

**SOUTH AFRICAN GOVERNMENT OFFICE
- WORLD TRADE CENTRE -**

27 May 1993

Head of the Administration
Multi-Party Negotiating Process
World Trade Centre

Dear Dr Eloff

**SUBMISSION BY THE SOUTH AFRICAN GOVERNMENT FOR THE
ATTENTION OF THE TECHNICAL COMMITTEE: INDEPENDENT
ELECTORAL COMMISSION**

1. Attached is a submission by the South African Government entitled *Government's approach to the report of the Technical Committee on the Independent Electoral Commission.*
2. Kindly transmit the document for immediate attention to the Technical Committee.

Yours sincerely

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GOVERNMENT OFFICE: WORLD TRADE CENTRE

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GOVERNMENT'S APPROACH TO THE REPORT OF THE TECHNICAL COMMITTEE ON THE INDEPENDENT ELECTORAL COMMISSION

1. Detail comments on the Independent Electoral Commission Act (7th Rough Draft) are set out in the Annexure.
2. The Technical Committee's brief is to formulate statutory proposals for the establishing of an Independent Election Commission.
3. The Government therefore strongly objects against the inclusion in the Bill of proposals that deal with Constitutional aspects and matters that should be regulated by a new electoral bill.
4. The Government is also of the opinion that a sovereign state cannot allow foreigners to serve as members on a commission with the vast powers as envisaged for the Independent Electoral Commission, and can therefore not support the proposals with regard to the composition of the Commission.
5. It is also submitted that the proposals regarding the powers and functions of the three functional legs of the Commission exceed the brief of the Technical Committee and can therefore also not be supported by the Government.

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COMMENTS ON THE DRAFT INDEPENDENT ELECTORAL COMMISSION ACT

Paragraph 1

The definitions contained in paragraphs 1.7 to 1.8 should not be part of this act but part of the Constitution.

Paragraph 3

The State derives its powers from statutes and it is trite law that where there is a conflict between acts, the later act shall supersede.

Paragraph 5

It is assumed that the words "registration of voters" only imply a responsibility for such a registration if such a method is decided on.

The recommendation of paragraphs 27, 28 and 33 of Working Group 3 of Codesa, should be borne in mind.

Paragraph 6.2

Cannot read "all matters affecting the organisation, conduct and supervision of the transitional elections", because issues like the issuing of identity documents, maintenance of the population register, determining of citizenship, etc, cannot be subordinate to the Commission. If it is enforced, then it means that the whole public service function will be subordinate to the Commission.

Paragraph 7.1

- (a) Composition of Commission: It is suggested that cognisance be taken of the proposals for the appointment of the members of the Independent Media Commission.

- (b) This paragraph provides for the inclusion of persons seconded for this purpose by accredited international organisations. In all comments on the composition of a commission it has been stressed that a sovereign state like South Africa cannot allow that a foreigner serves on a commission which will have the power and decide on so many issues as is foreseen with the Independent Electoral Commission. Therefore throughout this act, where it refers to the appointment of people accredited by international organisations, this recommendation cannot be supported.

Paragraph 7.5

It is suggested that the last sentence should read "advised by the Forum or the Council as may be the case for appointment by the State President". Alternatively the words after appointment in line 6 should be deleted and replaced by the words "according to 7.4".

Paragraph 7.6

The last sentence of that paragraph, in stead of approve, "advised" by the Forum or Council, as the case may be. Alternatively delete the words after 7.1 and replace by "and the procedure stated in 7.4"

Paragraph 8

In the Department's comment on a possible model for elections, there is no room for by-elections, because it is believed that vacancies will not be filled by by-elections but by selection of a member from a party list submitted by the political parties.

Paragraph 9.1.2

Delete in view of previous comment.

Paragraph 9.1.3.4

Delete the word "or any 100 eligible voters". It cannot be foreseen that this is a workable proposition. Voters are in any case represented by political parties and that should be the channel through which they should operate.

Paragraph 10

The contents of this paragraph which reads "as may be determined by the Council" is in conflict with the basic concept of this act which says that the Commission will in all respects be independent and separate from the Council, state departments, etc. See paragraph 6.1 of the Act. Paragraph 15.1 also refers to a matter which concerns the appointment of staff in which respect it is suggested that the Commission operate independently. Further comment on this will be given at paragraph 15.1. ;

Paragraph 11.2

Again the foreigners included in the Commission, not acceptable. Second part of paragraph 11.2, which starts with the words "if such resolution is not supported", it is felt that this is not really an option because if we are working with a true democracy and it has been decided that Parliament with a majority of X number of votes must give its approval to a matter and that is not done, then the matter cannot be referred to a another body for resolution. It is suggested that this part of paragraph 11.2 be deleted.

Paragraph 11.3

It is assumed that this paragraph will only be applicable if a parliament was not properly constituted.

Paragraph 12.2

The same comment in regard to by-elections as previously made.

Paragraph 13.3

It is anticipated that the chief executive officer will be the accounting officer. This is not in line with the statement at 6.1 that the Commission is totally independent, therefore, the reference to other statutes is in conflict with 6.1.

Paragraph 14

It is believed that the State cannot guarantee the commitments, etc by the Commission if it is anticipated that the Commission is totally independent and not subordinate to the State.

Paragraph 15.1

It is assumed that this paragraph implies that appointments can be made without the consensus of the Public Service Commission. This may be tendering for problems.

Paragraphs 15.3 to 15.6

Further consideration must be given to the provisions of these paragraphs. The Commission cannot operate independent of all and be responsible to none.

Paragraph 16

It is not stated that the Commission will be responsible for the drafting of a draft electoral act for approval by the Council or Parliament. It is therefore suggested that after paragraph 16.1, a new paragraph be inserted which may read: "The Independent Electoral Commission is responsible to formulate and submit to the Council draft legislation for the execution of functions and duties in respect of elections."

Paragraph 16.3

Delete the reference to accredited international organisations.

Paragraph 16.4

The word "rescind" in the second last line means that the Adjudicating - and Monitoring Directorates are not totally independent. It then follows that ultimately the Commission certifies its own doings in respect of the free and fair election, in other words it will be judging its own actions. In bilateral discussions it was agreed that the Commission will only co-ordinate and supervise the actions of the 3 directorates who will function independently of each other. What is required is that each Directorate, who in its own field of activity is independently responsible for ensuring a free and fair election, is in turn supervised by the Electoral Commission to ensure that it in fact acted accordingly. The Electoral Commission is also ultimately responsible for certification of the election as free and fair.

Paragraph 17.3

Second part of the paragraph "and determining polling districts and electoral divisions". It is suggested that it should read

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"polling regions" and that this provision should be the function of the commission or body already announced to be responsible for the delimitation of regions. It should not be part of this act.

Paragraph 17.6

This cannot be a function of the Executive alone. The Adjudicating - and Monitoring Directorates will also be involved. The application of penalties will be for the Commission and courts to apply.

Paragraph 17.9

It cannot be foreseen that special and postal votes will be used, and it is therefore suggested that paragraph 17.9 be deleted. *Footnote number 19* which reads "Without repeating the provisions of the Electoral Act, it is assumed that the same or similar provisions shall be made applicable to this election." This assumption is wrong. There is hardly any comparison between the forthcoming election and other previous general elections held in the Republic. A totally new Electoral Act must be introduced.

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Paragraphs 17.14 and 17.15

It is suggested that these two paragraphs be deleted because it is not foreseen that there should be any prescription on this matter. It will only lead to problems and will not prevent the misstatement of a party's financial actions.

Paragraph 17.17

This paragraph can be deleted, as already commented, because a new electoral act must be drafted.

Footnote number 23. It cannot be foreseen that the Commission be given such wide powers as has been suggested by the ANC.

Paragraph 18

At the outset there must be a clear distinction between an observer and a monitor and the word "scrutiniser" must be deleted. It is foreseen that people acting on behalf of international organisations or other governments will be treated as observers and will only have observer status. That means they can only observe and report back to their own authority. Monitors will be people appointed by the South African organisations involved in the monitoring of the election and they will report to their parties or to the Commission, or if necessary to the Adjudicating Directorate, etc. This is in line with the attached United Nations guidelines . Therefore paragraph 18.1 must be reformulated in this respect.

Paragraph 18.2

It cannot be foreseen that the Monitoring Directorate will have the right to issue and execute search warrants, etc. Their observance must be reported if necessary to the Adjudicating Directorate and if it should be necessary for steps to be taken, the Adjudicating Directorate will have to do so, even with the help of the Police if necessary, but the Monitoring Directorate cannot act on its own in this respect.

Paragraph 18.4

The recommendations should be done by the Executive Directorate because it is believed that the Monitoring Directorate can only observe that the rules of the game is adhered to and should not be responsible to make the rules.

Paragraph 18.5

Here also, it is for the Adjudicating Directorate to decide whether an infringement of the Electoral Act has taken place and if so what steps must be taken to rectify the matter.

Paragraph 18.6

Substitute the existing wording for the following: "The manner in which alleged or observed infringements or breaches of the Electoral Code of Conduct or Electoral Act are brought to the attention of the responsible authority."

Chapter seven

The heading reads "The Election Adjudication Electorate". It should read The Election Adjudication "Directorate".

Paragraph 19.1

Put a closing bracket at the end of the paragraph.

Footnote number 26: It is not a conflict of authority to still make provision for adjudication by courts. In all the acts presently in force in South Africa there are still room for the courts.

Paragraph 20.1

It cannot be foreseen that only a part of an election result be excepted. This will have far-reaching results as far as the re-election is concerned and this can under no circumstances be recommended.

Paragraph 20.2

Reference is made to 8 members. What if the Commission has only 7 members? Should it not read that 75% of the Commission should support the finding.

Paragraph 21

It cannot be foreseen that decisions by the Commission can be excluded from appeal to the Provincial Division of the Supreme Court.

Paragraph 22

This should not be part of this act but part of the Constitution.

Paragraphs 24 to 30

These paragraphs should be included in the new Electoral Act to be formulated and do not belong in this Bill.

Paragraph 31

Belongs in the act that regulates duties, taxes and fees and not in this Bill.

The Department would appreciate an opportunity to amplify the above comments.