

REPUBLIC OF SOUTH AFRICA

ELECTORAL AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary
of Bill and prior notice of its introduction published in Government Gazette No. 45716 of
31 December 2021)
(The English text is the official text of the Bill)*

(MINISTER OF HOME AFFAIRS)

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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 Electoral Act, 1998, so as to insert certain definitions consequential to the expansion of this Act to include independent candidates as contesters to elections in the National Assembly and provincial legislatures; to provide that registered parties must submit a declaration confirming that all its candidates are registered to vote in the region or province where an election will take place; to provide for the nomination of independent candidates to contest elections in the National Assembly or provincial legislatures; to provide for the requirements and qualifications which must be met by persons who wish to be registered as independent candidates; to provide the procedure to follow for a non-compliant nomination of an independent candidate; to provide for the inspection of copies of lists of independent candidates and accompanying documents; to provide for objections to independent candidates; to provide for the inclusion of a list of independent candidates entitled to contest elections; to provide that independent candidates are bound by the Electoral Code of Conduct; to provide for the return of a deposit to independent candidates in certain circumstances; to amend Schedule 1; to substitute Schedule 1A; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 73 of 1998, as amended by section 1 of Act 18 of 2013 and section 7 of Act 4 of 2021

1. Section 1 of the Electoral Act, 1998 (Act No. 73 of 1998) (hereinafter referred to as the “principal Act”), is hereby amended—

- (a) by the insertion after the definition of “agent” of the following definition:
 “**‘candidate’** means a person contesting an election, or a person nominated on a list of a political party contesting an election, as the context requires;”;
- (b) by the insertion after the definition of “Commission” of the following definition:
 “**‘Constitution’** means the Constitution of the Republic of South Africa, 1996;”;
- (c) by the insertion after the definition of “identity document” of the following definition:
 “**‘independent candidate’** means a person contesting an election and who is not nominated on a list of a political party;”;

- (d) by the insertion after the definition of “list of candidates” of the following definition:
 “**‘list of independent candidates’** means the list of independent candidates referred to in sections 31D and 31F;”;
- (e) by the insertion after the definition of “presiding officer” of the following definitions:
 “**‘province’** means a province referred to in section 103 of the Constitution;
 ‘region’ means the territorial area of a province;”.

Amendment of section 27 of Act 73 of 1998, as amended by section 10 of Act 4 of 2021

2. Section 27 of the principal Act is hereby amended by the insertion in subsection (2) of the following paragraph after paragraph (c):

“(cA) declaration, signed by each candidate appearing on the party’s regional list of candidates or provincial list of candidates referred to in Schedule 1A, confirming that he or she is registered to vote within the region or province in which the election will take place;”.

Amendment of section 28 of Act 73 of 1998, as amended by section 11 of Act 1 of 2019 and section 11 of Act 4 of 2021

3. Section 28 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections respectively:

“(1) If a registered party that has submitted a list of candidates has not fully complied with section 27(2)(a), (b), (cA), (d) or section 27(4), the chief electoral officer must notify that party of its non-compliance.

(2) The notification must be given in the prescribed manner by not later than the relevant date stated in the election timetable, and must indicate that the party has an opportunity to comply with section 27(2)(a), (b), (cA), (d) or section 27(4), by not later than the relevant date stated in the election timetable.”.

Insertion of Part 3A in Chapter 3 in Act 73 of 1998

4. The following Part is inserted in Chapter 3 of the principal Act after Part 3:

“Part 3A

Independent candidates

Nomination of independent candidate

31A. (1) A person may be nominated to contest an election as an independent candidate in a region for the National Assembly or for a provincial legislature if that person is—

- (a) ordinarily resident in the region or province concerned; and
 (b) registered as a voter on the segment of the voters’ roll for the region or province concerned.

(2) Provided the other provisions of this Act are complied with, a person nominated in terms of subsection (1) stands as an independent candidate in that election.

Requirements and qualifications for independent candidates to contest elections

31B. (1) A person may contest an election as an independent candidate only if that person is nominated on a prescribed form and that form is submitted to the Commission by not later than a date stated in the timetable for the election and complies with the requirements of subsection (3).

(2) The prescribed nomination form must be submitted in the prescribed manner by not later than the relevant date stated in the election timetable.

(3) The following must be attached to a nomination when it is submitted:

- (a) A completed prescribed form, with at least the prescribed minimum number of signatures of voters whose names appear on the segment of the voters' roll for the region or province in which the candidate is standing for election;
- (b) a deposit equal to a prescribed amount, if any, payable in the prescribed form and manner;
- (c) a prescribed undertaking, signed by the candidate, to be bound by the Code;
- (d) a prescribed declaration, signed by the candidate, that he or she is not disqualified from standing for election in terms of the Constitution or any applicable legislation;
- (e) a prescribed declaration, signed by the candidate, confirming that his or her residential address is situated within the region or province in which the election will take place that he or she intends contesting;
- (f) a prescribed declaration, signed by the candidate, confirming that he or she has not been a member of any political party for at least three months preceding the date of the nomination; and
- (g) a recent photograph of the candidate in such form as may be prescribed.

(4) The Commission may in the form and manner as may be prescribed request—

- (a) an acceptance of nomination signed by the candidate; and
- (b) a copy of the identity card or that page of the candidate's identity document on which the candidate's photo, name and identity number appear.

(5) The Commission must accept a nomination submitted to it and allow the nominated person to stand as a candidate in the election if the provisions of section 31A and this section have been complied with.

Non-compliance

31C. (1) If the nomination of an independent candidate does not fully comply with section 31B(3)(a), (c), (d), (e), (f), (g) or section 31B(4), the chief electoral officer must notify the nominated person of the non-compliance.

(2) The notification must be given in the prescribed manner by not later than the relevant date stated in the election timetable, and must indicate that the nominated person has an opportunity to comply with section 31B(3) (a), (c), (d), (e), (f), (g) or section 31B(4), by not later than the relevant date stated in the election timetable.

(3) If a person has been nominated both as an independent candidate and by one or more parties for an election—

- (a) the chief electoral officer must, where possible, in writing, notify the person and such party or parties who have nominated such person about such state of affairs by no later than the relevant date and time stated in the election timetable; and
- (b) the party or parties to whom notice has been given in terms of paragraph (a) may, by not later than the relevant date and time stated in the election timetable, substitute such a candidate.

Inspection of copies of lists of independent candidates and accompanying documents

31D. (1) By not later than the relevant date stated in the election timetable, the chief electoral officer must—

- (a) compile a draft list of independent candidates; and

- (b) give notice that copies of the draft list of independent candidates and accompanying documents submitted in terms of section 31B, as amended and supplemented in terms of section 31C, will be available for inspection.
- (2) The notice referred to in subsection (1)(b) must be—
- (a) published in the *Government Gazette*; and
- (b) publicised in the media considered appropriate by the chief electoral officer so as to ensure wide publicity of the lists.
- (3) The notice referred to in subsection (1)(b) must state, and the chief electoral officer must ensure, that for the relevant period stated in the election timetable—
- (a) copies of the lists for—
- (i) an election of the National Assembly, will be available for inspection at the Commission’s head office, a place in each province designated in the notice and the office of each municipality in the country; and
- (ii) an election of a provincial legislature, will be available for inspection at the Commission’s head office, a place in the province designated in the notice and the office of each municipality in that province; and
- (b) copies of the documents accompanying the lists are available for inspection at the Commission’s head office.
- (4) Any person may inspect a copy of the draft list of independent candidates and accompanying documents referred to in subsection (1).
- (5) The chief electoral officer must provide a certified copy of, or extract from, the draft list of independent candidates or document referred to in subsection (1), to any person who has paid the prescribed fee.

Objections to independent candidates

- 31E.** (1) Any person, including the chief electoral officer, may object to the nomination of an independent candidate on the following grounds:
- (a) The nominated candidate is not qualified to stand in the election;
- (b) the nominated candidate has failed to submit the prescribed acceptance of nomination signed by the candidate as contemplated in section 31B(4); or
- (c) there is no prescribed undertaking, signed by the nominated candidate, that the candidate is bound by the Code.
- (2) The objection must be made to the Commission in the prescribed manner by not later than the relevant date stated in the election timetable, and must be served on the nominated candidate.
- (3) The Commission must decide the objection, and must notify the objector and the nominated candidate of the decision in the prescribed manner by not later than the relevant date stated in the election timetable.
- (4) The objector, or the nominated candidate, may appeal against the decision of the Commission to the Electoral Court in the prescribed manner and by not later than the relevant date stated in the election timetable.
- (5) The Electoral Court must consider and decide the appeal and notify the parties to the appeal and the chief electoral officer of the decision in the prescribed manner and by not later than the relevant date stated in the election timetable.
- (6) If the Commission or the Electoral Court decides that a candidate’s nomination does not comply with section 31B, the Commission or the Electoral Court may allow the nominated candidate an opportunity to comply with that section.

List of independent candidates entitled to contest election

- 31F.** (1) By not later than the relevant date stated in the election timetable, the chief electoral officer must—

- (a) give effect to a decision of the Commission in terms of section 31E(3) and to a decision of the Electoral Court in terms of section 31E(5); and
- (b) compile a final list of independent candidates entitled to contest the election concerned. 5
- (2) The chief electoral officer must provide a certified copy of, or extract from, a list mentioned in subsection (1)(b) to any person who has paid the prescribed fee.
- (3) By not later than the relevant date stated in the election timetable, the chief electoral officer must issue to each independent candidate on the list of independent candidates for an election, a certificate stating that the person is an independent candidate in that election.” 10

Amendment of section 57A of Act 73 of 1998, as amended by section 15 of Act 34 of 2003

5. Section 57A of the principal Act is hereby amended— 15
- (a) by the substitution for paragraph (a) of the following paragraph:
“(a) lists of candidates and lists of independent candidates;” and
- (b) by the substitution for paragraph (c) of the following paragraph:
“(c) the designation of candidates from candidate lists and lists of independent candidates as representatives [in] for those seats; and” 20

Substitution of section 94 of Act 73 of 1998

6. The following section is hereby substituted for section 94 of the principal Act:

“Contravention of Code

94. No person, [or] registered party, or independent candidate bound by the Code may contravene or fail to comply with a provision of that Code.” 25

Amendment of section 99 of Act 73 of 1998, as amended by section 15 of Act 4 of 2021

7. Section 99 of the principal Act is hereby amended by the deletion in subsection (1) of the word “and” at the end of paragraph (a), the insertion of the word “and” at the end of paragraph (b), and the addition of the following paragraph: 30
- “(c) by every independent candidate before that independent candidate may be placed on a list of independent candidates in terms of section 31F.”

Amendment of section 106 of Act 73 of 1998 35

8. Section 106 of the principal Act is hereby amended—
- (a) by the insertion after subsection (1) of the following subsection:
“(1A) Subject to section 96(2)(c), the Commission must refund to an independent candidate any deposit paid by such candidate in terms of section 31B(3)(b) if the candidate is allocated a seat in the legislature whose election the independent candidate contested;” and 40
- (b) by the substitution for subsection (2) of the following subsection:
“(2) A deposit that is not refundable in terms of subsection (1) or (1A) is forfeited to the State.”

Amendment of section 110 of Act 73 of 1998 45

9. Section 110 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:
- “(1) Any mistake in the certified segment of the voters’ roll referred to in section 24, [or] the final list of candidates referred to in section 31, or the final list of independent candidates referred to in section 31F, does not invalidate that voters’ roll, [or] that list of candidates, or that list of independent candidates.” 50

Amendment of Schedule 1 of Act 73 of 1998, as amended by section 24 of Act 34 of 2003 and section 17 of Act 1 of 2019

10. Schedule 1 to the principal Act is hereby amended—

(a) by the substitution for item 4 of the following item:
“Cut-off date for submission of list of candidates and nominations of independent candidates 5

4. (1) Registered parties that intend to contest this election must nominate and submit a list of their candidates for the election to the chief electoral officer in the prescribed manner by [day/month/year]. 10

(2) Nominators of independent candidates that intend to contest this election must submit their nominations to the chief electoral officer in the prescribed manner by [day/month/year].”;

(b) by the substitution for subitem 5(1) of the following subitem:
“(1) The chief electoral officer must notify a registered party that has submitted a list of candidates in terms of section 27 but has not fully complied with **[that]** section 27(2)(a), (b), (c), (d) or section 27(4), of that non-compliance by [day/month/year].”;

(c) by the insertion after subitem 5(1) of the following subitem:
“(1A) The chief electoral officer must notify the person nominated to be an independent candidate, who has not fully complied with section 31B(3)(a), (c), (d), (e), (f), (g) or section 31B(4), of that non-compliance by [day/month/year].”;

(d) by the substitution for subitem 5(2) of the following subitem:
“(2) If the party or person notified **[party]** in terms of subitem (1) or (1A) takes the opportunity to comply with section 27(2) (a), (b), (c), (d), section 27(4), section 31B(3)(a), (c), (d), (e), (f), (g) or section 31B(4), that party or person must do so by [day/month/year].”;

(e) by the insertion after subitem 5A(1) of the following subitem: 30
“(1A) The Commission must notify—
(a) a person who has been nominated both as an independent candidate and by one or more parties for an election; and
(b) all the parties on whose party lists such a candidate appears, of the multiple nominations by [day/month/year].”; 35

(f) by the substitution for subitem 5A(2) of the following subitem:
“(2) If the notified party decides to act in terms of section 28(3) or section 31C(3), that party must do so by (date).”;

(g) by the substitution for item 6 with the following item:
“Inspection of lists of candidates and draft list of independent candidates and accompanying documents 40

6. The chief electoral officer must give notice by [day/month/year], that from the date of the notice until [day/month/year], copies of the following documents will be available for inspection: 45

(a) The lists of candidates and accompanying documents submitted by registered parties in terms of section 27, as amended and supplemented in terms of section 28[.]; and
(b) The draft list of independent candidates and accompanying documents submitted in terms of section 31B, as amended and supplemented in terms of section 31C. ”; 50

(h) by the substitution for item 8 of the following item:
“Decision of objections

8. The Commission must decide an objection under section 30 or section 31E, and must notify the objector, **[and]** the registered party that nominated the candidate, and the nominated independent candidate, if applicable, of the decision in the prescribed manner by [day/month/year].”; 55

(i) by the substitution for item 9 of the following item:

“Cut-off date for appeals against decisions

9. (1) The objector or the registered party who nominated the candidate may appeal against a decision of the Commission in terms of section ~~30(3)~~ 30(4) to the Electoral Court in the prescribed manner by [day/month/year]. 5

(2) The objector or the nominated independent candidate may appeal against a decision of the Commission in terms of section 31E(4) in the prescribed manner by [day/month/year].”;

(j) by the substitution for item 10 of the following item:

“Deciding appeals

10. The Electoral Court must consider and decide an appeal brought under section 30(4) or 31E(4) and notify the parties to the appeal, and the chief electoral officer, of the decision in the prescribed manner by [day/month/year].” 15

(k) by the substitution for item 11 of the following item:

“List of parties and candidates entitled to contest election and final list of candidates

11. By [day/month/year], the chief electoral officer—
(a) must give effect to a decision of the Commission in terms of section 30(3), section 31E(3), or a decision of the Electoral Court in terms of section 30(5) or section 31E(5); and 20
(b) must compile a list of the registered parties entitled to contest the election, **[and]** the final list of candidates for each of those parties, and the list of independent candidates contesting this election.”; 25
and

(l) by the substitution for item 12 of the following item:

“Issue of certificate to candidates

12. By [day/month/year], the chief electoral officer must issue in the prescribed manner to each candidate on a final list of candidates, and to each independent candidate on the final list of independent candidates, a certificate stating that the person is a candidate in this election in terms of sections 31(3) and section 31F(3).”. 30

Substitution of Schedule 1A of Act 73 of 1998, as inserted by section 25 of Act 34 of 2003 and amended by section 8 of Act 55 of 2008 35

11. Schedule 1A of the principal Act is hereby substituted for the following schedule:

“SCHEDULE 1A

SYSTEM OF REPRESENTATION IN NATIONAL ASSEMBLY AND PROVINCIAL LEGISLATURES

(Section 57A) 40

National Assembly

1. The seats in the National Assembly are allocated as follows:
(a) Half the seats are filled by independent candidates and candidates from lists of candidates of political parties contesting the nine regions and these shall be referred to as regional seats; and 45
(b) half the seats are filled by candidates from lists of candidates of political parties and these shall be referred to as compensatory seats.
2. The Commission must prepare a list of independent candidates contesting an election of the National Assembly in each region in accordance with this Act. 50

3. (1) Registered parties contesting an election of the National Assembly must nominate candidates on a list of candidates prepared in accordance with this Act.

(2) A party's list of candidates must consist of—

- (a) a regional list for each region; and
- (b) a national list,

with such number of names on each list as the party may determine subject to subitem (3).

(3) The lists of candidates submitted by a party must together not contain more names than the number of seats in the National Assembly, and each such list must denote the fixed order of preference of the names as the party may determine.

(4) The same name—

- (a) may appear on a list for one region and the national list of a party; and
- (b) may not appear on more than one regional list.

Regional seats

4. The Commission must determine a fixed number of seats reserved for each region for every election of the National Assembly, taking into account available scientifically based data in respect of voters and representations by interested parties.

5. The regional seats are allocated for each region in three separate rounds.

6. In the first round:

- (a) A quota of votes per seat is determined in respect of each region by dividing the total number of votes cast in a region by the total number of seats allocated to that region and the result, disregarding fractions is the first quota of votes per seat.
- (b) Each independent candidate who receives enough votes to meet the first quota is awarded a seat.

7. In the second round:

- (a) A second quota of votes is determined in each region by—
 - (i) disregarding the independent candidates who were allocated seats in the first round;
 - (ii) disregarding the votes cast for independent candidates who were allocated seats in the first round;
 - (iii) disregarding the number of seats allocated to independent candidates in the first round; and
 - (iv) dividing the remaining number of votes cast in a region by the remaining number of seats allocated to that region, and the result, disregarding fractions, is the second quota of votes per seat.
- (b) Each remaining independent candidate who receives enough votes to meet the second quota is awarded a seat.

8. In the third round:

- (a) A third quota of votes is determined in each region by—
 - (i) disregarding all independent candidates;
 - (ii) disregarding all votes cast for independent candidates;
 - (iii) disregarding the number of seats allocated to independent candidates in first and second rounds; and
 - (iv) dividing the remaining number of votes cast in a region, by the remaining number of seats allocated to that region, plus one, and the result plus one, disregarding fractions, is the third quota of votes per seat.
- (b) The number of seats to be awarded for the purposes of paragraph (d) in respect of such region to a political party, subject to paragraph (c), is determined by dividing the total number of votes cast in favour of such party in a region by the third quota of votes per seat indicated by paragraph (a) for that region.

- (c) Where the result of the calculation referred to in paragraph (b) yields a surplus of seats not absorbed by the number awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties in respect of the relevant region, and any seat or seats in respect of that region not awarded in terms of paragraph (b), is awarded to the party or parties concerned in sequence of the highest surplus. 5
- (d) The aggregate of a party's awards in terms of paragraphs (b) and (c) in respect of a particular region is that party's allocation of regional seats for that region. 10
- 9.** Regional seats are allocated to a party according to the party's regional lists for each region.
- 10.** (1) A party that has submitted a regional list containing fewer names than the number of its allocation of seats which would have been filled from such list in terms of item 8, forfeits a number of seats equal to the deficit in that region. 15
- (2) In the event of any forfeiture of seats in terms of subitem (1) affecting the allocation of seats in respect of any particular region in terms of item 8, such allocation is recalculated as follows: 20
- (a) The party forfeiting seats is disregarded in such recalculation, and the allocation of seats in terms of item 8 for the region in question, minus the number of seats forfeited by it in respect of its list for such region, is its final allocation of the seats in such region. 20
- (b) An amended quota of votes per seat is determined in respect of such region by— 25
- (i) disregarding all independent candidates;
- (ii) disregarding all votes for independent candidates;
- (iii) disregarding the number of seats allocated to independent candidates in the first and second rounds; and
- (iv) dividing the total number of votes cast in the region, minus the number of votes cast in such region in favour of the party referred to in paragraph (a) by the number of seats, plus one, reserved for such region, minus the number of seats allocated to the said party in terms of paragraph (a), 30
- and the result plus one, disregarding fractions, is the amended quota of votes per seat in respect of such region for purposes of the said recalculation. 35
- (c) The number of seats awarded for the purposes of paragraph (e) in respect of the region to a party participating in the recalculation, subject to paragraph (d), is determined by dividing the total number of votes cast in favour of such party in such region by the amended quota of votes per seat indicated by paragraph (b) for such region. 40
- (d) Where the result of the recalculation in terms of paragraph (c) yields a surplus not absorbed by the number of seats awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties participating in the recalculation in respect of the said region, and any seat or seats in respect of such region not awarded in terms of paragraph (c), is awarded to the party or parties concerned in sequence of the highest surplus. 45
- (e) The aggregate of a party's awards in terms of paragraphs (c) and (d) in respect of such region, subject to subitem (3), is that party's final allocation of regional seats for that region. 50
- (3) In the event of a party being allocated an additional number of seats in terms of this item, and if its list in question does not contain the names of a sufficient number of candidates as set out in subitem (1), the procedure provided for in this item is repeated with the changes required by the context until all seats are allocated. 55

Compensatory seats

- 11.** A quota of votes per compensatory seat is determined by— 60
- (a) disregarding all independent candidates who contested the election in the nine regions;

- (b) disregarding all votes for independent candidates cast in the nine regions; and
- (c) dividing the total number of remaining votes cast for political parties in all nine regions, by the number of compensatory seats in the National Assembly, plus one, and the result plus one, disregarding fractions, is the quota of votes per compensatory seat. 5
- 12.** The number of seats to be awarded to a party for the purposes of item 14 subject to item 11, is determined by dividing the total number of votes cast nationally in all nine regions in favour of the party by the quota of votes per seat determined in terms of item 11. 10
- 13.** Where the result of the calculation in terms of item 12 yields a surplus not absorbed by the number of seats awarded to a party concerned—
- (a) such surplus competes with other similar surpluses accruing to any other party or parties, and any seat or seats not awarded in terms of item 12, is awarded to the party or parties concerned in sequence of the highest surplus, up to a maximum of five seats so awarded; and 15
- (b) provided that seats still remaining unawarded, are awarded in sequence to those parties having the highest average number of votes per seat already awarded in terms of item 12 and this item. 20
- 14.** The aggregate of a party's awards in terms of items 12 and 13 is that party's allocation of compensatory seats.
- 15.** Compensatory seats are allocated according to a party's national list. 25
- 16.** (1) A party that has submitted a national list containing fewer names than the number of its allocation of seats which would have been filled from such list in terms of item 14, forfeits a number of seats equal to the deficit.
- (2) In the event of any forfeiture of seats in terms of subitem (1) affecting the allocation of seats in terms of item 14, such allocation is recalculated as follows: 30
- (a) The party forfeiting seats is disregarded in such recalculation, and the allocation of seats in terms of item 14, minus the number of seats forfeited by it in respect of its national list, is its final allocation of compensatory seats. 35
- (b) An amended quota of votes per compensatory seat is determined by—
- (i) disregarding all independent candidates who contested the election in the nine regions; 40
- (ii) disregarding all votes for independent candidates cast in the nine regions; and
- (iii) dividing the total number of votes cast for political parties in all nine regions, minus the number of votes cast in favour of the party referred to in paragraph (a) by the number of compensatory seats, plus one, minus the number of compensatory seats allocated to the said party in terms of paragraph (a), 45
- and the result plus one, disregarding fractions, is the amended quota of votes per compensatory seat for purposes of the said recalculation. 50
- (c) The number of compensatory seats to be awarded for the purposes of paragraph (e) to a party participating in the recalculation, must, subject to paragraph (d), be determined by dividing the total number of votes cast in favour of such party in all nine regions by the amended quota of votes per seat indicated by paragraph (b). 55
- (d) Where the result of the recalculation in terms of paragraph (c) yields a surplus not absorbed by the number of seats awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties participating in the recalculation, and any compensatory seat or seats not awarded in terms of paragraph (c), is or are awarded to the party or parties concerned in sequence of the highest surplus. 60

(e) The aggregate of a party's awards in terms of paragraphs (c) and (d), subject to subitem (3), is that party's final allocation of the compensatory seats.

(3) In the event of a party being allocated an additional number of seats in terms of this item, and if its national list does not contain the names of a sufficient number of candidates as set out in subitem (1), the procedure provided for in this item is repeated with the changes required by the context until all compensatory seats are allocated.

Provincial legislatures

17. (1) Registered parties contesting an election of a provincial legislature must nominate candidates on a provincial list of candidates prepared in accordance with this Act, with such number of names on each list as the party may determine subject to subitem (3).

(2) The list of candidates submitted by a party must not contain more names than the number of seats in the provincial legislature concerned, and must denote the fixed order of preference of the names as the party may determine.

18. The Commission must prepare a list of independent candidates contesting an election of a provincial legislature in accordance with this Act.

19. The seats in a provincial legislature are allocated in three separate rounds.

20. In the first round:

(a) A quota of votes per seat is determined by dividing the total number of votes by the total number of seats and the result, disregarding fractions, is the first quota of votes per seat.

(b) Each independent candidate who receives enough votes to meet the first quota is awarded a seat.

21. In the second round:

(a) A second quota of votes is determined by—

(i) disregarding all independent candidates who were allocated seats in the first round;

(ii) disregarding all votes for independent candidates who were allocated seats in the first round;

(iii) disregarding the number of seats allocated to independent candidates in the first round; and

(iv) dividing the remaining number of votes cast by the remaining number of seats,

and the result, disregarding fractions, is the second quota of votes per seat.

(b) Each remaining independent candidate who receives enough votes to meet the second quota is awarded a seat.

22. In the third round:

(a) A third quota of votes is determined by—

(i) disregarding all independent candidates;

(ii) disregarding all votes for independent candidates;

(iii) disregarding the number of seats allocated to independent candidates in first and second rounds; and

(iv) dividing the remaining number of votes cast by the remaining number of seats, plus one,

and the result plus one, disregarding fractions, is the third quota of votes per seat.

(b) The number of seats to be awarded for the purposes of paragraph (d) to a political party, must, subject to paragraph (c), be determined by dividing the total number of votes cast in favour of such party by the third quota of votes per seat indicated by paragraph (a).

(c) Where the result of the calculation referred to in paragraph (b) yields a surplus of seats not absorbed by the number awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties, and any seat or seats not

- awarded in terms of paragraph (b), is or are awarded to the party or parties concerned in sequence of the highest surplus.
- (d) The aggregate of a party's awards in terms of paragraphs (b) and (c) is that party's allocation of seats for a provincial legislature.
23. Seats in provincial legislatures are allocated to a party according to the party's list of candidates for the province.
24. (1) If a party has submitted a list of candidates for the province containing fewer names than the number of its allocation of seats which would have been filled from such list in terms of item 22, it forfeits a number of seats equal to the deficit.
- (2) In the event of any forfeiture of seats in terms of subitem (1) affecting the allocation of seats in terms of item 22, such allocation is recalculated as follows:
- (a) The party forfeiting seats is to be disregarded in such recalculation, and the allocation of seats in terms of item 22, minus the number of seats forfeited by it in respect of its list for such province, becomes its allocation of seats for the provincial legislature.
- (b) An amended quota of votes per seat is determined by—
- (i) disregarding all independent candidates;
 - (ii) disregarding all votes for independent candidates;
 - (iii) disregarding the number of seats allocated to independent candidates in first and second rounds; and
 - (iv) dividing the total number of votes cast, minus the number of votes cast in favour of the party referred to in paragraph (a) by the number of seats, plus one, minus the number of seats allocated to the said party in terms of paragraph (a), and the result plus one, disregarding fractions, is the amended quota of votes per seat for purposes of the said recalculation.
- (c) The number of seats to be awarded for the purposes of paragraph (e) to a party participating in the recalculation, must, subject to paragraph (d), be determined by dividing the total number of votes cast in favour of such party by the amended quota of votes per seat indicated by paragraph (b).
- (d) Where the result of the recalculation in terms of paragraph (c) yields a surplus not absorbed by the number of seats awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties participating in the recalculation, and any seat or seats not awarded in terms of paragraph (c), is or are awarded to the party or parties concerned in sequence of the highest surplus.
- (e) The aggregate of a party's awards in terms of paragraphs (c) and (d), subject to subitem (3), is that party's final allocation of the seats for the provincial legislature.
- (3) In the event of a party being allocated an additional number of seats in terms of this item, and if its list of candidates for the province in question does not contain the names of a sufficient number of candidates as set out in subitem (1), the procedure provided for in this item is repeated with the changes required by the context until all seats are allocated.

Ballot papers

25. (1) The Commission must produce separate ballot papers for the election of members of the National Assembly and of members of the provincial legislatures.
- (2) The ballot paper to be used in each region for the election of members of the National Assembly shall include only the independent candidates standing in that region for election to the National Assembly, together with the relevant political parties.

Designation of representatives of political parties

26. (1) After the counting of votes has been concluded, the number of representatives of each party has been determined and the election result has been declared in terms of section 190(1)(c) of the Constitution, the Commission must, within two days after such declaration, designate from each list of candidates, the representatives of each party in the legislature. 5

(2) Following the designation in terms of subitem (1), if a candidate's name appears on more than one list for the National Assembly or on lists for both the National Assembly and a provincial legislature (if an election of the Assembly and a provincial legislature is held at the same time), and such candidate is due for designation as a representative in more than one case, the party which submitted such lists must, within two days after the said declaration, indicate to the Commission from which list such candidate will be designated or in which legislature the candidate will serve, as the case may be, in which event the candidate's name must be deleted from the other lists. 10 15

(3) If a party fails to indicate to the Commission from which list a candidate will be designated or in which legislature a candidate will serve, such candidate's name must be deleted from all the lists. 20

(4) The Commission must forthwith publish the list of names of representatives in the legislature or legislatures.

Supplementation of lists of candidates of political parties

27. A political party may not supplement a list of candidates for any legislature prior to the designation of representatives in terms of item 26. 25

28. After the designation of representatives in terms of item 26 has been concluded, political parties may supplement their lists of candidates by the addition of an equal number of names at the end of the applicable list, if—

- (a) a representative is elected as the President or to any other executive office as a result of which he or she resigns as a representative of a legislature; 30
- (b) a representative is appointed as a permanent delegate to the National Council of Provinces; 35
- (c) a name is deleted from a list in terms of item 26(2) or (3); or
- (d) a vacancy has occurred and the appropriate list of candidates of the party concerned is depleted.

29. A political party may supplement a list of candidates referred to in item 26(1) on one occasion only at any time during the first 12 months following the date on which the designation of representatives in terms of item 26 has been concluded, in order to fill casual vacancies: Provided that any such supplementation must be made at the end of the list. 40

30. The number of names on lists of candidates as supplemented in terms of item 28 may not exceed the difference between the number of seats in the National Assembly or a provincial legislature, as the case may be, and the number of representatives of a party in any such legislature. 45

Review of lists of candidates by party

31. A party may review its undepleted lists as supplemented in terms of items 28, 29 and 30, within seven days after the expiry of the period referred to in item 29, and annually thereafter, until the date on which a party has to submit lists of candidates for an ensuing election, in the following manner: 50

- (a) All vacancies may be supplemented;
- (b) no more than 25 per cent of candidates may be replaced; and 55
- (c) the fixed order of lists may be changed.

Publication of supplemented and reviewed lists of candidates

32. The Secretary to Parliament and the Secretaries of the provincial legislatures must publish lists of candidates supplemented in terms of items 28 and 29 or reviewed in terms of item 31 within 10 days after the receipt of such lists from the parties concerned.

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Vacancies

33. (1) In the event of a vacancy in a legislature of a seat allocated to a political party, the party which the vacating member represented must fill the vacancy by nominating a person—

(a) whose name appears on the list of candidates from which that party's members were originally nominated; and

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(b) who is the next qualified and available person on the list.

(2) A nomination to fill a vacancy must be submitted to the Speaker of the legislature in writing.

(3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of section 47(3)(c) or section 106(3)(c) of the Constitution, the seats in question must be allocated to the remaining parties with the changes required by the context as if such seats were forfeited seats in terms of item 16(2) or item 24(2), as the case may be.

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34. (1) In the event of a vacancy in a legislature in a seat allocated to an independent candidate, the seat in question will not be filled until the next elections.

Definitions

35. In this Schedule—

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'**Constitution**' means the Constitution of the Republic of South Africa, 1996;

'**national list**' means a list of candidates prepared by a party for an election of the National Assembly to reflect that party's order of preference of candidates in respect of the allocation of compensatory seats;

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'**provincial list**' means a list of candidates prepared by a party for an election of a provincial legislature;

'**region**' means the territorial area of a province;

'**regional list**' means a list of candidates in respect of a region prepared by a party for an election of the National Assembly to reflect that party's order of preference of candidates in respect of the allocation of regional seats in respect of each region; and

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'**votes**' means—

(a) where it occurs in items 6, 7, 8, 10, 11, 12, 13 and 16, votes cast in the election for the National Assembly;

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(b) where it occurs in items 20, 21, 22 and 24, votes cast in the election for the provincial legislature of a province concerned; and

(c) where it occurs in item 26, votes cast in the election for the National Assembly and the provincial legislatures.".

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Short title and commencement

12. This Act is called the Electoral Amendment Act, 2022, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE ELECTORAL AMENDMENT BILL

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) (the “Act”), 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 The Constitutional Court directed Parliament to rectify the impugned sections of the Act within a period of 24 months from the date of the judgment, which 24 months is to be calculated from June 2020 to June 2022.

2. PURPOSE OF THE BILL

The Electoral Amendment Bill (the “Bill”), amends the Act by—

- (a) inserting certain definitions consequential to the expansion of the Act to include independent candidates as contesters to elections in the National Assembly and provincial legislatures;
- (b) including a provision that registered parties must submit a declaration confirming that all its candidates are registered to vote in the region or province where the election will take place;
- (c) providing for the nomination of independent candidates to contest elections in the National Assembly and provincial legislatures;
- (d) providing the requirements and qualifications which must be met by persons who wish to be registered as independent candidates;
- (e) providing the procedure that must be followed in the event that a non-compliant nomination of an independent candidate is determined;
- (f) providing for the inspection of copies of lists of independent candidates and accompanying documents;
- (g) providing for objections to independent candidates;
- (h) providing for the inclusion of a list of independent candidates entitled to contest elections;
- (i) providing that independent candidates are bound by the Electoral Code of Conduct;
- (j) providing for the return of a deposit to independent candidates in certain circumstances;
- (k) amending Schedule 1 and substituting Schedule 1A to make provision for independent candidates; and
- (l) providing for matters connected therewith.

3. SUMMARY OF BILL

- 3.1 Clause 1 amends section 1 of the Act to include definitions of “candidate”, “Constitution”, “independent candidate”, “list of candidates” and “province”.
- 3.2 Clause 2 amends section 27 of the Act which deals with the submission of lists of candidates, by providing that the list or lists must be accompanied by a declaration, signed by each candidate appearing on the party’s regional list of candidates or provincial list of candidates referred to in Schedule 1A, confirming that he or she is registered to vote within the region or province in which the election will take place.
- 3.3 Clause 3 amends section 28 of the Act, which provides for non-compliance concerning submission of lists of candidates, to provide for technical amendments by including reference to the newly inserted paragraph 27(2)(cA) in section 28 of the Act.

- 3.4 Clause 4 inserts Part 3A in Chapter 3 of the Act, to provide for the nominations of independent candidates, the requirements and qualifications for independent candidates to contest elections, the process to be followed in the event of non-compliance of a nomination of an independent candidate, the inspection of copies of lists of independent candidates and accompanying documents, objections to independent candidates, and the list of independent candidates entitled to contest elections.
- 3.5 Clause 5 amends section 57A of the Act, which provides for the system of representation in the National Assembly and the provincial legislatures, by expanding the application of Schedule 1A to the Act to include candidate lists and lists of independent candidates.
- 3.6 Clause 6 substitutes section 94 of the Act, which provides for the contravention of the Electoral Code of Conduct, to expand the application of the section to independent candidates.
- 3.7 Clause 7 amends section 99 of the Act which provides for the Electoral Code of Conduct and other codes, by providing that every independent candidate, before that independent candidate may be placed on a list of independent candidates in terms of section 31F, must subscribe to the Electoral Code of Conduct.
- 3.8 Clause 8 amends section 106 of the Act, which provides for the return and forfeiture of a deposit, to provide for the Commission to refund to an independent candidate any deposit paid by such candidate in terms of section 31B(3)(b) if the candidate is allocated a seat in the legislature whose election the independent candidate contested.
- 3.9 Clause 9 amends section 110 of the Act, which provides for the effect of certain irregularities by including reference to independent candidates.
- 3.10 Clause 10 amends Schedule 1 to the Act, which provides for the election timetable, to include independent candidates in the election timetable.
- 3.11 Clause 11 amends Schedule 1A to the Act, which provides for the system of representation in the national assembly and provincial legislatures, by substituting the Schedule with one that includes independent candidates.
- 3.12 Clause 12 contains the short title and provides that the Electoral Amendment Act, 2022, shall come into operation on a date determined by the President by proclamation in the *Gazette*.

4. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The coming into operation of the amendment Act will have no additional personnel implications.

5. FINANCIAL IMPLICATIONS FOR STATE

The costing will be undertaken and presented when the Bill is finalised and passed.

6. COMMUNICATION IMPLICATIONS

There are no communication implications envisaged as a result of the introduction of the Bill. The Department will, however, work with Government Communication and Information Services to develop a communications strategy on the Bill.

7. CONSTITUTIONAL OBLIGATIONS

The Bill complies with the Constitutional Court judgment in *New Nation Movement NPC & others v President of the Republic of South Africa & others* [2020] ZACC 11.

8. INSTITUTIONS CONSULTED

- (a) The Ministerial Advisory Committee, established by the Minister of Home Affairs, consulted, amongst others, with:
- (i) Political Parties (amongst others, ANC, ACDP, DA, EFF, ATM, COPE, FF+);
 - (ii) Civil Society Organisations (Activate Change Drivers, Corruption Watch, My Vote Counts, One South Africa Movement, Youth Lab, The 70's Group and iTrends);
 - (iii) Organised Labour (Business Unity South Africa);
 - (iv) Organised Business (Congress of South African Trade Unions and South African Federation of Trade Unions);
 - (v) South African Council of Churches;
 - (vi) University of KwaZulu-Natal;
 - (vii) University of Johannesburg;
 - (viii) Helen Suzman Foundation;
 - (ix) Auwal Socio-Economic Research Institute; and
 - (x) Inclusivity Society Institute.
- (b) The Department further consulted with:
- (i) Forum of South African Directors-General;
 - (ii) Governance, State Capacity and Institutional Development Cluster of Directors-General; and
 - (iii) Justice, Crime Prevention and Security Cluster of Directors-General.

9. PARLIAMENTARY PROCEDURE

9.1 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.

9.2. The following relevant Constitutional Court judgment is essential to assist in the tagging of the Bill and the legal principles from this judgment are highlighted as follows:

9.2.1 In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, CCT100/09 [2010] ZACC 10 (“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 of the Constitution. At paragraph 60 of the Tongoane case, the Constitutional Court held that 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.”.

9.2.2 The legislative competence and the substance of the Bill must be considered when tagging a Bill. At paragraph 70 of 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. 2 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.”.”

- 9.2.3 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. At paragraph 60 of the *Tongoane* case, the Constitutional Court held that the more the Bill affects the interests, concerns and capabilities of the provinces, the more say the provinces should have on its content. 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”. (Underlining is our emphasis)

- 9.2.4 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 legislatures 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.”. (Underlining is our emphasis).

- 9.2.5 At paragraph 74 of the *Tongoane* case, the Constitutional Court then examined the CLARA to determine the extent to which its provisions regulated “indigenous law” and “traditional leadership”, which are two clauses 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. This would include Bills over which provinces have concurrent jurisdiction and the Constitutional Court further stated the following:

[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.” (Underlining is our emphasis.)

- 9.3 The primary objective of the Bill is to provide for the inclusion of independent candidates to contest elections in the National Assembly and provincial legislatures.
- 9.4 The Bill provides for matters that affect the provinces. By means of example, clause 31A(1) of the Bill, provides for the nomination of independent candidates and provides that a person may be nominated to contest an election as an independent candidate in a region for the National Assembly or for a provincial legislature if that person is ordinarily resident in the region or province concerned; and registered as a voter on the segment of the voters’ roll for the region or province concerned.
- 9.5 Clause 31B provides for requirements and qualifications for independent candidates to contest elections. Clause 31B(1) provides that a person may contest an election as an independent candidate only if that person is nominated on a prescribed form and that form is submitted to the Commission by a specific date and is accompanied by, among other requirements, a completed prescribed form, with at least the prescribed minimum number of signatures of voters whose names appear on the segment of the voters’ roll for the region or province in which the candidate is standing for election.
- 9.6 We have considered all the provisions in the Bill in light of the *Tongoane* case, and found that the purpose and effect of the Bill in a substantial manner affects the interests, concerns and capacities of the provinces. The primary objective of the Bill is to provide for the inclusion of independent candidates to contest elections in the National Assembly and provincial legislatures.
- 9.7 The Department and the State Law Advisers are therefore of the opinion that the Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution, since the purpose and effect of the Bill in a substantial measure affects the interests, concerns and capacities of the provinces.
- 9.8 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.