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GENERAL NOTICE

NOTICE 674 OF 2013

NOTICE OF INTENTION TO INTRODUCE PRIVATE MEMBER'S BILL AND INVITATION FOR PUBLIC COMMENT ON DRAFT CONSTITUTION NINETEENTH AMENDMENT BILL

In accordance with Rule 241(1)(b) of the Rules of the National Assembly, notice is hereby given that Mudene Smuts MP, intends to introduce a private member's bill entitled the Constitution Nineteenth Amendment Bill to give effect to Cabinet policy as encapsulated in the National Development Plan, where it calls for clear criteria for judicial appointment, for impartial selection processes and for a change in the composition of the Judicial Service Commission to reduce its size and the political influence perceived to affect its decisions.

A copy of the draft Constitution Nineteenth Amendment Bill and a memorandum setting out its objectives are included in the Schedule to this Notice in fulfilment of the requirements of Rule 241(1)(c) of the Rules of the National Assembly.

Interested parties and institutions are invited to submit written representations on the draft bill to the Secretary to Parliament within 40 days of the publication of this notice. Representations can be delivered to the Secretary to Parliament, Old Assembly Building, Parliament Street, Cape Town; or mailed to the Secretary to Parliament, P O Box 15, Cape Town, 8000; or emailed to mcoetzee@parliament.gov.za and copied to dene@iafrica.co.za.

M Smuts MP
19 June 2013

SCHEDULE

REPUBLIC OF SOUTH AFRICA

**CONSTITUTION NINETEENTH
AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 74); Bill and prior notice of its introduction
published in Government Gazette 36608 of 28 June 2013)*

(The English text is the official text of the Bill)

(Ms M Smuts, MP)

[PMB7 - 2013]

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 Constitution of the Republic of South Africa, 1996, so as to further regulate the appointment of judicial officers and the composition of the Judicial Service Commission; and to provide for matters connected therewith.

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

Amendment of section 174 of the Constitution of the Republic of South Africa, 1996

1. Section 174 of the Constitution of the Republic of South Africa, 1996 (herein after referred to as the “Constitution”) is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) (a) Any South African citizen who is appropriately qualified and a fit and proper person may be appointed as a judicial officer.

(b) The determination whether a person is appropriately qualified must be made with due regard to demonstrable capability to perform judicial functions.

(c) The determination whether a person is fit and proper for judicial office must be made with due regard to their demonstrated commitment to Constitutional values, professional conscientiousness and personal integrity.

(d) All candidates for judicial office must be assessed equally.”.

Amendment of section 178 of Constitution of the Republic of South Africa

2. Section 178 of the Constitution is hereby amended by—

(a) the substitution in subsection (1), for paragraph (h) of the following paragraph:

- “(h) [six] four persons designated by the National Assembly from among its members who are not also members of the executive, at least [three] two of whom must be members of opposition parties represented in the Assembly;”;
- (b) the substitution in subsection (1), for paragraph (i) of the following paragraph:
- “(i) [four] two permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces, one of whom must be a member of an opposition party;” and
- (c) the substitution in subsection (1), for paragraph (j) of the following paragraph:
- “(j) when considering appointments in terms of section 174 (6) and matters under subsection 5, [four] two persons, who are not political office bearers, designated by the President as head of the national executive, after consultation with the leaders of all parties in the National Assembly;”.

Short title and commencement

3. This Act is called the Constitution Nineteenth Amendment Act of 2013 and takes effect on a date determined by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION NINETEENTH
AMENDMENT BILL, 2013**

1. SUMMARY

The Bill aims to give effect to Cabinet policy as encapsulated in the National Development Plan, where it calls for clear criteria for judicial appointment, for impartial selection processes and for a change in the composition of the Judicial Service Commission to reduce its size and the political influence perceived to affect its decisions.

2. PROVISIONS OF THE BILL

The provisions of the Bill are summarised below:

2.1. Clause 1

2.1.1. A substantive change is proposed in clause 1(a), which requires that all judges should be South African citizens. Considerations which may have been valid at the time of the negotiation of the Constitution have surely fallen away and it is submitted that it is self-evident that South Africa's judges should be South African citizens.

2.1.2. Clause 1(b) elaborates on the appropriate qualifications required in clause 1(a) by stipulating that a demonstrable ability to perform judicial functions forms part thereof. The National Development Plan at page 453 states that "Unfortunately there is little or no consensus in the Judicial Service Commission or in the legal fraternity about the qualities and attributes needed for the bench"; and at page 454 recommends the "Establishment of clear criteria for the appointment of judges, with emphasis on the candidates' progressive credentials and transformative judicial philosophy and expertise". It is submitted that a demonstrable ability to perform judicial functions satisfies the National Development Plan's requirement for clarity and for expertise.

2.1.3. Clause 1(c): This clause elaborates the qualities and attributes which a judge should have. A demonstrated commitment to the Constitution and its values is all that can properly be required, and is in all likelihood what the National Development Plan intends when it speaks of "a progressive" (page 454) or "a transformative judicial philosophy" (also page 454). Professional conscientiousness and personal integrity are self-evidently qualities that render a candidate fit and proper but are proposed for explicit inclusion in the Constitution *inter alia* so that a candidate knows what he or she may expect during a JSC interview; and also because the Judicial Service Commission in its summary of the criteria used by the JSC when considering candidates for judicial appointments (published in September 2010) deals with integrity and "energy and motivation" as "Supplementary criteria", separate from "Criteria stated in the Constitution", including the question whether a candidate is a fit and proper person.

2.1.4. Clause 1 (d): This clause requires the equal assessment of all candidates and seeks to address the problem identified by the National Development Plan, that the impartiality of the Judicial Service Commission's processes is called into question.

2.2. Clause 2

- 2.2.1. The National Development Plan at page 453 states: “Further reforms include the composition of the JSC itself, which is argued to be too large to function effectively, and to be hamstrung by political interests.”
- 2.2.2. Clause 2 gives effect to this goal by reducing the number of political commissioners. Each existing category is reduced by half.
- 2.2.3. In addition clause 2(a) stipulates that the National Assembly members may not also be members of the executive which it is submitted defeats the purpose of representing legislators on the JSC. The Minister of Justice and Constitutional Development already sits on the JSC *ex officio* and at present two members of the JSC are Deputy Ministers.
- 2.2.4. Clause 2(b): In this clause the same principle that half the representatives of the NA should be opposition members is carried through to the NCOP. It was until recently the NCOP convention that one of the four members elected *en bloc* was an opposition member. The question may legitimately be asked whether the National Council of Provinces should enjoy representation on the JSC when Justice is a national competence, but this House is retained in the interests of inclusivity and because it already enjoys representation.
- 2.2.5. Clause 2(c): In this clause the four presidential appointees are reduced by half and their role in the appointment of judges is limited to those categories of judges where the JSC’s recommendation is decisive. It is submitted that in all cases where the President is given a discretion (section 174 (3) and (4)) the presidential appointees are superfluous. It is proposed that the presidential appointees should also contribute to advising the government on other matters relating to justice under section 178(5). Like the NCOP, the presidential appointees are perhaps a relic of the Interim Constitution, 1993.

3. FINANCIAL IMPLICATIONS

None.

4. PARLIAMENTARY PROCEDURE

- 4.1 The Legal Advisers of Parliament are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 74(3)(a) of the Constitution, since—
- (a) it amends provisions of the Constitution other than section 1, section 74(1) or Chapter 2; and
 - (b) the amendments do not—
 - (i) relate to a matter that affects the National Council of Provinces;
 - (ii) alter provincial boundaries, powers, functions or institutions; or
 - (iii) amend a provision that deals specifically with a provincial matter.
- 4.2 The Legal Advisers of Parliament are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.