 2005), to audit his or her books and financial statements;
- (d) keep separate books and records of account, in the prescribed manner, in respect of money allocated from the Funds and all transactions involving that money; and
- (e) within the prescribed period—
 (i) prepare a financial statement showing all money received by the independent representative from the Funds during the

- previous financial year, the application of that money and the purposes for which the money has been applied;
- (ii) prepare a statement, in the prescribed form, showing all donations received during that financial year; and
 - (iii) submit those statements and the books and records of account to an auditor appointed in terms of paragraph (c). 5
- (2) On receipt of the statements, books and records contemplated in subsection (1)(e)(iii), the auditor must perform an audit of the financial statements and express an opinion on those statements—
- (a) indicating whether the donations received by the independent representative comply with section 8(1); 10
 - (b) listing the donations required to be disclosed in terms of section 9(1);
 - (c) listing the donations under the threshold prescribed in section 9(1);
 - (d) indicating whether the transactions in the financial statements related to the money allocated from the Funds are in accordance with this Act; 15
 - (e) indicating whether any income was received by the independent representative other than provided for in terms of this Act; and
 - (f) indicating whether any money lent to the independent representative is on commercial terms. 20
- (3) The independent representative must submit the auditor’s opinion and audited financial statements to the Commission within the prescribed period. 20
- (4) An independent candidate must—
- (a) deposit all donations received by him or her into a separate account with a bank registered as a bank in terms of the Banks Act, in the candidate’s name; and 25
 - (b) prepare a statement, in the prescribed manner, showing—
 - (i) all donations received by the candidate during the previous two financial years before his or her nomination of whatever form and into whatever account and after his or her nomination; and 30
 - (ii) any money lent to the independent candidate as well as the terms and conditions of such loan.
- (5) Where an independent representative first becomes a member of the National Assembly or a provincial legislature— 35
- (a) the independent representative must submit the statement contemplated in subsection (4)(b) to an auditor appointed in terms of subsection (1)(c);
 - (b) the auditor must perform an audit of the financial statements and express an opinion on those statements— 40
 - (i) indicating whether the donations received by the independent representative after his or her nomination comply with section 8(1);
 - (ii) listing the donations received after his or her nomination required to be disclosed in terms of section 9(1); 45
 - (iii) listing the donations received after his or her nomination under the threshold prescribed in section 9(1); and
 - (iv) indicating whether any money lent to the independent representative is on commercial terms.
 - (c) the independent representative must submit the auditor’s opinion and audited financial statements to the Commission within the prescribed period. 50
- (6) The Auditor-General may at any reasonable time audit any independent representative’s books, records of account and financial statements relating to money allocated to the independent representative from the Political Representatives Fund.” 55

Amendment of section 13 of Act 6 of 2018

19. Section 13 of the Political Party Funding Act, 2018, is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection: 60
 - “(1) Any money allocated from the Funds to a represented political party or independent representative that is unspent at the end of the

financial year must be shown as a credit balance carried forward to the next financial year in the—

- (a) account contemplated in section 12(1)(b) or section 12A(1)(b); and
- (b) books and records of account contemplated in section 12(2)(c) or section 12A(1)(d).”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) If Parliament or a provincial legislature is dissolved in terms of section 50 or section 109 of the Constitution respectively, or when the terms of these legislatures expire, a represented political party or independent representative to whom money has been allocated from the Funds and that fails to obtain representation in any legislature in the next election must—

- (a) within 21 days after that election—
 - (i) close [its] the books and records in respect of those Funds; and
 - (ii) repay to the Commission the unspent balance of the money allocated to that political party or independent representative;
- (b) within three months after that election, submit an audited financial statement of the books and records contemplated in paragraph (a)(i) to the Commission.”; and

(c) by the addition after subsection (2) of the following subsection:

“(3) If a vacancy occurs or a member of a political party or an independent candidate resigns from Parliament or a provincial legislature, a represented political party or independent representative to whom money has been allocated from the Funds, must—

- (a) within 21 days after that vacancy or resignation occurs—
 - (i) close the books and records in respect of those Funds; and
 - (ii) repay to the Commission the unspent balance of the money allocated to that political party or independent representative; and
- (b) within three months after resignation or after the vacancy occurs, submit an audited financial statement of the books and records contemplated in paragraph (a)(i) to the Commission.”.

Amendment of section 14 of Act 6 of 2018

20. Section 14 of the Political Party Funding Act, 2018, is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) The Commission must monitor compliance by political parties and independent candidates with this Act by, subject to subsection (2), evaluating the information and documentation provided by [political parties] any person in terms of this Act.”; and

(b) by the substitution for subsection (4) of the following subsection:

“(4) If a complaint relating to the income or expenditure of a political party or independent candidate is lodged with the Commission, it must, if the chief executive officer is of the view that there is *prima facie* substance to the complaint, investigate the complaint.”.

Amendment of section 15 of Act 6 of 2018

21. Section 15 of the Political Party Funding Act, 2018, is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) The Commission may issue a direction to a political party, independent representative or independent candidate in the prescribed manner in order to avoid imposing a sanction—

- (a) after affording that party, independent representative or independent candidate an opportunity to make representations; and
- (b) if it is of the opinion that the party, independent representative or independent candidate fails to comply with this Act.”; and

(b) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

“The direction contemplated in subsection (1) must indicate which of the following sanctions that the Commission may impose if the political

party, independent representative or independent candidate fails to comply with that direction.”.

Amendment of section 16 of Act 6 of 2018

22. Section 16 of the Political Party Funding Act, 2018, is hereby amended by the substitution in subsection (1) for paragraphs (a) and (b) of the following paragraphs: 5

- (a) may suspend the payment of money to a represented political party or independent representative envisaged in section 6(7) if it is satisfied on reasonable grounds that the represented political party or independent representative has failed to comply with this Act; and
- (b) must terminate the suspension contemplated in paragraph (a) if the Commission is satisfied that the suspension is no longer justified in the light of the represented political party’s or independent representative’s subsequent conduct.”. 10

Amendment of section 17 of Act 6 of 2018

23. Section 17 of the Political Party Funding Act, 2018, is hereby amended— 15

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
 - “A political party, independent representative or independent candidate is liable to pay to the Commission any money that is—”;
- (b) by the substitution in subsection (1) for paragraph (a) of the following paragraph: 20
 - (a) accepted in contravention of sections 8, 9(1), [or] 10 or 10A; or”;
- (c) by the substitution in subsection (2) for paragraph (b) of the following paragraph:
 - “(b) setting off the liability against any amount to be allocated to a represented political party or independent representative from the Funds.”; and
- (d) by the substitution for subsection (4) of the following subsection: 25
 - “(4) A represented political party or independent representative contemplated in subsection (1) may not share in any allocation of the paid back or recovered money.”. 30

Amendment of section 19 of Act 6 of 2018

24. Section 19 of the Political Party Funding Act, 2018, is hereby amended—

- (a) by the substitution in subsection (1) for paragraphs (a) and (b) of the following paragraphs: 35
 - “(a) sections 8, 9(1)[,] or 9(2) [or 10]; or
 - (b) sections 12(1), 12(2), 12(4) [or], 12(5), 12A(1), 12A(3), 12A(4), 12A(5)(a), 12A(5)(c) or 13(2).”;
- (b) by the addition after subsection (2) of the following subsections: 40
 - “(3) Any person who makes a donation to a political party, a member of a political party, an independent candidate or an independent representative in the expectation that the party, member, independent representative or candidate concerned will influence the awarding of a tender, licence, approval, consent or permission, or the relaxation of a condition or restriction in relation thereto, in the said person’s favour, commits an offence and may be sentenced to a fine not exceeding R200 000.00 or to imprisonment for a period not exceeding five years or both. 45
 - (4) Any person who makes a donation to a member of a political party instead of the political party concerned to circumvent the provisions of Chapter 3, commits an offence and may be sentenced to a fine not exceeding R200 000.00 or to imprisonment for a period not exceeding five years or both. 50
 - (5) Any member of a political party who— 55
 - (i) accepts a donation instead of his or her political party to circumvent the provisions of Chapter 3; or
 - (ii) appropriates for himself or herself a donation intended to be made to his or her political party,

commits an offence and may be sentenced to a fine not exceeding R200 000.00 or to imprisonment for a period not exceeding five years or both.”.

Amendment of section 22 of Act 6 of 2018

25. Section 22 of the Political Party Funding Act, 2018, is hereby amended—
- (a) by the substitution in paragraph (a) of subsection (1) for subparagraphs (ii) and (iii) of the following subparagraphs:
 - “(ii) the allocations made from the Funds to the represented political parties and independent representatives;
 - (iii) the amounts spent by each represented political party and independent representative in connection with the purpose under the prescribed categories and;”;
 - (b) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
 - “(b) report on all donations made to political parties, independent representatives and independent candidates in that year; and”.

Amendment of section 24 of Act 6 of 2018

26. Section 24 of the Political Party Funding Act, 2018, is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection:
 - “(1) (a) The President, [**acting on a resolution of the National Assembly**] after consultation with the relevant Portfolio Committee of the National Assembly and the Minister responsible for this Act, may by proclamation in the *Gazette* make regulations in respect of matters contemplated in sections 6(2), 7(2)(e), 7(3)(d), 8(2), 8(5) and 9(1)(a).
 - (b) When making regulations for matters contemplated in section 8(2) and (5), the President must take the following factors into account:
 - (i) The amount of money previously appropriated by Acts of Parliament for the Political Representatives Fund within the previous five financial years;
 - (ii) the effects of inflation on the value of money over time; and
 - (iii) the costs associated with participating as a political party, independent representative or independent candidate in elections and the democratic process in South Africa.”;
 - (b) by the addition after subsection (4) of the following subsection:
 - “(5) Each regulation in Schedule 2 is a transitional regulation and shall become inoperative on the date that a regulation replacing the said regulation made by the President in terms of subsection (1) becomes effective.”.

Amendment of section 25 of Act 6 of 2018

27. Section 25 of the Political Party Funding Act, 2018, is hereby amended by the substitution for subsection (4) of the following subsection:
 - “(4) Despite the definition of financial year in section 1, the first financial year of the Multi-Party and Independents Democracy Fund runs from the date on which this Act comes into operation until 31 March of the following year.”.

Substitution of short title of Act 6 of 2018

28. The following short title is hereby substituted for the short title and commencement of the Political Party Funding Act, 2018:
 - “(1) This Act is called the Political [**Party**] Funding Act, 2018, and subject to subsection (2), comes into operation on a date determined by the President by [**Proclamation**] proclamation in the *Gazette*.
 - (2) Section 6(7) only comes into effect in respect of the Multi-Party and Independents Democracy Fund on a prescribed date.”.

Amendment of Schedule 2 of Act 6 of 2018

29. Schedule 2 to the Political Party Funding Act, 2018, is hereby amended—

- (a) by the substitution in regulation 1 for the definition of “allocated moneys” of the following definition:

“**‘allocated moneys’**” means moneys allocated from the Funds to a represented political party or independent representative during a particular financial year;”

- (b) by the substitution in regulation 2 for subregulation (2) of the following subregulation:

“(2) The allocations from the Funds to be made and paid to each of the represented political parties and independent representatives concerned are calculated by—

(a) allocating [**two thirds**] 90 per cent of the total amount of funding determined in terms of subregulation (1) in respect of each of the Funds proportionally in accordance with regulation 3; and

(b) allocating [**one third**] 10 per cent of the total amount of funding determined in terms of subregulation (1) in respect of each of the Funds equitably in accordance with regulation 4.”;

- (c) by the substitution for regulation 3 of the following regulation:

“Proportional allocation 20

The proportional allocation is determined by dividing each of the amounts contemplated in regulation 2(2)(a) proportionally among the represented political parties and independent representatives in accordance with the number of seats awarded to each party and independent representative in the National Assembly and the provincial legislatures jointly.”;

- (d) by the substitution in regulation 4 for paragraph (b) of the following paragraph:

“(b) the allocation to a particular legislature in terms of paragraph (a) must be divided equally among the represented political parties and independent candidates in each of those legislatures.”;

- (e) by the substitution in regulation 5 for subregulations (1) and (2) of the following subregulations:

“(1) All allocations to which a represented political party or independent candidate is entitled as determined in terms of regulations 3 and 4, must be paid to the represented political party or independent candidate in question in four equal instalments, each within three months of the previous payment. The first instalment must be paid within four weeks of the beginning of the financial year in question.

(2) In the event of an election being called in terms of section 49(2) or 108(2) of the Constitution in respect of a particular legislature, any outstanding instalments still to be paid in terms of subregulation (1) to the represented political parties and independent candidates in that legislature during the period of 21 days referred to in section 13(2)(a) of the Act, must be suspended. The instalments so suspended must be distributed within two weeks after the date of election to the political parties and independent candidates that gain representation in the legislature concerned as a result of the election in accordance with the provisions of regulations 3 and 4, as the case may be.”;

- (f) by the addition in regulation 6 after subregulation (2) of the following subregulations:

“(3) An independent representative must provide the Commission with particulars of the independent representative’s banking account contemplated in section 12A(1)(b) of the Act, within two weeks of such a banking account being opened.

(4) Any payments to be made to an independent representative in terms of these regulations must be paid into the independent representative’s banking account contemplated in section 12A(1)(b) of the Act.”;

(g) by the substitution for regulation 7 of the following regulation:

“Upper limit of donations

7. (1) The President may, from time to time after a Parliamentary resolution and by notice in the *Gazette*, determine the amount contemplated in section 8(2) of the Act.

(2) In determining the amount referred to in subregulation (1), the President may consider the following:

(a) The actual fiscal contribution to public party funding;

(b) inflation; and

(c) the actual costs of running a party and running elections, as submitted by parties.”;

(h) by the substitution for regulation 9 of the following regulation:

“Disclosure limit

9. The President must, from time to time after a Parliamentary resolution and by notice in the *Gazette*, determine the threshold referred to in section 9(1)(a) of the Act.”;

(i) by the substitution in regulation 10 for the words preceding paragraph (a) of the following words:

“The separate books and records of account required by [section] sections 12(2)(c) and 12A(1)(d) of the Act must be kept according to generally recognised accepted accounting practices, and must include the following.”;

(j) by the substitution in subregulation (1) of regulation 11 for the words preceding paragraph (a) of the following words:

“ Financial statements prepared in relation to the Funds must show the amounts spent during a financial year in question by each represented political party and independent representative that received allocations in accordance with these regulations in connection with purposes classifiable under the following descriptive categories.”; and

(k) by the substitution in regulation 11 for subregulation (2) of the following subregulation:

(2) The information required for the purposes of subregulation (1) must be furnished to the Commission by the accounting officer of a political party referred to in section 12(1)(c) of the Act and by an independent representative within three months after the end of the financial year in question.”.

Amendment of section 1 of Act 73 of 1998, as amended by section 1 of Act 18 of 2013, section 7 of Act 4 of 2001 and section 1 of Act 1 of 2023

30. Section 1 of the Electoral Act, 1998, is hereby amended by the substitution for the definition of “serve” of the following definition:

“ ‘serve’ means to send by registered post, electronic mail, telegram, telex, telefax or to deliver by hand;”.

Amendment of section 24A of Act 73 of 1998, as inserted by section 7 of Act 34 of 2003 and as amended by section 9 of Act 4 of 2021

31. The following section is hereby substituted for section 24A of the Electoral Act, 1998:

“**24A.** A voter who is unable, on voting day, to cast his or her vote at the voting station in the voting district where he or she is registered may, in the prescribed manner, notify the chief electoral officer by no later than the relevant date stated in the election timetable of his or her intention to cast a vote in another specified voting district within the Republic on voting day: Provided that such voter may only vote in the election for the regional seats in the National Assembly in terms of Schedule 1A or for the provincial legislature if his or her name appears on a segment of the voters’ roll for the province in which that specified voting district is situated.”.

Amendment of section 33 of Act 73 of 1998, as amended by section 2 of Act 40 of 2003, section 9 of Act 34 of 2003, section 6 of Act 18 of 2013 and section 13 of Act 4 of 2021

32. Section 33 of the Electoral Act, 1998, is hereby amended by the substitution for subsection (5) of the following subsection: 5

“(5). **[For the purposes of Schedule 1A, votes cast in accordance with subsections (3) and (4) shall be counted as votes cast nationally.]** Persons contemplated in subsections (3), (4) or (4A) may only cast a vote for the election of the compensatory seats for the National Assembly in terms of Schedule 1A.”.

Amendment of section 1 of Act 51 of 1996, as amended by section 1 of Act 117 of 1998, section 1 of Act 4 of 2021 and section 6 of Act 22 of 2014 10

33. Section 1 of the Electoral Commission Act, 1996, is hereby amended—

(a) by the insertion after the definition of “Electoral Court” of the following definition:

“**‘independent candidate’** includes any person nominated to contest or intending to contest an election for the National Assembly and provincial legislatures and municipal councils, who is not a member of or is not nominated by a political party;”; and 15

(b) by the insertion after the definition of “Independent Commission” of the following definition: 20

“**‘independent representative’** means any person who is a member of the National Assembly or a provincial legislature who is not a member of or is not nominated by a political party;”.

Amendment of section 5 of Act 51 of 1996, as amended by section 1 of Act 1 of 2019

34. Section 5 of the Electoral Commission Act, 1996, is hereby amended by the substitution in subsection (1) for paragraph (g) for the following paragraph: 25

“(g) establish and maintain liaison and co-operation with parties and independent representatives and independent candidates;”.

Amendment of section 1 of Act 36 of 2005, as amended by section 1 of Act 1 of 2014 and section 1 of Act 37 of 2007 30

35. Section 1 of the Electronic Communications Act, 2005, is hereby amended—

(a) by the insertion after the definition of “ICT Charter” of the following definitions:

“**‘independent candidate’** means any person nominated to contest or intending to contest an election for the National Assembly and provincial legislatures, who is not a member of or is not nominated by a political party;”; 35

‘independent representative’ means any person who is a member of the National Assembly or a provincial legislature who is not a member of or is not nominated by a political party;”; 40

(b) by the substitution for the definition of “party election broadcast” of the following definition:

“**‘[party] election broadcast’** means a direct address or message broadcast free of charge on a broadcasting service and which is intended or calculated to advance the interests of any particular political party or independent candidate;”; 45

(c) by the reordering of the definition of “election broadcast” after the definition of “election”; and

(d) by the substitution for the definition of “political advertisement” of the following definition: 50

“**‘political advertisement’** means an advertisement broadcast on a broadcasting service which is intended or calculated to advance the interests of any particular political party or independent candidate, for which advertisement the relevant broadcasting service licensee has

received or is to receive, directly or indirectly, any money or other consideration;”.

Substitution of section 52 of Act 36 of 2005

36. The following section is hereby substituted for section 52 of the Electronic Communications Act, 2005: 5

“Prohibition on granting of broadcasting service licence to party-political entities, independent candidates and independent representatives”

52. No broadcasting service licence may be granted to—
 (a) any party, movement, organisation, body or alliance which is of a party-political nature; or 10
 (b) to any independent candidate or to any independent representative.”.

Substitution of section 56 of Act 36 of 2005

37. The following section is hereby substituted for section 56 of the Electronic Communications Act; 2005: 15

“Prohibition on broadcasting of [party] election broadcasts and political advertisements except in certain circumstances

“[A party] An election broadcast and a political advertisement must not be broadcast on any broadcasting service except during an election period and then only if, and to the extent authorised by the provisions of sections 57 and 58.”. 20

Substitution of section 57 of Act 36 of 2005

38. The following section is hereby substituted for section 57 of the Electronic Communications Act, 2005:

“Broadcasting of [party] election broadcasts on public broadcasting services 25

57. (1) Subject to the provisions of this section, a public broadcasting service licensee must permit [a party] an election broadcast only during an election period and then only if such a broadcast is produced on behalf of the political party or independent candidate in question at the instance of its or their duly authorised representative. 30

(2) The Authority must determine the time to be made available to political parties and independent candidates for the purposes of subsection (1), including the duration and scheduling of [party] election broadcasts, taking into account the financial and programming implications for the broadcasting services in question. 35

(3) The Authority must consult with the relevant public broadcasting service licensee and all the political parties and independent candidates nominated to contest the election concerned prior to making any determination in terms of subsection (2). 40

(4) In making any determination in terms of subsection (2), the Authority may impose such conditions on a public broadcasting service licensee with respect to [party] election broadcasts as it considers necessary, having due regard to the fundamental principle that all political parties and independent candidates are to be treated equitably. 45

(5) [A party] An election broadcast may not contain any material which may reasonably be anticipated to expose the broadcasting service licensee to legal liability if such material were to be broadcast.

(6) [A party] An election broadcast must conform to a technical quality acceptable to the Authority. 50

(7) No [party] election broadcast may be broadcast later than 48 hours prior to the commencement of the polling period.

(8) A commercial or community broadcasting service licensee is not required to broadcast [party] election broadcasts, but if he or she elects to do so, the preceding provisions of this section applies, with the necessary changes.”. 5

Amendment of section 58 of Act 36 of 2005

39. Section 58 of the Electronic Communications Act, 2005, is hereby amended—

(a) by the substitution for subsections (1), (2) and (3) of the following subsections: 10

“(1) A broadcasting service licensee is not required to broadcast a political advertisement, but if he or she elects to do so, he or she must afford all other political parties and independent candidates, should they so request, a like opportunity.

(2) A broadcasting service licensee may broadcast a political advertisement only during an election period and then only if it has been submitted to such licensee on behalf of a political party or independent candidate by its or their duly authorised representative. 15

(3) In making advertising time available to political parties and independent candidates, no broadcasting service licensee may discriminate against any political party or independent candidate, or make or give any preference to any political party or independent candidate, or subject any political party or independent candidate to any prejudice.”; and 20

(b) by the substitution for subsection (7) of the following subsection:

“(7) This section is subject to the provisions of any law relating to the expenditure of political parties and independent candidates during an election period.”. 25

Substitution of section 59 of Act 36 of 2005

40. The following section is hereby substituted for section 59 of the Electronic Communications Act, 2005: 30

“Equitable treatment of political parties and independent candidates by broadcasting service licensees during election period

59. (1) If during an election period, the coverage of any broadcasting service extends to the field of elections, political parties, independent candidates and issues relevant thereto, the broadcasting services licensee concerned must afford reasonable opportunities for the discussion of conflicting views and must treat all political parties and independent candidates equitably. 35

(2) In the event of any criticism against a political party or independent candidate being levelled in a particular programme of any broadcasting service— 40

(a) without such party or independent candidate having been afforded an opportunity to respond thereto in such programme; or

(b) without the view of such political party or independent candidate having been reflected therein, 45

the broadcasting services licensee concerned must afford such party or independent candidate a reasonable opportunity to respond to the criticism.

(3) If, within 48 hours before the commencement of the polling period or during the polling period, a broadcasting services licensee intends broadcasting a programme in which a particular political party or independent candidate is criticised, the licensee must ensure that the political party or independent candidate in question is given a reasonable opportunity to— 50

(a) respond thereto in the same programme; or

(b) respond thereto as soon as is reasonably practicable thereafter. 55

(4) Subsection (3) does not apply in relation to the contents of any [party] election broadcast in the circumstances contemplated in section 57

and any political advertisement in the circumstances contemplated in section 58.”.

Amendment of Arrangement of Sections

41. The Arrangement of Sections of the Electronic Communications Act, 2005, is hereby amended— 5

- (a) by the substitution for item 52 of the following item:
 - “52. Prohibition on granting of broadcasting service licence to party-political entities, independent candidates and independent representatives”;
- (b) by the substitution for item 56 of the following item: 10
 - “56. Prohibition on broadcasting of **[party]** election broadcasts and political advertisements except in certain circumstances”; and
- (c) by the substitution for item 59 of the following item:
 - “59. Equitable treatment of political parties and independent candidates by broadcasting service licensees during election period”. 15

Amendment of section 1 of Act 10 of 2009, as amended by section 3 of Act 34 of 2014

42. Section 1 of the Financial Management of Parliament and Provincial Legislatures Act, 2009, is hereby amended by the insertion after the definition of “fruitless and wasteful expenditure” of the following definition:

- “**‘independent representative’** means any person who is a member of the National Assembly or a provincial legislature who is not a member of or is not nominated by a political party;”. 20

Amendment of section 34 of Act 10 of 2009, as amended by section 13 of Act 34 of 2014

43. Section 34 of the Financial Management of Parliament and Provincial Legislatures Act, 2009, is hereby amended— 25

- (a) by the substitution for subsection (1) of the following subsection:
 - “(1) The Executive Authority must make regulations concerning the allocation and use of any funds provided by Parliament to political parties or to Members of Parliament who are nominated by political parties or who are independent representatives.” 30
- (b) by the substitution in subsection (2) for paragraph (a) the following paragraph:
 - “(a) the Speaker of the National Assembly must consult with the political parties represented and independent representatives in the National Assembly;” 35
- (c) by the substitution in subsection (3) for paragraph (g) of the following paragraph:
 - “(g) require parties and independent representatives to submit audited financial statements in the prescribed format to the Accounting Officer; and 40
- (d) by the substitution for subsection (5) of the following subsection:
 - “(5) Each party represented in the Assembly must be provided with financial and administrative assistance in proportion to its representation to enable it and its leader to perform their functions in Parliament effectively and each independent representative must be provided with financial and administrative assistance in proportion to their representation to enable them to perform their functions in Parliament effectively.” 45

Short title and commencement

44. (1) This Act is called the Electoral Matters Amendment Act, 2023, and takes effect on a date determined by the President by proclamation in the *Gazette*. 50

(2) Different dates may be determined by the President in respect of the taking effect of different provisions of this Act.

**MEMORANDUM ON THE OBJECTS OF THE
ELECTORAL MATTERS AMENDMENT BILL, 2023**

1. INTRODUCTION

- 1.1 The Constitutional Court in its judgment in *New Nation Movement NPC & others v President of the Republic of South Africa & others* [2020] ZACC 11, declared the Electoral Act, 1998 (Act No. 73 of 1998), unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and provincial legislatures only through their membership of political parties.
- 1.2 Parliament enacted the Electoral Amendment Act, 2023 (Act No. 1 of 2023), to provide that adult citizens may contest elections for the National Assembly and provincial legislatures as independent candidates.

2. PURPOSE OF THE BILL

- 2.1 The Electoral Matters Amendment Bill, 2023 (“the Bill”), makes consequential amendments, which arise from the introduction of independent candidates and independent representatives in the National Assembly and provincial legislatures, to the following statutes:
- (a) The Political Party Funding Act, 2018 (Act No. 6 of 2018) (the “Funding Act”);
 - (b) the Electoral Act, 1998 (Act No. 73 of 1998) (“the Electoral Act”);
 - (c) the Electoral Commission Act, 1996 (Act No. 51 of 1996) (“the Electoral Commission Act”);
 - (d) the Electronic Communications and Transactions Act, 2005 (Act No. 36 of 2005) (“the Electronic Communications and Transactions Act”); and
 - (e) the Financial Management of Parliament and Provincial Legislatures Act, 2009 (Act No. 10 of 2009) (“Financial Management of Parliament and Provincial Legislatures Act”).
- 2.2 The Bill also makes amendments to the Funding Act:
- (a) To amend the title, long title and preamble, and to insert and substitute definitions;
 - (b) to amend the names of the Funds;
 - (c) to preclude the Electoral Commission from accepting donations to the Multi-Party and Independents Democracy Fund which it has reason to believe is the proceeds of crime;
 - (d) to empower the Commission to invest money in the Funds in any bank registered in terms of the Banks Act, 1990;
 - (e) to proscribe the attachment of money in the Funds by certain persons;
 - (f) to provide for the right of political parties, independent candidates and independent representatives to refuse donations;
 - (g) to provide for the prohibition on donations to a member of a political party;
 - (h) to amend the provisions relating to the accounting obligations of represented and unrepresented political parties;
 - (i) to provide for the offence of making a donation to a political party, a member of a political party, an independent candidate or an independent representative in the expectation that the party, member, candidate or independent representative will influence the award or relaxation of benefits or conditions in accordance with the recommendations of the *Judicial Commission of Inquiry into Allegations of State Capture* (Judicial Commission of Inquiry into State Capture Report: Part VI Vol. 4: All the Recommendations — 10 October 2022);
 - (j) to provide for the offence of making a donation to a member of a political party to circumvent the provisions of Chapter 3;
 - (k) to provide for offences by a member of a political party of accepting a donation to circumvent the provisions of Chapter 3 or appropriating the donation for themselves;
 - (l) to amend the powers of the President to make regulations on certain matters; and

(m) to amend Schedule 2 in respect of the formula for the allocation of money in the Funds on a proportional and equitable basis, in respect of the upper limit of donations and the disclosure limit for donations.

3. SUMMARY OF THE BILL

- 3.1 Clauses 1 and 2 amend the long title and preamble of the Funding Act to reflect that it regulates the private and public funding of all participants in the political process — i.e. political parties, independent candidates and independent representatives.
- 3.2 Clause 3 substitutes and inserts various definitions in section 1 of the Funding Act in order to ensure that the Funding Act applies to political parties, independent candidates and independent representatives.
- 3.3 Clauses 4 and 5 substitute the names of the Funds in sections 2 and 3 of the Funding Act, respectively.
- 3.4 Clause 6 substitutes section 4 of the Funding Act, to empower the Electoral Commission to invest money in the Funds not immediately required for making an allocation, in any bank registered as a bank in terms of the Banks Act, 1990 (Act No. 94 of 1990), and provides in section 4 for the inclusion of independent candidates and independent representatives.
- 3.5 Clause 7 substitutes the provisions of section 6 of the Funding Act, pertaining to the allocation of money in the Funds to political parties and independent representatives, including the criteria for the prescribed formula for allocation of money in the Funds on a proportional and equitable basis.
- 3.6 Clause 8 inserts section 6A in the Funding Act to prohibit the attachment of money in the Funds by a creditor of any political party or independent representative, and to provide that section 179 of the Tax Administration Act, 2011 (Act No. 28 of 2011), does not apply to money in the Funds.
- 3.7 Clause 9 substitutes the provisions of section 7 of the Funding Act, in order to regulate the use of public money allocated to independent representatives.
- 3.8 Clause 10 substitutes the heading of Chapter 3 of the Funding Act, to provide for the inclusion of independent representatives and independent candidates.
- 3.9 Clause 11 amends the provisions of section 8 of the Funding Act, in order to prohibit certain direct donations to independent candidates and independent representatives.
- 3.10 Clause 12 inserts section 8A in the Funding Act, to provide for political parties, independent candidates and independent representatives to refuse donations.
- 3.11 Clause 13 amends section 9 of the Funding Act, to require independent candidates and independent representatives to disclose certain donations and to require those who make certain donations to independent candidates and independent representatives, to make disclosure thereof.
- 3.12 Clause 14 substitutes section 10 of the Funding Act, which absolutely proscribed all donations to members of political parties other than for party political purposes. In other words, section 10 of the Funding Act prohibited a member of a political party from receiving any donation in their private capacity for any reason whatsoever. Clause 24 inserts a new focused offence in section 19 of the Funding Act, which is the making of a donation to a member of a political party to circumvent the provisions of Chapter 3, i.e. the provisions which regulate the direct or private funding of political parties; and of a member of a political party accepting a donation to circumvent the provisions of Chapter 3 or of appropriating a donation meant for a political party.

- 3.13 Clause 15 substitutes the heading of Chapter 4 of the Funding Act, to include independent representatives and independent candidates.
- 3.14 Clause 16 substitutes section 11 of the Funding Act, to require independent representatives and independent candidates to furnish information and documentation to the Commission as prescribed or required.
- 3.15 Clause 17 substitutes section 12 of the Funding Act, to clarify the circumstances in which political parties must account for income and provides that only represented political parties must have their financial statements audited by a registered auditor.
- 3.16 Clause 18 inserts section 12A in the Funding Act, to regulate the duties of independent candidates and independent representatives to account for income.
- 3.17 Clause 19 amends section 13 of the Funding Act, to include independent representatives and to include reference to newly inserted sections. Clause 19 also provides for the insertion of subsection (3) in section 13 of the Funding Act, to provide for the process to be followed in respect of a vacancy occurring or the resignation of a member of a political party or independent candidate, to whom money from the fund was allocated.
- 3.18 Clause 20 amends section 14 of the Funding Act, to require the Commission to monitor compliance by independent candidates and independent representatives with the Funding Act.
- 3.19 Clause 21 amends section 15 of the Funding Act, to empower the Commission to issue directions to independent candidates and independent representatives.
- 3.20 Clause 22 amends section 16 of the Funding Act, to empower the Commission to suspend the payment of money to independent representatives under certain circumstances.
- 3.21 Clause 23 amends section 17 of the Funding Act, to empower the Commission to recover money from independent candidates and independent representatives under certain circumstances.
- 3.22 Clause 24 amends section 19 of the Funding Act, to—
- (i) introduce offences in respect of breaches of consequentially inserted and amended provisions regulating private and public funding of political parties, independent candidates and independent representatives;
 - (ii) introduce an offence by a person making a donation to a political party, a member of a political party, an independent candidate or an independent representative in the expectation that the party, member, representative or candidate concerned will influence the awarding of a tender, licence, approval, consent or permission, or the relaxation of a condition or restriction in relation thereto, in the said person's favour in accordance with the recommendations of the *Judicial Commission of Inquiry into Allegations of State Capture*; and
 - (iii) introduce offences by a member of a political party of accepting a donation to circumvent the provisions of Chapter 3, or appropriating the donation for themselves, so as to replace the absolute prohibition in section 10 of the Funding Act of members of political parties accepting donations in their private capacities.
- 3.23 Clause 25 amends section 22 of the Funding Act, to require the Commission to include information pertaining to the private and public funding by independent representatives and independent candidates.
- 3.24 Clause 26 amends section 24 of the Funding Act, to provide that the President may make regulations after consultation with the relevant Portfolio Committee of the National Assembly and the Minister responsible for the Funding

Act; to set out the factors that the President must take into account when making regulations for the matters contemplated in section 8(2) and (5) and section 9(1)(a) — i.e. the limits on what donations may be accepted by a political party, independent candidate or independent representative and the threshold above which donations must be disclosed to the Commission, and to make it clear that the regulations contained in Schedule 2 are transitional and become inoperative when the President makes a regulation replacing them.

- 3.25 Clause 27 amends section 25 of the Funding Act, in relation to the name of the Multi-Party and Independents Democracy Fund.
- 3.26 Clause 28 amends section 26 of the Funding Act, which provides for the short title and commencement.
- 3.27 Clause 29 amends Schedule 2 to the Funding Act, to include references to independent representatives where necessary; to amend the formula by which money in the Funds is allocated to represented political parties and independent representatives on a proportional and equitable basis; to amend the upper limit of donations; and to amend the disclosure threshold for donations.
- 3.28 Clause 30 amends the definition of “serve” in section 1 of the Electoral Act, to include electronic mail.
- 3.29 Clause 31 substitutes section 24A of the Electoral Act, to provide that a voter who is unable to cast their vote at a voting station in the district they are registered in, may only vote for the regional seats in the National Assembly if their name appears on the segment of the voters’ roll for the province in which the voting district is situated.
- 3.30 Clause 32 amends section 33 of the Electoral Act, to provide that persons contemplated in subsections (3), (4) or (4A) may only cast a vote for the election of the compensatory seats for the National Assembly in terms of Schedule 1A.
- 3.31 Clause 33 inserts definitions of “independent candidate” and “independent representative” in section 1 of the Electoral Commission Act.
- 3.32 Clause 34 amends section 5 of the Electoral Commission Act to specify that the Commission’s functions include establishing and maintaining liaison and co-operation with parties, independent candidates and independent representatives.
- 3.33 Clause 35 inserts definitions of “independent candidate” and “independent representative”, and substitutes other definitions in section 1 of the Electronic Communications Act.
- 3.34 Clauses 36 to 40 substitute sections 52, 56, 57, 58 and 59 the Electronic Communications Act, so as to include references to independent candidates and independent representatives, and to give effect to other technical and consequential amendments.
- 3.35 Clause 41 amends the arrangement of sections, specifically items 52, 56 and 59, of the Electronic Communications Act.
- 3.36 Clause 42 inserts a definition of “independent representative” in section 1 of the Financial Management of Parliament and Provincial Legislatures Act.
- 3.37 Clause 43 amends section 34 of the Financial Management of Parliament and Provincial Legislatures Act, to include a reference to “independent representatives”.

3.38 Clause 44 provides for the short title and commencement of the Act.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Department of Home Affairs consulted with the Electoral Commission concerning various consequential amendments to the relevant Acts.

5. FINANCIAL IMPLICATIONS FOR STATE

Most of the amendments proposed by this Bill relate to normal operations related to elections. For this reason, the financial implications thereof have already been taken into account within the baseline allocations related to the elections.

6. PARLIAMENTARY PROCEDURE

6.1 The Constitution of the Republic of South Africa, 1996 (“the Constitution”), prescribes the classification of Bills. The national legislative process regarding Bills is governed by sections 73 to 77 of the Constitution which prescribes the different procedures to be followed when enacting legislation. Four categories of Bills are distinguished: Bills amending the Constitution (section 74); ordinary Bills not affecting provinces (section 75); ordinary Bills affecting provinces (section 76); and money Bills (section 77). A Bill must be correctly tagged otherwise it is constitutionally invalid.

6.2 In the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) (the “Tongoane case”), the key issue concerned the proper classification of the Communal Land Rights Act, 2004 (Act No. 11 of 2004) (“CLARA”), which had been processed in terms of section 75. The test for tagging must be informed by its purpose and how the Bill must be considered by the provinces and in the National Council of Provinces. The more the Bill affects the interests, concerns and capabilities of the provinces, the more say the provinces should have on its content.

6.3 The legislative competence and the substance of the Bill must be considered when tagging a Bill. In the Tongoane case, the Constitutional Court stated that the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence. The Constitutional Court stated further that whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in section 76(3), and second by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence.

6.4 The test for tagging must be informed by its purpose and how the Bill must be considered by the provinces and in the National Council of Provinces. The more the Bill affects the interests, concerns and capabilities of the provinces, the more say the provinces should have on its content.

6.5 Furthermore, at paragraph 72 of the Tongoane case, it was stated as follows:

“To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in section 76 (3) (a)-(f), over which the provinces have no legislative competence, as well as Bills, the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f): and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence”. (emphasis added)

- 6.6 The Constitutional Court rejected the “pith and substance” test and endorsed the substantial measure test instead. Ngcobo CJ held as follows:

“[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill must be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislature depends on whether it 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.” (Our emphasis).

- 6.7 The court then examined the CLARA to determine the extent to which its provisions regulated “indigenous law” and “traditional leadership”, which are two areas listed in Schedule 4 to the Constitution. The Constitutional Court held that any Bill whose provisions substantially affect the interests of provinces must be tagged as a section 76 Bill. The CC held as follows:

“[69] The tagging of Bills before Parliament must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. The subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification.

“[70] To apply the “pith and substance” test to the tagging question, therefore, undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) requires to be enacted in accordance with the section 76 procedure. It does this because it focuses on the substance of a Bill and treats provisions which fall outside its main substance as merely incidental to it and consequently irrelevant to tagging. In so doing, it ignores the impact of those provisions on the provinces. To ignore this impact is to ignore the role of the provinces in the enactment of legislation substantially affecting them. Therefore the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence.”

- 6.8 The primary objective of the Bill is to amend the Political Party Funding Act to provide for the regulation of the private and public funding of independent candidates and independent representatives, and matters incidental thereto; to regulate the acceptance of donations; to provide for the investment of money in the Funds in any bank registered in terms of the Banks Act; to provide for the right of political parties, independent candidates and independent representatives to refuse donations; to amend the provisions relating to the accounting obligations of represented and unrepresented political parties; to provide for certain offences in respect of donations and related matters; to amend the powers of the President to make regulations on certain matters; to amend Schedule 2 in respect of the formula for the allocation of money in the Funds on a proportional and equitable basis, and to amend the Electoral Act, Electoral Commission Act, Electronic Communications Act, and the Financial Management of Parliament and Provincial Legislatures Act, so as to make consequential amendments resulting from the introduction of independent candidates to contest elections of the National Assembly and provincial legislatures.

- 6.9 The Department of Home Affairs and the State Law Advisers are of the opinion that the purpose and effect of the Bill does not in a substantial manner affect the interests, concerns and capacities of the provinces and the Bill should be tagged as a section 75 bill.
- 6.10 The Department and the State Law Advisers are also of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leadership in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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