Consultant:

INCLUSIVE SOCIETY INSTITUTE

In re:

ANALYSIS OF CONSITUTITONAL ISSUES PERTAINING TO THE ELECTORAL AMENDMENT BILL

By:

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1. In *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11, ("*New Nation Movement"*), the Constitutional Court held that the Electoral Act 73 of 1998 ("the Act") was unconstitutional to the extent that it did not provide for individuals to contest elections for membership of the National Assembly and Provincial Legislatures independently from political parties. The Court suspended the declaration of invalidity for 24 months to allow Parliament to remedy the defect (the Court subsequently extended the suspension until 10 December 2022).

2. In response to *New Nation Movement,* Parliament is currently considering the Electoral Amendment Bill (B1-2022) as the means to cure the defects in the Act. On 2 September 2022, the Portfolio Committee on Home Affairs called for further public comments on material revisions of the Bill (B1A-2022) ("the Bill").

3. Several civil society organisations, including the Inclusive Society Institute, have raised concerns regarding the constitutionality of the Bill. This analysis is aimed at considering various aspects of the Bill, in the form put forward for public comment on 2 September 2022, from a constitutional perspective, focusing specifically on those aspects that may be constitutionally suspect.

Barriers to entry

4. Section 31B of the Bill sets out the requirements for an independent candidate to contest elections. These include, in section 31B(3)(a), the requirement of nomination requiring an independent candidate to submit "the names, identity numbers and signatures of voters whose names appear on the segment of the voters' roll for that region or province in which the candidate is standing for election

and who support his or her candidature, totalling at least thirty percent of the quota for a seat that was required for a seat in the previous comparable election". This requirement is analogous to (but not the same as) the requirement in the Electoral Commission Act 51 of 1996, section 15(3), read with section 26 of the Act. In terms of the latter, a party may only contest elections if it is registered as set out in section 15 of the Electoral Commission Act. This includes a requirement, in section 15(3)(a), that the application for registration be accompanied by "that party's deed of foundation which … has been signed by the prescribed number of persons who are qualified voters".

5. The Act and the Bill thus place a limitation on both independent candidates and parties to contest elections in the form of proof of support by a set number of voters. There are, however, important differences between this support limitation as applied to independent candidates and parties respectively.

5.1. In the case of independent candidates, such limitation on contesting elections is more direct in that a party only has to submit such proof of support once when registering as a party and not in each instance that it wishes to contest elections, whereas an independent candidate must submit such proof each and every time they intend to contest an election, regardless of whether the candidate has previously been elected to a seat in the chamber to which the election pertains.

5.2. There is a material difference in the number of voters that must indicate support for independent candidates and parties respectively. In terms of the Regulations for the Registration of Political Parties (GNR.13 of 7 January 2004, as amended), promulgated under the Electoral Commission Act,

regulation 3, a party must submit a list of 1000 signatures for registration nationally, 500 signatures for registration in a particular province and 300 signatures for registration in a particular district or metropolitan municipality. In contrast, the Bill sets the number of signatures required by an independent candidate at 30% of the quota for a seat that was required for a seat in the previous comparable election, regardless of what chamber the candidate is contesting for. The exact number of signatures required by independent candidates will thus differ from time to time and between chambers, but will in most instances be significantly more than the set numbers required for parties. For example, in the 2019 national elections, the number of votes required to secure a seat in the National Assembly was approximately between 30 000 and 40 000. On a very basic calculation, this implies that, on the approach adopted in the Bill, an independent candidate will require upwards of 10 000 signatures in support to contest an election for the National Assembly. There is thus more than a tenfold difference in the support requirement as applied to parties and independent candidates respectively.

6. The support limitation raises multiple constitutional concerns.

6.1. Firstly, the limitation imposed by the support requirement is questionable in light of the Constitutional Court's remarks in *New Nation Movement* regarding the wording of section 19(3)(b) of the Constitution. The Court interpreted the section as conferring a right on individuals to stand for public office, only limited by the requirement that such individuals must be adults and South African citizens. That is, any additional limitations on an adult citizen to stand for public office, would fall foul of section 19(3)(b) and will only be justifiable in terms of section 36 of the Constitution. Throughout his majority judgment in

New Nation Movement, Jafta J emphasises the lack of further limitations on the section 19(3)(b) right, for example:

> "[154] The drafters of our Constitution were quite alive to the fact that one cannot vote unless there is someone she can vote for. In their wisdom they added to the mix the right to contest elections and the right to hold office. The latter right depends on winning the election contest. However, it is significant to note that in plain language, section 19(3) reserves the right to stand for public office which entails contesting elections for adult South Africans. It is them only, who are entitled to be voted into public office. And the words "every adult citizen" at the opening of section 19(3) demonstrate that each adult South African is the bearer of the right to stand for public office and if elected, to hold the office she stood for. This construction is consistent with the language of the provision, *which is framed in inclusive terms to prevent the exclusion of some South Africans from exercising those rights* as it happened during the apartheid era. This interpretation is also in alignment with international law. It will be recalled that the ICCPR provides that every citizen shall have the right to vote and be elected by secret ballot" (emphasis added).
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> "[158] … Section 19(3)(b) entitles every adult South African who wishes to do so, to contest elections and if elected to hold public office."
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> "[160] … In unequivocal terms, section 19(3)(b) confers upon every adult South African the right 'to stand for public office and, if elected, to hold office'. Whilst Parliament has the power to pass legislation that regulates

> the exercise of the right, it cannot enact legislation that prevents the exercise of the right."
>
> "[171] … Without contesting elections, it is impossible for any adult citizen to exercise the right to stand for and hold public office if elected."

There can be little doubt that the support requirement for contesting elections imposes a significant limitation on adult citizen's right under section 19(3)(b), which reminds one starkly of limitations of a bygone era, such as property-holding criteria that were still prevalent during the earlier parts of the previous century.

6.2. The second problem with the support requirement is the differentiated manner in which it is applied to parties compared to independent candidates. This differentiation, as noted in para 5 above, lies both in the repeated nature of the requirement resting on independent candidates versus the once-off requirement for parties and the material difference in the number of signatures required. This differentiation can be viewed as denying independent candidates equal enjoyment of the political rights in section 19 of the Constitution. Since the choice to contest an election, i.e. exercise the section 19(3)(b) right, as an independent candidate, rather than through a political party, is closely linked to freedom of association in section 18 and freedom of conscience in section 15 of the Constitution as well as a person's dignity, as set out by Madlanga J in his majority judgment in *New Nation Movement,* the differentiation imposed by the support requirement can be viewed as unfair discrimination under section 9 of the Constitution given that the grounds of differentiation are conscience, which is a listed ground in section 9(3) causing

differentiation on that ground to be presumed unfair discrimination, political association and that the differentiation impedes a person's dignity. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 supports the latter point in that it defines discrimination as "any act … including a … law, rule, practice, condition … which … imposes burdens … on, or withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds" and defines "prohibited grounds" as including any "ground … where discrimination based on that … ground … undermines human dignity".

7. In its current form in the Bill, it is highly questionable whether the requirement that independent candidates must submit a list of signatures from voters equalling 30% of the quota required to fill the contested seat in the previous election, *prior* to them being allowed to contest the election, will pass constitutional muster.

8. It is proposed that the provision in section 31B(3)(*a*) pertaining to the list of signatures to be submitted by independent candidates, either be,

8.1. removed in its entirety; or

8.2. replaced by a requirement identical to that placed on political parties in section 15(3)(*a*) of the Electoral Commission Act, read with regulation 3 of the Regulations for the Registration of Political Parties (GNR.13 of 7 January 2004, as amended), namely that an independent candidate should only be required to submit a list of supporting voter signatures once and in the same number as that applied to parties.

Allocation of seats

9. Schedule 1A in the Bill sets out how seats will be allocated to independent candidates and parties contesting elections for the National Assembly respectively. A fundamental difference between independent candidates and parties in the way that National Assembly seats are allocated is that independent candidates only compete for half of the seats (so-called “regional seats”). A region, in effect, refers to a province. Political parties, in contrast, compete for regional seats as well as the other half of the seats (so-called “compensatory seats”). Compensatory seats are thus filled exclusively by political parties. Parties must submit fixed lists of nominated candidates for both regional and compensatory seats. A candidate may be nominated by a political party on both regional and compensatory seat lists, but the combined total of candidates on the regional and compensatory seat lists may not exceed the total number of seats.

10. Another material difference between allocation of seats to parties and independent candidates relates to calculation of votes across regions (provinces). An independent candidate can only win a seat within a particular region/province, based on the total number of votes cast in favour of that candidate *within* that region/province. Any votes cast for the candidate in another region/province is in effect forfeited by that candidate. That is, such votes are not taken into account in determining whether the candidate is allocated a seat. In contrast, when the total number of seats allocated to a political party is calculated, the *aggregate* of all votes cast for that party *across* all regions/provinces is used to determine the party’s total number of allocated seats, in the form of the combined regional and compensatory seats. Political parties thus benefit from votes cast across regions/provinces, whereas independent candidates do not.

11. Viewed from an individual candidate's perspective, there is accordingly a material difference between the exercise of their section 19(3)(b) right based on whether they contest the election as an independent candidate rather than a nominee of a political party. That is, the right to hold office, *if elected,* differs in content materially in a given election between independent and party nominated candidates. That difference lies in the content of the phrase 'if elected' as set out in the Bill and discussed in paras 9 and 10 above. Simply put, the number of votes required to be elected differs materially between the two categories of candidates.

12. While viewed separately, it can probably be argued that the manner of allocating seats to independent candidates and political parties respectively in the Bill will not fall foul of section 19(3)(b) of the Constitution, the differentiation between the two categories raises constitutional concerns. Along the same lines as argued in para 6.2 above in respect of the support requirement, the differentiation between types of candidates in how seats are allocated will quite likely fall foul of section 9 of the Constitution. An aggravating factor is the fact that the Bill does not adopt a similar approach in the allocation of seats in provincial legislatures. For those seats, the different types of candidates are treated the same in the allocation calculation. That raises serious doubts as to the justifiability of the differentiation in allocating seats in the National Assembly.

13. It is recommended that the division of National Assembly seats in regional seats and compensatory seats be removed from the Bill and that the allocation of all seats in the National Assembly be done on an equal basis between independent candidates and political parties, along the same lines as that for provincial legislatures.

14. The combined effect of the proposed rules in the Bill that an independent candidate may contest an election for a seat in the National Assembly in more than one region, but may not aggregate the votes received across regions in order to be allocated a seat, calls into question whether the system created in the Bill amounts to an electoral system that "results, in general, in proportional representation" as required by section 46(1)(d) of the Constitution. The effect of these two rules in the Bill, read together, is that there may be significant distortion between the votes cast nationally and the allocation of seats. The representation in the National Assembly may thus not be, in general, proportional to the votes cast, given the potentially large number of votes that are discarded in the process of seat allocation.

15. This problem may be addressed by either restricting the participation of independent candidates to one region, as is the case for party nominated candidates, or allowing independent candidates to aggregate votes across regions in the allocation of seats.

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