

INDEPENDENT ELECTORAL COMMISSION**DOCUMENTS INCLUDED:**

1. Second Report of the Technical Committee on the Independent Electoral Commission to the Negotiating Council
2. Executive Summary
3. First Draft of The Independent Electoral Commission Act

SECOND REPORT OF THE TECHNICAL COMMITTEE ON THE INDEPENDENT ELECTORAL COMMISSION TO THE NEGOTIATING COUNCIL

21 MAY 1993

In terms of its undertaking conveyed to the Negotiating Council on Tuesday 18 May 1993, the Technical Committee annexes its initial draft of a proposed Independent Electoral Commission Act, which it has prepared as a legislative framework for consideration by the Negotiating Council in accordance with its Terms of Reference.

This initial draft represents the product of intensive work undertaken over the period of ten days which has elapsed since the Committee was appointed. During this period, one member of the Committee, Mr S K Ndlovu, has been simultaneously committed as a member of the SABC Panel, and accordingly, he has not as yet been able to participate in much of the work of the Technical Committee. The Committee has also just been enlarged by the addition of Dr Frene Ginwala, as a new member, and an initial meeting between her and the Committee has been scheduled for early next week.

In the circumstances, this annexed draft is submitted for the consideration of the Negotiating Council, with the reservation that all members of the Technical Committee, but in particular Mr S K Ndlovu and Dr Frene Ginwala, may wish to make additional comment at a subsequent stage in the drafting process.

The Committee notes its intention to give further attention to the formulation of an Electoral Code of Conduct and to certain comparative legislation from other countries which has been made available to it. It has drawn attention to the need to consult further with regard to certain technical matters affecting the voting and electoral process. It also notes that certain Constitutional issues arise from this draft, and intends to discuss these issues with the Technical Committee on Constitutional Matters.

In the meanwhile, the Committee would welcome comment and further guidance from the participating delegations in the Negotiating Council.

EXECUTIVE SUMMARY

1. This initial draft has been prepared on the basis of the written brief given to the Technical Committee on behalf of the Multi Party Forum.

(Addendum D : Proposals to the Negotiating Council on the appointment of Technical Committees, and their Terms of Reference on certain matters arising from the Consolidated Document, Planning Committee : 26 April 1993)

2. The Preamble indicates in general terms the ambit and purposes of the Act, and that the Independent Electoral Commission will, in terms of the present draft, assume responsibility for the conduct of democratic national elections for a new Parliament to function in terms of an Interim Constitution. As noted in the Planning Committee's Brief, where regional elections are involved, new formulations will have to be considered. Consequently these fall outside the ambit of the present draft although the South African Government's submission envisages a broader context for this legislation.

3. Section 1 contains the definitions of the key terms used in the Act.

Attention is drawn to Section 1.8 in which a definition of "Eligible Voters" has been included. This definition confers the right to vote upon all South African citizens of 18 years and over, including citizens of the TBVC states, and only excludes persons from the right to vote, by reason of criminality, mental disorder and other provisions of the Act or Regulations to be promulgated under the Act. As noted in footnote 2 of the draft Act, certain submissions were made to the Technical Committee to the effect that prisoners should be entitled to vote. This is a policy consideration on which the Technical Committee will require guidance from the Negotiating Council.

Section 1.17 contains a definition of "The Transitional Elections", which states that the Act applies only to the elections of a new parliament.

4. Section 2 provides, however, that the Act will remain in force until such time as it is repealed by Parliament. Until so repealed, it will be possible for a new Independent Electoral Commission to be reconstituted in terms of the Act, in order to perform similar functions in respect of any future election or Referendum, as the case may be.
5. Section 3 is intended to ensure that the Act and Regulations promulgated thereunder by the Independent Electoral Commission, in respect of the conduct and supervision of the Transitional Elections, will override any other statute or regulations which might be in conflict therewith. Theoretically, it might have been preferable to undertake an audit of every Act and regulation on the statute book, and to repeal or amend any conflicting provision specifically. However, such an audit would be time-consuming and probably impracticable given the present time constraints. Section 3

is designed to circumvent this difficulty. The overriding power conferred on the Commission is limited to the ambit of the Act and Regulations as they affect the conduct and supervision of national elections and other matters dealt with therein.

6. Section 4 establishes the Commission.
7. Section 5 states the objects of the Commission.
8. Section 6 ensure that the Commission should function as an institution independent and separate from government and any official body or other authority. In terms of Section 6.3 the Commission will have a duty to submit written reports on its acts and decisions to the State President, copies of which will be delivered to the Forum or the Council, and will constitute documents available to the public.
9. Section 7 provides for the composition of the Commission, which it is proposed should comprise not less than seven (7) and not more than eleven (11) persons. The present draft makes provision for the secondment of representatives from accredited international organisation and/or foreign governments. The number of such international representatives has been left open, and guidance is also sought in respect of their status. (For example, whether they should serve merely as observers or as full members, voting or non-voting).

Section 7.3 indicates criteria for eligibility of members of the Commission. No person who has held political office, (meaning, an appointment or position, whether involving remuneration or not, in the service of a political party or organisation within the Republic, during a period of three years prior to the date of the Transitional Elections) will be eligible to serve as a member of the Commission. Furthermore, upon ceasing to be a member of the Commission, a Commissioner shall not be eligible to accept appointment to any public office (meaning, remunerated position in the service of the State or of a parastatal) for a period of three years reckoned from the date upon which such member's appointment terminated. These provisions are designed to ensure not only the perceived impartiality of the Commission, but also that members are perceived as impervious to political pressure, including future benefit or advantage.

10. Section 8 provides that the Commission is to be constituted from a date to be fixed by the State President by Proclamation in the Gazette, after consultation with the Forum, and shall only be dissolved by the State President upon advice of the Transitional Executive Council or Parliament after:
 - (a) Confirmation by the Commission that the Transitional Elections have been substantially free and fair; and after
 - (b) the final determination by the Commission of all issues and disputes which might have arisen in consequence of the Elections.

11. Section 9 deals with the circumstances in which a member's appointment can be terminated. This includes resignation by the member, and the withdrawal of the official nomination of any international representative. Application for the removal of a member can also be made to the Appellate Division of the Supreme Court by the State President, the Transitional Executive Council, or any registered political party or one hundred eligible voters; provided that insofar as such party or voters are concerned, the Chief Justice must first give leave for such application to be brought. The Appellate Division can order the removal of a member of the Commission only in the event of serious misconduct or incapacity bearing upon a member's fitness for office. This would include continued ill health, and a material breach of the pre-conditions and qualifications referred to in Section 7 (see paragraph 10 above), or any other substantial reason which the Court considers inconsistent with the member's continuation in office. The application must be heard by the Chief Justice and not less than six (6) other Appeal Court judges.
12. Section 10 deals with the remuneration and conditions of appointment of members of the Commission.
13. Section 11 states that the Commission may be reconstituted, if necessary, in order to undertake the same or similar functions and responsibilities in respect of future elections which may be called in terms of the Constitution. The nomination and appointment of members of a reconstituted Commission shall be effected by the State President upon the advice of Parliament, acting in terms of a resolution passed by the same majority as is necessary to amend the Constitution. If parliament is deadlocked, and unable to establish the required majority to nominate a new Commission, then the deadlock breaking mechanism is that the nomination and appointment of the reconstituted commission will be effected by the State President, on the advice of a majority decision of the full bench of the Appellate Division, comprising the Chief Justice and not less than six (6) other Appeal Court judges.
14. Sections 12-15 deal with procedure, administration, financial accountability and a Guarantee by the State for the commitments of the Commission.
15. Section 16 deals with the powers, duties and functions of the Commission. In particular it is envisaged that the Commission shall set up three (3) separate Directorates, viz: an Election Administration Directorate, an Election Monitoring Directorate and an Election Adjudication Directorate. The Commission shall be entitled to co-opt suitably qualified persons including nominees from accredited international organisations to assist these Directorates.

Section 16.4 provides that each Directorate shall operate independently of the others, but will be accountable and subject to the overall management and control of the Commission.
16. Section 17 sets out the responsibilities of the Election Administration Directorate, including the role of voter education, determining the eligibility and identification of

voters, the enforcement of an electoral Code of Conduct, administering the obligation to disclose the receipt and source of each financial contribution to a political campaign in excess of R1,000.00; and the promulgation of regulations governing political advertising, to be determined in consultation with the Independent Media Commission. It should be noted that the administrative details involving proof of eligibility and identification of voters has not yet been specified, and will require further consideration and technical advice. Guidance is required from the Negotiating Council whether detailed provisions are to be included in this Act or left to the Commission to determine, in view of the obvious need for substantial amendments to the existing Electoral Act. Provision is made for an electoral Code of Conduct to become Schedule A to this Act. This Code has not yet been drafted by the Committee, which has thus far received only two draft submissions from the negotiating parties in this regard.

17. Section 18 provides for the Election Monitoring Directorate. In particular Section 18.2 envisages that this directorate shall have investigative powers, including the right to issue and execute search warrants, and to seize items as evidence of alleged infringements of the electoral Code of Conduct.
18. Section 19 provides for the responsibilities of the Election Adjudication Directorate. Section 19.1 provides that this Directorate shall serve as the final arbiter of claims, issues and disputes affecting the campaign, conduct and results of the Transitional Elections, save that there is to be a final right to appeal to the Commission.
19. Section 20 deals with the Commission's final adjudication of the election results. It is provided that the Commission shall be required within a period of 21 days after completion of the ballot, to determine and certify the final results of the Transitional Elections, and to declare whether, and if so to what extent, such elections have been conducted in a manner which has been substantially free and fair. Section 20.2 provides that a simple majority is not sufficient to certify the result of the election, and a majority of at least eight (8) members is required. In the event that the Commission finds that the poll was partly unfree and unfair, Section 20.3 empowers it to implement such steps as it may deem appropriate in order to achieve a free and fair election result. This could enable the Commission to take limited action in a particular region, without having to hold a completely new national election, in the event that there were unacceptable conditions in a limited area of the country only.
20. Section 21 provides that the Commission's decisions are not subject to appeal, but may be reviewed by a Provincial Division of the Supreme Court, or with the leave of the Chief Justice by the Appellate Division.
21. Section 22 provides for the succession of the rights and prerogatives of the Forum firstly by the Transitional Executive Council, and ultimately by Parliament.
22. Section 23 empowers the Commission to delegate any of its' powers, save only for its' duty in respect of the final adjudication of the election results.

23. Sections 24-28 deal with electoral offences, and have been drafted along the lines of the existing provisions of the Electoral Act.
24. Section 29 prohibits the conduct of opinion polls during a period of six (6) weeks prior to the date of commencement of the Transitional Elections. (In terms of the present Electoral Act, the effective period of the prohibition is six-and-a-half weeks). There have been submissions to the effect that this period should be shorter, say two (2) weeks. Guidance is required also in respect of this matter.
25. Section 30 protects the secrecy of voting from disclosure in court proceedings.
26. Section 31 exempts the Commission from liability for fiscal duties, taxes and fees.
27. Section 32 empowers the Commission to promulgate regulations, and penalties for contraventions. It also empowers the Commission to prescribe voting forms and other necessary documents.
28. Section 33 provides that upon advice of the Forum, the Council or Parliament, the State President may declare this Act applicable to the holding of a Referendum, which could be conducted either nationally, or in any particular region/s, and on any specified issues.
29. Section 34 contains the Short Title of the Act.

FIRST DRAFT

**SUBMITTED BY THE TECHNICAL COMMITTEE ON THE INDEPENDENT
ELECTORAL COMMISSION TO THE NEGOTIATING COUNCIL**

21 MAY 1993

THE INDEPENDENT ELECTORAL COMMISSION ACT

To provide for the establishment of an Independent Electoral Commission to assume responsibility for the conduct, supervision, monitoring and evaluation of national elections to be conducted in order to facilitate the democratic election of a new Parliament to function in terms of an Interim Constitution; and to provide generally for the necessary powers, functions, duties and procedures of the Commission, and for a Code of Conduct binding upon all political parties; and for related matters arising from and connected with the elections.

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CHAPTER ONE
INTERPRETATION AND APPLICATION OF THE ACT

1. Definitions

In this Act, unless the context indicates otherwise :

- 1.1 **"Accredited International Organisations"** means the United Nations, the European Economic Community, the British Commonwealth, the Organisation of African Unity and any other international organisation so designated by the Forum, or the Council, or the New Parliament.
- 1.2 **"Chief Executive Officer"** means a person appointed to such office by the Commission.
- 1.3 **"The Electoral Code of Conduct"** means the Code of Conduct binding upon political parties in terms of 17.6.
- 1.4 **"CODESA"** means the Convention for a Democratic South Africa.
- 1.5 **"The Commission"** means the Independent Electorate Commission constituted or reconstituted in terms of this Act.
- 1.6 **"The Council"** means the Transitional Executive Council to be established in consequence of special legislation enacted in implementation of decisions and agreements reached by the Forum.
- 1.7 **"Eligible Candidates"** means any Eligible Voter who is not serving a current term of imprisonment, and who has not been disqualified from voting by order of the Commission in terms of this Act or by the Court.

- 1.8 **"Eligible Voters"** means all South African citizens¹ of 18 years and more, including citizens of the TBVC States, with the exception only of such persons as may be disqualified from voting by reason of criminality², mental disorder³ or other provisions of this Act and of the Regulations.
- 1.9 **"The Independent Media Commission"** means the commission charged with responsibility for control of public media in terms of the ... Act.
- 1.10 **"The Forum"** means the Multi-Party Negotiating Process constituted in order to resume the constitutional negotiations commenced at CODESA.
- 1.11 **"Parliament"** means the new Parliament to be elected as a result of the Transitional Elections, to function as the sovereign legislature in terms of an interim Constitution and to draft and enact a new Constitution for the Republic.

¹ The ANC submission (Section 5.2 et seq) envisages a special deeming provision in relation to citizenship which includes birth in South Africa, at least one parent being South African, marriage to a South African, or continuous residence in South Africa for at least five years.

² The term "criminality" is used at this stage merely to highlight the need for the Forum to address the principle involved. The Electoral Act (Section 4) contains an extensive debarment from voting of persons convicted of criminal offenses. The ANC suggests that this debarment be confined to persons convicted of corrupt or illegal practices under this Act. Lawyers for Human Rights in their submission suggest that at least in respect of the Transitional Elections, prisoners be given the right to vote and that their future voting right be determined by the constitution making body.

³ It is envisaged that the appropriate provision of the Electoral Act (Section 4(2)) be incorporated by reference as envisaged in terms of 17.17.

- * **"New Definition"**⁴
- 1.12 **"Political Office"** means any appointment or position, whether involving remuneration or not, in the service of a political party or organisation within the Republic.
- 1.13 **"Public Office"** means any remunerated position in the service of the State, or of any corporate body or other institution, which is owned and/or controlled, whether directly or indirectly by the State.
- 1.14 **"The Regulations"** means the Regulations promulgated in terms of this Act.
- 1.15 **"The Republic"** means the Republic of South Africa, including the TBVC States.⁵
- 1.16 **"The TBVC States"** means those areas which formerly constituted a part of the Republic and are presently governed in terms of Constitutional legislation establishing Transkei, Bophuthatswana, Venda and Ciskei respectively.
- 1.17 **"The Transitional Elections"** means the elections to be conducted for a new Parliament in terms of this Act.
- 1.18 **"This Act"** includes the Regulations prescribed thereunder.

⁴ It is suggested by the Gender Advisory Committee that a definition be included in all such legislation defining "Persons" as meaning both men and women.

⁵ The Technical Committee has assumed that there will be agreement by all the TBVC States for the inclusion of their citizens for purposes of the Transitional Elections.

2. Application of this Act

The provisions of this Act shall apply initially in respect of the Transitional Elections, but shall remain in force in respect of future elections⁶, notwithstanding the dissolution of the originally constituted Commission, until formally repealed by Parliament.

3. Binding on the State

This Act and the Regulations to be promulgated thereunder shall be binding upon the State, and to the extent that its provisions may conflict with the inherent powers of the State or with the provisions of any other Statute, it shall supersede and override any such powers and provisions insofar as they may relate to the conduct and supervision of national elections, and other matters dealt with in terms of this Act.⁷

⁶ The South African Government in its submission envisages the application of the Act, and the jurisdiction of the Commission, as applicable to a broad category of elections, including national, regional and other elections for the appointment of any "board, body or institution of any authority."

⁷ Members of the Technical Committee have expressed concern with regard to the possibly unintended ambit of this overriding provision. However, the broad theme appears to be in accordance with the Committee's brief and the parties' individual submissions. Clearly there has not been time to undertake an adequate audit of legislation which could be affected by this provision.

The appropriate constraints on the powers of the Commission in relation to the Courts and existing laws need to be clearly defined. In the ANC submission, it is proposed that the Commission have power to promulgate regulations, repealing and amending any existing law, and power to direct government authorities, including the police and defence force "to perform and execute tasks" necessary for the implementation and conduct of the election.

CHAPTER 2
ESTABLISHMENT OF COMMISSION

4. Establishment of Commission

There is hereby established a body⁸ to be known as "THE INDEPENDENT ELECTORAL COMMISSION", which shall be a juristic person.

5. Objects of Commission

The objects of the Commission shall be to administer and conduct a free and fair democratic electoral process for the new Parliament, and to assume plenary executive powers in respect of the Transitional Elections, including responsibility for registration of voters and political parties; supervision of the electoral process; monitoring and evaluation of the process; determining the results thereof; and adjudicating issues affecting the Transitional Elections and the conduct of political parties during the course of such Elections.

6. Independence of the Commission

6.1 The Commission shall function as an institution independent of and separate from the State, the Government, the Council, or any subordinate Ministry, local authority, sub-council, department or organ thereof.

6.2 In respect of all matters affecting the organisation, conduct and supervision of the Transitional Elections, all powers of the State and such other bodies as are referred to shall be deemed to have been derived

⁸ The IFP/KwaZulu Government's submission envisages a plurality of Commissions to be separately established in respect of each State within a Federal context.

from and shall be subordinate to the Commission.⁹

6.3 Notwithstanding the foregoing, the Commission shall have a duty to submit written reports upon its acts and decisions to the State President, which reports shall be simultaneously delivered to the Forum or the Council, and shall represent public documents.

7. Composition of the Commission

7.1 The Commission shall comprise not less than¹⁰ seven (7) nor more than eleven (11)¹¹, members appointed by the State President¹² upon the advice of the Forum, who shall be respected and suitably qualified persons representing a broad cross-section of the population, and who are themselves eligible voters; on condition that the composition of the

⁹ The PAC submission recommends that the Commission be subordinate only to the Council which shall have power to ratify and/or amend its decisions.

¹⁰ The Technical Committee has expressed some concern as to whether the number of members should be defined specifically or left within a range. As drafted, the Statute requires that the State President's discretion be exercised on the advice of the Forum or Council, as the case may be. However, the appointment of additional members during the progress of the elections could give rise to contention.

¹¹ The Democratic Party proposes either a Commission of 26 members, comprising: "Non-Partisan Commissioners from civil society", one of whom shall be nominated by each delegation participating in the Forum, or a commission of 7-11 members selected by a neutral selection body.

¹² In the SA Government submission (Section 4(1)(b)) it is suggested that the State President should make appointments "from the names submitted to the State President by the Council". The Committee has assumed that the State President does not have an independent discretion to select names from a list.

Commission may also include¹³ not more than persons seconded for this purpose by Accredited International Organisations and/or foreign Governments, and approved for appointment by the Forum.¹⁴

7.2 No person who has held Political Office during a period of three years prior to the date of the Transitional Elections, shall be eligible to serve as a member of the Commission¹⁵; and upon ceasing to be a member of the Commission for any reason, no person shall be eligible to accept appointment to Public Office for a further period of three (3) years from the date upon which such appointment shall terminate.¹⁶

7.3 It shall be a fundamental precondition to the appointment and eligibility of every member of the Commission :

¹³ The Government of Bophuthatswana proposes representation of international organisations, but only as observers with advisory status.

The South African Government proposes that only South African citizens serve as members of the Commission, although it does envisage accredited external observers.

The Democratic Party also suggests that international representatives should serve in a non-voting capacity.

¹⁴ The ANC proposes a Commission comprising not less than seven (7) and not more than eleven (11) members who are all to be eligible voters in the election, plus four (4) persons from the international community (ie a total of eleven (11) to fifteen (15) members.

The Venda Government's submission specifies that members of the Commission should include women and represent a balance between population groups.

The South African Government proposes a Commission of up to eleven (11) members, with no minimum.

¹⁵ This accords with the suggestion of the Democratic Party.

¹⁶ The Committee has included this provision as a suggestion, although it does not derive from its brief or from the submissions of any of the parties.

- 7.3.1 That they shall serve impartially in their individual personal capacities (notwithstanding party affiliation, secondment or nomination) and that all voting and decision-making shall be undertaken in absolute good faith, and without fear, favour, bias or prejudice.
- 7.3.2 That they shall not during the term of their appointment accept nomination for any Political¹⁷ or Public Office, whether remunerated or otherwise, nor in any other manner serve or assist any of the participating political parties or any other organisations involved with the Transitional Elections.
- 7.3.3 That they shall be ineligible to serve as members of the Council, nor shall they be Eligible Candidates in the Transitional Elections, nor available for nomination or co-option to either such body; and they shall remain ineligible for such election, nomination or co-option to Parliament for a period of at least three (3) years from the date of the Transitional Elections.
- 7.3.4 That they shall not by membership, association, conduct or otherwise, place their perceived independence in jeopardy or in any other manner damage the credibility and integrity of the Commission.
- 7.4 The State President, acting on the advice of the Forum, shall designate one (1) member of the Commission as Chairperson and another member as Vice-Chairperson. In the absence of both the designated Chairperson and Vice-Chairperson, the remaining members of the Commission shall nominate another of their number as acting Chairperson.

¹⁷ The ANC's submission implies that former political office bearers should not be disqualified, provided they resign prior to assuming their membership of the Commission.

7.5 In the event of a vacancy arising on the Commission for any reason, the State President (with the concurrence of the Forum or the Council, as the case may be) may either allow the appointment of such member to lapse (subject to the existence of the minimum number of members stipulated above) or effect a substituted appointment of some other suitably qualified person who fulfils the same or similar criteria as the person ceasing to hold office, provided that any such substituted appointee/s shall likewise be approved by the Forum or the Council, as the case may be.

7.6 Nothing hereinbefore stipulated shall preclude the State President from effecting further appointments of members to the Commission from time to time, within the numerical limits stated in 7.1, with a view to ensuring its efficacy and demonstrating its broad-based impartiality, on condition that any such further appointments shall be likewise approved by the Forum or the Council, as the case may be.

8. Term of the Commission

The Commission shall come into being upon a date to be fixed by the State President by proclamation in the Gazette, which shall be a date determined in consultation with the Forum, and its appointment shall continue until it has completed its mandate and is dissolved¹⁸ by the State President upon the advice of the Council or Parliament; provided that the Commission shall not be dissolved until the last-occurring of:

- (i) the confirmation of the Transitional Elections as substantially free and fair,

¹⁸

The SA Government submission implies that the Commission would be a permanent institution established not merely for purposes of the Transitional Elections, and that members of the Commission should serve for a fixed term viz five (5) years. Recognising the possible future need of the Commission, if further elections are needed before adoption of a new Constitution, the Technical Committee has formulated an alternative proposal (Section 20), which is to the effect that the Commission may be reconstituted in the event of such further elections, but it will not continue to have an established membership during any intervening period.

including similar confirmation in respect of any such further by-elections as may be ordered by the Commission in terms of 20.3.

- (ii) the final determination of all issues or disputes which may have arisen in consequence of the Transitional Elections, that are referred to the Commission for its adjudication in terms of this Act.

9. Termination¹⁹ of Appointment

9.1 Notwithstanding the provisions of clauses 7 and 8, the appointment of a member of the Commission shall be terminated in the following circumstances:

- 9.1.1 At the instance of the member concerned, by resignation in writing delivered to the State President;
- 9.1.2 At the instance of an Accredited International Organisation or Foreign Government, which requests the withdrawal of its nominated or co-opted member.
- 9.1.3 In consequence of an Order to this effect by a full bench of the Appellate Division, comprising the Chief Justice and not less than six (6) other Appeal Court judges, if it is satisfied as to the existence of good and sufficient reason therefor, pursuant to an Application lodged on behalf of:

¹⁹

The ANC in its submission does not address the issue of terminating the appointment of Commission members during their term of office. In the SA Government's submission, it is proposed (6(2)) that complaints concerning unfair or partial behaviour should be made to the Council which should investigate the matter and make recommendations to the State President. The State President is thereafter given a discretion to remove the member from office.