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)*(c*A*)* 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.

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