
GENERAL NOTICES • ALGEMENE KENNISGEWINGS

**PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA
NOTICE 917 OF 2015****NOTICE OF INTENT TO INTRODUCE PRIVATE MEMBER'S BILL AND
INVITATION FOR PUBLIC COMMENT ON CONSTITUTION
EIGHTEENTH AMENDMENT BILL**

In accordance with Rule 241(1)(b) of the Rules of the National Assembly, notice is hereby given that Hendrik Cornelus Schmidt MP intends introducing a private member's bill shortly in order to amend the Constitution of the Republic of South Africa, 1996 in order to further regulate the appointment of judicial officers and the composition of the Judicial Service Commission, and to provide for matters connected therewith.

A copy of the draft Constitution Eighteenth Amendment Bill and a memorandum setting out its objectives are included in the schedule to this notice in fulfillment 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 e-mailed to gmgidlana@parliament.gov.za and copied to cayleyg@da.org.za.

11 September 2015
H C Schmidt MP

SCHEDULE

REPUBLIC OF SOUTH AFRICA

**CONSTITUTION EIGHTEENTH AMENDMENT
BILL**

(As introduced in the National Assembly (proposed section 74(3)(b)(i)))

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

(Hendrik Cornelus Schmidt MP)

[PMB 5 - 2015]

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 Constitution as amended by section 13 of the Constitution of the Republic of South Africa Amendment Act, 2001

1. Section 174 of the Constitution is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) **[Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.]***(a)* _____ Any person who is appropriately qualified and a fit and proper person may be appointed as a judicial officer.

(b) The determination whether a person is—

- (i)* appropriately qualified must be made with due regard to their competency to perform judicial functions; and
- (ii)* a fit and proper person for judicial office must be made with due regard to their professional conscientiousness, personal integrity and commitment to constitutional values.”.

Amendment of section 178 of Constitution as amended by the section 2 of the Constitution of the Republic of South Africa Amendment Act, 1998; section 16 of the Constitution of the Republic of South Africa Amendment Act, 2001 and section 10 of the Constitution Seventeenth Amendment Act, 2012

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 national 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) **[four]** when considering appointments in terms of section 174(6) and matters under subsection 5, two persons designated by the President as head of the national executive, after consultation with the leaders of all parties in the National Assembly;”.

Transitional provision

3. Notwithstanding section 178(3), the members of the Judicial Service Commission who were designated or nominated to serve on the Commission in terms of section 178(1), continue to do so until 24 months after the coming into operation of this Act.

Short title and commencement

4. This Act is called the Constitution Eighteenth Amendment Act of 2015 and comes into operation on a date set by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION EIGHTEENTH AMENDMENT BILL, 2015

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 (JSC) 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 removes the requirement of South African citizenry for appointment to the Constitutional Court to align it with the appointment of all other judicial officers.

2.1.2 Clause 1(b) elaborates on the appropriate qualifications required in clause 1(a). The National Development Plan 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 recommends the “establishment of clear criteria for the appointment of judges, with emphasis on the candidates’ progressive credentials and transformative judicial philosophy and expertise”.

2.1.3 Clause 1(b)(ii): This clause elaborates on the qualities and attributes which a judge should have. A 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” or “a transformative judicial philosophy”. 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. Furthermore, the JSC, 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.

2.2. Clause 2

2.2.1. The National Development Plan 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 (NA) members may not also be members of the national executive as it defeats the purpose of representing legislators on the JSC. The Minister of Justice and Correctional Services 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 of the representatives of the NA should be opposition members is carried through to the National Council of Provinces (NCOP). Until recently, it was practice in the NCOP that one of the four members elected *en bloc* was an opposition member. It may legitimately be asked whether the NCOP 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 It is proposed that the Bill be dealt with in accordance with the procedure established by section 74(3)(b)(i) of the Constitution, since the amendments relate to a matter that affects the National Council of Provinces.
- 4.2 It is further proposed that it is not necessary to refer the 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.