

MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION OF THE WESTERN CAPE FIRST AMENDMENT BILL, 2021

1. BACKGROUND

Alignment with Constitution

Various amendments have been made to the Constitution of the Republic of South Africa, 1996 (the Constitution). These amendments have not been incorporated in the Constitution of the Western Cape, 1997 (Act 1 of 1998) (the Provincial Constitution).

Section 143(1) of the Constitution provides that a provincial constitution must be consistent with the Constitution. Section 3(3) of the Provincial Constitution, in line with the Constitution, provides that it should not be interpreted as conferring any legislative or executive authority on the Western Cape Government that is inconsistent with the Constitution. It is proposed that the Provincial Constitution be amended to align it with the Constitution in order to avoid any inconsistencies and difficulties with interpretation.

Commissioner for the Environment

Section 71 of the Provincial Constitution establishes the position of Commissioner for the Environment. The appointment of the Commissioner for the Environment is an obligation imposed by the Provincial Constitution and is binding on the provincial legislature and executive in terms of sections 104(3) and 125(6)(b) of the Constitution and sections 9(2) and 35(3) of the Provincial Constitution.

The position of Commissioner for the Environment is vacant and has never been filled.

Since the commencement of the Provincial Constitution various pieces of national legislation that establish authorities and structures for the protection of the environment have been passed. The national legislation includes the National Environmental Management Act, 1998 (Act 107 of 1998), the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004), the National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2003), the National Environmental Management: Waste Act, 2008 (Act 59 of 2008), and the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008).

The Western Cape Government is of the view that the filling of the vacancy of the Commissioner for the Environment is not desirable, because it would involve an overlap and duplication of roles and functions provided for in national legislation and would consume scarce state resources. The Western Cape Government is also of the view that national legislation and international conventions provide the necessary protection of the environment.

Unless the provisions relating to the establishment of the Commissioner for the Environment are repealed, the Western Cape Government is failing to fulfil a constitutional obligation. It is accordingly proposed that the Provincial Constitution be amended to repeal the provisions relating to the Commissioner for the Environment. Effect could then be given to the establishment of the Commissioner when it is thought desirable to do so through provincial legislation.

2. OBJECTS OF BILL

The purpose of the Bill is to—

- (a) amend the Provincial Constitution to align it with the amendments that have been made to the Constitution;
- (b) repeal the provisions relating to the Commissioner for the Environment; and
- (c) improve the Xhosa text.

3. CONTENTS OF BILL

Clause 1 amends section 15 of the Provincial Constitution by the substitution of subsection (3) to reflect the amended section 106(3) of the Constitution to provide for the loss of membership in the legislature if a member ceases to be a member of the party that nominated him or her. (Constitution Tenth Amendment Act of 2003 and Constitution Fourteenth Amendment Act of 2008)

Clause 2 amends section 17 of the Provincial Constitution by the insertion of subsection (2A) after subsection (2) to reflect the amended section 108 of the Constitution, which provides for the proclamation of election dates before or after the expiry of the term of a provincial legislature in the event that a provincial legislature is dissolved in terms of section 109 of the Constitution or when its term expires. (Constitution Fourth Amendment Act of 1999)

Clause 3 amends section 30 of the Provincial Constitution to reflect the amended definition of “Money Bill” in accordance with section 120 of the Constitution. (Constitution Seventh Amendment Act of 2001)

Clause 4 amends section 49 of the Provincial Constitution to reflect the amended section 139 of the Constitution relating to provincial intervention in local government. (Constitution Eleventh Amendment Act of 2003)

Clause 5 amends section 59(1)(b) of the Provincial Constitution to reflect the amended section 228 of the Constitution in respect of the imposition of taxes by provinces. (Constitution Seventh Amendment Act of 2001)

Clause 6 amends section 63 of the Provincial Constitution to reflect the amended section 230 of the Constitution in respect of the raising of loans by provinces. (Constitution Seventh Amendment Act of 2001)

Clause 7 repeals sections 71 to 77 of the Provincial Constitution.

Clause 8 replaces the expression “President of the Constitutional Court” with the expression “Chief Justice” wherever it appears in the Provincial Constitution (Constitution Sixth Amendment Act of 2001) and certain expressions in the Xhosa text of the Provincial Constitution.

Clause 9 makes provision for the short title of the Bill, once enacted.

4. CONSULTATION

The following provincial departments were consulted:

- (a) Department of the Premier: Legal Services;
- (b) Department of the Premier: Policy and Strategy; and
- (c) Department of Environmental Affairs and Development Planning.

The Draft Bill was published for comment on 6 March 2018 in the *Provincial Gazette* with a closing date for comments of 6 April 2018 (Provincial Notice 33 in *Provincial Gazette Extraordinary* 7891 of 6 March 2018). Media notices providing information pertaining to the Bill and calling for further comments were subsequently published in four newspapers circulating in the Province. The Draft Bill was also forwarded by registered post and by e-mail to the South African Local Government Association (SALGA) and all municipalities in the Western Cape on 18 April 2018. The due date for submission of further comments was 18 May 2018.

5. FINANCIAL IMPLICATIONS

The Department of the Premier will incur costs for legal representation in the Constitutional Court in respect of the certification of the Bill by the Constitutional Court.

6. LEGISLATIVE COMPETENCE

The Premier is satisfied that all the provisions in the Bill fall within the Province's legislative competence.

**MEMORANDUM OOR DIE OOGMERKE VAN DIE EERSTE
WYSIGINGSWETSONTWERP OP DIE GRONDWET VAN DIE
WES-KAAP, 2021**

1. AGTERGROND

Ooreenstemming met die Grondwet

Verskeie wysigings aan die Grondwet van die Republiek van Suid-Afrika, 1996 (die Grondwet), is reeds gemaak. Hierdie wysigings is nog nie opgeneem in die Grondwet van die Wes-Kaap, 1997 (Wet 1 van 1998) (die Provinsiale Grondwet), nie.

Artikel 143(1) van die Grondwet bepaal dat 'n provinsiale grondwet nie onbestaanbaar met die Grondwet mag wees nie. Artikel 3(3) van die Provinsiale Grondwet, in ooreenstemming met die Grondwet, bepaal dat dit nie uitgelê behoort te word asof dit enige wetgewende of uitvoerende gesag aan die Wes-Kaapse Regering opdra wat onbestaanbaar met die Grondwet is nie. Daar word voorgestel dat die Provinsiale Grondwet gewysig word om dit in ooreenstemming met die Grondwet te bring ten einde enige teenstrydighede en uitlegprobleme te vermy.

Omgewingskommissaris

Artikel 71 van die Provinsiale Grondwet stel die amp van Omgewingskommissaris in. Die aanstelling van die Omgewingskommissaris is 'n verpligting wat deur die Provinsiale Grondwet opgelê word wat bindend is op die provinsiale wetgewer en uitvoerende gesag ingevolge artikels 104(3) en 125(6)(b) van die Grondwet en artikels 9(2) en 35(3) van die Provinsiale Grondwet.

Die amp van Omgewingskommissaris is vakant en is nog nooit gevul nie.

Sedert die inwerkingtreding van die Provinsiale Grondwet is verskeie stukke nasionale wetgewing aangeneem wat owerhede en strukture vir die beskerming van die omgewing instel. Die nasionale wetgewing sluit in die Wet op Nasionale Omgewingsbestuur, 1998 (Wet 107 van 1998), die “National Environmental Management: Biodiversity Act, 2004” (Wet 10 van 2004), die “National Environmental Management: Protected Areas Act, 2003” (Wet 57 van 2003), die “National Environmental Management: Waste Act, 2008” (Wet 59 van 2008), en die “National Environmental Management: Integrated Coastal Management Act, 2008” (Wet 24 van 2008).

Die Wes-Kaapse Regering is van mening dat die vul van die vakature van Omgewingskommissaris nie wenslik is nie omdat dit sal lei tot 'n oorvleueling en duplisering van rolle en funksies waarvoor daar in nasionale wetgewing voorsiening gemaak word, en skaars staatshulpbronne sal vermors. Die Wes-Kaapse Regering is ook van mening dat nasionale wetgewing en internasionale konvensies die nodige beskerming van die omgewing daarstel.

Tensy die bepalings met betrekking tot die instelling van die Omgewingskommissaris herroep word, bly die Wes-Kaapse Regering in gebreke om 'n grondwetlike verpligting na te kom. Daar word gevolglik voorgestel dat die Provinsiale Grondwet gewysig word om die bepalings met betrekking tot die Omgewingskommissaris te herroep. Uitvoering kan dan deur provinsiale wetgewing aan die instelling van die Kommissaris gegee word wanneer dit wenslik geag word om dit te doen.

2. OOGMERKE VAN WETSONTWERP

Die doel van die Wetsontwerp is om—

- (a) die Provinsiale Grondwet te wysig om dit in ooreenstemming te bring met die wysigings wat aan die Grondwet gemaak is;
- (b) die bepalings met betrekking tot die Omgewingskommissaris te herroep; en
- (c) die Xhosateks te verbeter.

3. INHOUD VAN WETSONTWERP

Klousule 1 wysig artikel 15 van die Provinsiale Grondwet deur die vervanging van subartikel (3) om die gewysigde artikel 106(3) van die Grondwet te weerspieël om voorsiening te maak vir die verlies van lidmaatskap in die wetgewer indien 'n lid ophou om lid te wees van die party wat hom of haar benoem het. (Tiende Wysigingswet op die Grondwet van 2003 en Veertiende Wysigingswet op die Grondwet van 2008)

Klousule 2 wysig artikel 17 van die Provinsiale Grondwet deur die invoeging van subartikel (2A) ná subartikel (2) om die gewysigde artikel 108 van die Grondwet te weerspieël, wat voorsiening maak vir die afkondiging van verkiesingsdatums voor of ná die verstryking van 'n provinsiale wetgewer se termyn indien die provinsiale wetgewer ingevolge artikel 109 van die Grondwet ontbind word of wanneer sy termyn verstryk. (“Constitution Fourth Amendment Act of 1999”)

Klousule 3 wysig artikel 30 van die Provinsiale Grondwet om, ooreenkomstig artikel 120 van die Grondwet, die gewysigde omskrywing van “Geldwetsontwerp” te weerspieël. (Sewende Wysigingswet op die Grondwet van 2001)

Klousule 4 wysig artikel 49 van die Provinsiale Grondwet om die gewysigde artikel 139 van die Grondwet, met betrekking tot provinsiale ingryping in plaaslike regering, te weerspieël. (Elfde Wysigingswet op die Grondwet van 2003)

Klousule 5 wysig artikel 59(1)(b) van die Provinsiale Grondwet om die gewysigde artikel 228 van die Grondwet te weerspieël ten opsigte van die oplegging van belastings deur provinsies. (Sewende Wysigingswet op die Grondwet van 2001)

Klousule 6 wysig artikel 63 van die Provinsiale Grondwet om die gewysigde artikel 230 van die Grondwet ten opsigte van die aangaan van lenings deur provinsies te weerspieël. (Sewende Wysigingswet op die Grondwet van 2001)

Klousule 7 herroep artikels 71 tot 77 van die Provinsiale Grondwet.

Klousule 8 vervang die uitdrukking “President van die Konstitusionele Hof” met die uitdrukking “Hoofregter” waar dit ook al in die Provinsiale Grondwet voorkom (Sesde Wysigingswet op die Grondwet van 2001) en sekere uitdrukkings in die Xhosateks van die Provinsiale Grondwet.

Klousule 9 maak voorsiening vir die kort titel van die Wetsontwerp nadat dit verorden is.

4. OORLEGPLEGING

Daar is met die volgende provinsiale departemente oorleg gepleeg:

- (a) Departement van die Premier: Regsdienste;
- (b) Departement van die Premier: Beleid en Strategie; en
- (c) Departement van Omgewingsake en Ontwikkelingsbeplanning.

Die Konsepwetsontwerp is op 6 Maart 2018 in die *Provinsiale Koerant* gepubliseer met 'n sluitingsdatum vir kommentaar van 6 April 2018 (Provinsiale Kennisgewing 33 in *Buitengewone Provinsiale Koerant* 7891 van 6 Maart 2018). Mediakennisgewings wat inligting oor die Wetsontwerp verskaf en verdere kommentaar aanvra, is gevolglik in vier koerante wat sirkuleer in die Provinsie, gepubliseer. Die Konsepwetsontwerp is ook op 18 April 2018 per geregistreerde pos en per e-pos aangestuur na die Suid-Afrikaanse Vereniging vir Plaaslike Regering (SALGA) en alle munisipaliteite in die Wes-Kaap. Die sluitingsdatum vir die indiening van verdere kommentaar was 18 Mei 2018.

5. FINANSIËLE IMPLIKASIES

Die Departement van die Premier sal koste aangaan vir regsverteenvoording in die Konstitusionele Hof ten opsigte van die sertifisering van die Wetsontwerp deur die Konstitusionele Hof.

6. WETGEWENDE BEVOEGDHEID

Die Premier is oortuig dat al die bepalings in die Wetsontwerp binne die wetgewende bevoegdheid van die Provinsie ressorteer.

**IMEMORANDAM ENGEZINTO ZOMTHETHO OSAYILWAYO
WOLUNGISO WOKUQALA KUMGAQO-SISEKO WENTSHONA
KOLONI, 2021**

1. INTSUKAPHI

Ungqanyaniso noMgaqosiseko

UMgaqo-siseko weRiphabliki yoMzantsi Afrika, ka-1996 (uMgaqo-siseko), uye wahlaziywa ngeendlela ngeendlela. Olu hlaziyo alukafakwa kuMgaqo-siseko weNtshona Koloni, ka-1997 (uMthetho 1 ka-1998) (uMgaqo-siseko wePhondo).

ICandelo 143(1) loMgaqo-siseko lithi umgaqo-siseko wephondo umele ungqinelane noMgaqo-siseko kazwelonke. ICandelo 3(3) loMgaqo-siseko wePhondo, ngokuhambelana noMgaqo-siseko kazwelonke, uthi awufanele ugqalwe njengomela naliphi na igunya lowiso-mthetho okanye lesigqeba kuRhulumente wePhondo leNtshona Koloni elingqinelani noMgaqo-siseko. Kwenziwa isiphakamiso sokuba uMgaqo-siseko wePhondo uhlaziywe ukuze ungqamane noMgaqo-siseko ukuze kuphetshwe nakuphi na ukungangqinelani kunye nobunzima bokuwutolika.

Umkhomishinala wezokuSingqongileyo

ICandelo lama-71 loMgaqo-siseko wePhondo lithetha ngokusekwa kwesikhundla soMkhomishinala wezokuSingqongileyo. Ukuqeshwa koMkhomishinala wezokuSingqongileyo yimbopheleleko ebekwe nguMgaqo-siseko wePhondo, esisinyanzelo kwipalamente yephondo nakwisigqeba ngokwecandelo le-104(3) nele-125(6)(b) loMgaqo-siseko, necandelo le-9(2) nelama-35(3) loMgaqo-siseko wePhondo.

Isikhundla soMkhomishinala wezokuSingqongileyo asinamntu kwaye akukaze kuqeshwe mntu kuso.

Ukususela ekuqalisweni koMgaqo-siseko wePhondo iinxenye ezahlukeneyo zomthetho welizwe eziseka igunya namasebe okukhusela okusingqongileyo ziye zapasiswa. Umthetho welizwe uquka uMthetho woLawulo lokuSingqongileyo kaZwelonke, ka-1998 (uMthetho 107 ka-1998)(i*National Environmental Management Act, 1998*), uMthetho wolawulo lokuSingqongileyo kaZwelonke: ukuNgafani kobomi, 2004 (uMthetho 10 ka-2004)(i*National Environmental Management: Biodiversity Act, 2004*), umMthetho woLawulo lokusiNqongileyo kuZwelonke: uMthetho weeNdawo eziKhuselweyo, 2003 (uMthetho 57 ka-2003), uMthetho woLawulo lokuSingqongileyo: iNkunkuma, 2008 (uMthetho 59 ka-2008)(i*National Environmental Management: Waste Act, 2008*), kunye noMthetho woLawulo lokuSingqongileyo: uLawulo lwaManxweme aHlanganisiweyo, 2008 (uMthetho 24 ka-2008)(i*National Environmental Management: Integrated Coastal Management Act, 2008*).

URhulumente weNtshona Koloni unoluvo lokuba ukuqeshwa koMkhomishinala wezokuSingqongileyo akufuneki, kuba kuya kubandakanya ukungqubana kweembopheleleko nokwenza imisebenzi efanayo echazwe kumthetho welizwe, kwaye kuya kudla imali karhulumente esele ishukuxekile kakade. Kwakhona uRhulumente weNtshona Koloni ukwavakalelwa ukuba umthetho welizwe nezivumelwano zamazwe ngamazwe zikukhusela ngokufanelekileyo okusingqongileyo.

Ngaphandle kokuba imiba ephathelele nokubekwa koMkhomishinala wezokuSingqongileyo iyarhoxiswa, uRhulumente weNtshona Koloni uyasilela ekufezekiseni imbopheleleko yakhe efunwa ngumgaqo-siseko. Ngoko senza isiphakamiso sokuba uMgaqo-siseko wePhondo uhlaziywe ukuze ubhange izibonelelo ezinxulumene noMkhomishinala wezokuSingqongileyo xa kucingwa ukuba kuyafuneka ukwenjenjalo ngokusebenzisa umthetho wephondo.

2. IINJONGO ZALO MTHETHO USAYILWAYO

Injongo yeBhili—

- (a) kukulungisa uMgaqo-siseko wePhondo ukuze ungqamane nohlaziyo olwenziwe kuMgaqo-siseko;
- (b) ukubhangiswa kwezibonelelo zoMkhomishinala wezokuSingqongileyo; kunye
- (c) nokuphucula ukubhalwa kwesiXhosa.

3. IZIQULATHO ZALO MTHETHO USAYILWAYO

Isoloty 1 lilungisa icandelo 15 loMgaqo-siseko wePhondo ngokufakela icandelwana (3) ukuze libonise icandelo 106(3) elilungisiweyo loMgaqo-siseko ukuze licacise ngokulahlekelwa lilungu lepalamente, ukuba ilungu liyayeka ukuba lilungu lombutho olikhethileyo ukuba liwumele. (*i-Constitution Tenth Amendment Act of 2003* kunye ne-*Constitution Fourteenth Amendment Act of 2008*)

Isoloty 2 lilungisa icandelo 17 loMgaqo-siseko wePhondo, ngokufakela icandelwana (2A) emva kwecandelwana (2), ukuze libonise icandelo 108 elilungisiweyo loMgaqo-siseko, elithi kufanele kuchazwe imihla yonyulo ngaphambi okanye ngemva kokuphelelwa kwepalamente yephondo kwimeko apho amalungu endlu yowisomthetho yephondo abhangisiwe ngokwecandelo 109 loMgaqosiseko xa liphelelwa lixesha. (*i-Constitution Fourth Amendment Act of 1999*)

Isoloty 3 lilungisa icandelo 30 loMgaqo-siseko wePhondo ukuze libonise ingcaciso elungisiweyo “yeBhili zeMali” ngokwecandelo 120 loMgaqo-siseko. (*i-Constitution Seventh Amendment Act of 2001*)

Isoloty 4 lilungisa icandelo 49 loMgaqo-siseko wePhondo ukuze libonise icandelo 139 elilungisiweyo loMgaqo-siseko eliphathelele ukungenelela kwephondo kurhulumente wengingqi. (*i-Constitution Eleventh Amendment Act of 2003*)

Isoloty 5 lilungisa icandelo 59(1)(b) loMgaqo-siseko wePhondo kwiSingesi nakwi-Afrikansi ukuze libonise icandelo 228 elilungisiweyo loMgaqo-siseko ngokuphathelele ukufakwa kweerhafu ngamaphondo. (*i-Constitution Seventh Amendment Act of 2001*)

Isoloty 6 lilungisa icandelo 63 loMgaqo-siseko wePhondo ukubonisa icandelo elilungisiweyo 230 loMgaqo-siseko eliphathelele nokukhulisa iimali-mboleko. (*i-Constitution Seventh Amendment Act of 2001*)

Isoloty 7 ubhangisa icandelo 71 ukuya kwelama-77 loMgaqo-siseko wePhondo.

Isoloty 8 lifakelwa kwindawo yebinzana elithi “uMongameli weNkundla yoMgaqo-siseko” kuze endaweni yalo kufakelwe elithi “iJaji eyiNtloko” naphina na apho livela khona kuMgaqo-siseko wePhondo (*i-Constitution Sixth Amendment Act of 2001*) namanye amabinzana athile kuMgaqo-siseko wePhondo obhalwe ngesiXhosa.

Isoloty 9 lenza ulungiselelo lwesihloko esifutshane soMthetho oSayilwayo, ukuwiswa nje kwawo.

4. UKUCEBISANA

Kucetyiswene nala masebe ephondo alandelayo:

- (a) ISebe leNkulumbuso: Iinkonzo zoMthetho;
- (b) ISebe leNkulumbuso: UMgaqo-nkqubo neQhinga lokusebenza; kunye
- (c) neSebe leMicimbi yokuSingqongileyo neSicwangciso soPhuhliso.

UQulunqo loMthetho oSayilwayo lwapapshelwa ukufumana izimvo ngomhla we-6 kweyoKwindla 2018 kwi*Gazethi yePhondo* eyayinomhla wamanqam

wokufumana izimvo we-6 kwekaTshazimpuzi 2018 (ISaziso sePhondo 33 kwi*Songezelelo seGazethi yePhondo* 7891 yomhla we-kweyoKwindla 2018). Izasizo zamajelo eendaba ezazinika iinkcukacha ezimayela nalo Mthetho oSayilwayo kunye nokucelwa kwezimvo ezongezelelekileyo zapapashwa kumaphephandaba amane walapha kwiPhondo. Nalo uQulunqo loMthetho oSayilwayo lwathunyelwa ngeposi ebhalisiweyo nange-imeyili kuManyano yooRhulumente beNgingqi yoMzantsi Afrika (i-SALGA) nakubo bonke oomasipala eNtshona Koloni ngomhla we-18 kwekaTshazimpuzi 2018. Umhla wamanqam okungeniswa kwezimvo ezongezelelekileyo yayingumhla we-18 kwekaCanzibe 2018.

5. IMALI EDINGEKAYO

ISEBE leNkulumbuso liza kuzihlawula iindleko zomeli wezomthetho kwiNkundla yoMgaqo-siseko ngokunxulumene nolwaneliseko lweNkundla ngoMthetho oSayilwayo.

6. ISAKHONO SOWISO-MTHETHO

INKULUMBUSO yanelisekile kukuba kulungiselelwe loMthetho uSayilwayo ophantsi kwesakhono sowiso-mthetho sePhondo.