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REPORTS OF THE TECHNICAL COMMITTEES

to the meeting of the
NEGOTIATING COUNCIL

to be held at 10:00 on Tuesday

25 MAY 1993

CONFIDENTIAL

STRICTLY EMBARGOED UNTIL TUESDAY 25 MAY 1993 12:00

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REPORTS OF THE TECHNICAL COMMITTEES

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A. CONSTITUTIONAL MATTERS

**SECOND REPORT OF THE TECHNICAL COMMITTEE ON
CONSTITUTIONAL ISSUES TO THE NEGOTIATING
COUNCIL: 19 MAY 1993**

1. Introduction

1.1 The resolution adopted by the Negotiating Council at its meeting on 18 May 1993 records broad agreement that the most suitable form of government for the future will be one which involves the allocation of powers to central and regional governments. We were asked to take into account the concerns and views of delegates expressed at the meeting of 18 May, and in their submissions to us, and to undertake the following tasks:

- 1.1.1 Provide the Negotiating Council with a report on constitutional principles.
- 1.1.2 Consider and report on the structures, powers and functions of states/provinces/regions (SPR).
- 1.1.3 Present proposals on various issues pertaining to the constitution-making process.
- 1.1.4 Provide the Negotiating Council with recommendations on how best the discussions within the Negotiating Council on these issues should be structured.

These issues are interrelated and consistently with the debate in the Negotiating Council, can be approached on an holistic basis.

1.2 The debate on the constitution-making process and the powers and functions of the SPR foreshadowed in the written representations that we have received from participants is likely once again to reflect the tension identified, for example 6.4 and 7.1 in our First Report to the Negotiating Council (13 May 1993). On the one hand a concern as to the legitimacy of the constitution-making process which underlies the position of many participants, that the constitution be drawn up by an elected body; on the other a concern reflected in the position of other participants that their interests will not adequately be protected if decisions are taken by a majority in a democratically elected constitution-making body.

- 1.3 The question is whether these two positions can be reconciled through the mechanism of developing a set of constitutional principles at the Negotiating Forum, which will be binding on the elected constitution-making body and provide sufficient assurances to meet the objections to a process which requires the constitution to be drawn up by an elected body.
- 1.4 Our task is to help in the structuring of the discussions and thereby to facilitate the negotiations. It is in that spirit that we have addressed the instructions given to us by the Negotiating Council on the 18 May.
- 1.5 The key to unlocking the differences that exist, and enabling the process to move forward, is to develop a set of constitutional principles. These should be sufficient to offer assurance to those who are concerned that their interests will not be adequately protected if the constitution is drawn up by an elected constitution making body, without being so detailed as to pre-empt the work of an elected constitution making body. They should guarantee that the constitution will be democratic in substance as well as in form, that basic rights will be respected and upheld, and that mechanisms will exist to prevent the abuse of power by the government of the day.
- 1.6 In this report we address:
 - 1.6.1 An approach to the formulation of constitutional principles, drawing on the work done in that regard at Codesa and the representations of the participants to us. We look at the common ground that exists and make suggestions that may help to take the process forward.
 - 1.6.2 We deal specifically with the SPR and make suggestions as to what may be necessary to provide the assurances that are sought in regard to the integrity and viability of the SPR.
 - 1.6.3 We locate our suggestions in the context of the broader debate involving self-determination and the form of state, and the process of constitution making.

2. **An Approach to Constitutional Principles**

In its Declaration of Intent on the Negotiating Process of 7 May 1993, the Negotiating Council committed itself inter alia:

- 3.1 To reach agreements on binding constitutional principles, the constitutional framework and the constitution-making process in terms of which elections will be held.

In the Negotiating Council's mandate to the Technical Committee on Constitutional Issues of 18 May 1993, this Committee was instructed, inter alia, to: Provide the Negotiating Council with a report on constitutional principles.

The Technical Committee also received submissions from various participating parties on constitutional principles.

The following paragraphs reflect the preliminary conclusions of the Technical Committee based upon a consideration of the relevant documents.

2.1 On the purpose and nature of a set of constitutional principles

Constitutional principles could play an important role in providing participants with the security they need in the process of constitutional transition with regard to future opportunities for political participation and other basic concerns. (Refer to the First Report of the Technical Committee on Constitutional Issues to the Negotiating Council : 13 May 1993 paragraph 5) The principles should therefore incorporate basic rights of political participation, multi-party democracy, checks and balances, separation of powers and secure SPR representation in order to ensure that a future constitutional system provides for the protection of minority and regional interests.

The principles should provide a clear framework for the drafting and adoption of a future Constitution.

The principles should not have the character of constitutional provisions as such, but they should establish clear parameters within which a future Constitution must be drafted.

The principles must be formulated in clear language which is capable of effective judicial interpretation and adjudication.

Although the principles and constitution making process are related, it may be desirable to reach agreement on constitutional principles first. This could facilitate agreement being reached on the constitution-making process. In drafting such principles, regard may be had to other precedents, international instruments, the CODESA documents and the submissions of parties.

2.2 Emerging consensus

It appears from the documents and submissions that we have considered, that with a few exceptions, consensus so far has emerged in relation to the following:

- (a) Democracy in the form of universal adult suffrage at all levels of government.

- (b) Supremacy of a rigid Constitution, whereby the validity of all laws and all acts of government is made subject to consistency with the provisions of the Constitution, such consistency being justiciable by an independent judiciary.
- (c) The inclusion in the Constitution of a set of fundamental rights authoritatively protecting the individual in a non-discriminatory manner against the state and all its organs.
- (d) The constitutional separation of the executive, legislative and judicial powers.
- (e) The constitutional distribution of the powers of government among democratically elected national, regional and local institutions.
- (f) Constitutional recognition and accommodation of the variety of cultures and religions being practised, and languages used by various segments of the population.

It should be noted that the above wording is not intended as formulations of constitutional principles as such, but simply to indicate areas of consensus.

3. **Structures, Powers and Functions of the SPR:** Remarks relevant to the form of state and confederation:

3.1 In our First Report of 13 May 1993, point 4, it was stated:

"The second report of the Planning Committee to the Negotiating Council (29/4/93) deals with the form of state in paragraphs 3.2.1 and 3.2.2. We are in substantial agreement with the views expressed in these paragraphs.

The form of state will be shaped by decisions in regard to the structures of the Constitution. Concepts such as the separation of powers, the entrenchment of fundamental rights, the powers of the judiciary, the boundaries, powers and functions of the regions, and the like, all have a bearing on the form of state."

From the submissions received from the parties as well as the discussions of our First Report in the Negotiating Council on 18 May 1993, it is evident that most parties consider the form of state as a matter directly linked to the way in which powers and functions of the state are distributed on central, regional and local level and the way in which these powers and functions are exercised.

- 3.2 A primary observation must be made: all states in the world, whether unitary or federal, must decentralize government powers and functions in order to achieve effective government. Considerations of scale (i.e. physical proportions of countries), diversity of people and economies, etc. all influence the degree of decentralization. Decentralization in the modern state is a fact of life and is made possible through many constitutional mechanisms, e.g. delegation of powers and functions, deconcentration of government activities, etc. Generally, and broadly stated, it can be said that decentralization in the modern state rests on the principle of devolution of powers which, in turn, assures that government is brought close to the people and the principle of subsidiarity is given effect to. In all states, decentralized government has to be performed by state institutions, on central, regional and local level. It is wrong to assert that the unitary state does not apply mechanisms of decentralization; in fact, some unitary states abound with structures and institutions at regional and local levels which all assure a high measure of decentralized government. The major distinguishing feature between the unitary state and the other form of state organisation which can be broadly labelled "federal", is that in the unitary state the central government retains the ultimate say over the distribution as well as the exercise of government powers and functions. (This does not mean, however, that the central government in exercising this ultimate authority, can act at will and ignore constitutional requirements and procedures).
- 3.3 An analysis based on the empirical evidence provided may very well conclude that a particular state exhibits so many federal characteristics and complies in so many respects with the federal idea, that it can be called a federation. Conversely, that its characteristics are such that it can more appropriately be called unitary. This is, however, a consequence of and not necessarily the determining factor of the constitutional order and governmental structures.
- 3.4 To conclude: There is no universally accepted definition of federalism, and we are not convinced that in a discussion on the form of state, it would be useful or indeed possible to use as a point of departure preconceived concepts such as unitary or federal states. We should like to reiterate our view contained in our First Report that a more expeditious way of dealing with the matter of form of state would be to consider all those separate issues which have a bearing on the form of state.
- 3.5 Finally, some remarks must be made about a confederation. A confederation is not a form of state since confederation, per definition, is a combination of separate, independent states which finds its basis for cooperation and cohesion, not in one constitutional system (although, of course, the respective constitutional system of the independent, separate states may reflect confederal agreements and arrangements), but according to rules of international law. Being of an international nature, each of the confederal states should enjoy international recognition in order to have their confederal pact sanctioned by international law. A clear example of a confederation which was not sanctioned by international law, is the confederation of the Republic of South

Africa and its TBVC states. International recognition of the independent status of the separate states in the confederation will to a very large extent depend on how these states gained their independence.

Independence founded on partition and secession which does not conform to international norms of human rights and self-determination (ie. mutual agreement by the mother country and the secessionist state based on the free and voluntary expression of the will of the people concerned) is unlikely to meet with international approval. Furthermore, it would be difficult to promote confederal ties of mutual trust, cooperation and support between independent states which do not necessarily hold the same convictions about democracy or, do not subscribe to the same norms on human rights and liberties. In the latter respect, the European Confederation of States in the form of the European Community provides a clear example of the type of co-operation that is required.

- 3.6 It would be helpful if participants in the Negotiating Council in favour of confederation as an option would provide us with more clarity on their proposals and in particular the territory and population of the envisaged separate state, and how it will meet the international law requirements of secession and self-determination.

4. **The Integrity and viability of the SPR**

- 4.1 Following upon the Codesa debates there seems to be broad agreement that provision should be made for organs of government at central and SPR levels and that for this purpose the constitutional principles should require:
- 4.1.1 Democratic representation at each level of government.
 - 4.1.2 Appropriate and adequate legislative and executive powers and functions to be vested in each level of government to enable each to function effectively.
 - 4.1.3 The entrenchment of such powers and functions in the Constitution.
 - 4.1.4 The general principles of the Constitution, including fundamental rights to be applicable at each level of government.
 - 4.1.5 Provision to be made for tasks to be carried out at different levels of government on an agency or delegation basis, where this would be appropriate.
- 4.2 In addition to these areas of broad agreement there are proposals from participants that the constitutional principles should also address:
- 4.2.1 Procedures for amending the provision of the Constitution entrenching SPR boundaries, powers and functions.
 - 4.2.2 The fiscal powers of and financial allocations to the SPR.

- 4.2.3 The distinction between exclusive and concurrent powers, and how conflicts arising out of the exercise of concurrent powers should be addressed.
 - 4.2.4 Whether residual powers - i.e. those not specifically allocated to the central government or the SPR in the constitution, should vest in the central government or in the SPR.
- 4.3 There are sound reasons for the constitutional principles to address each of the matters referred to in paragraph 4.2. By doing so, the Negotiating Forum may be able to provide all the assurances necessary to guarantee the integrity and viability of the SPR, without pre-empting the work of any elected constitution making body. A decision as to process could then be taken in the knowledge that the integrity and viability of the SPR are not disputed.
- 4.4 Amendments to the constitution
- 4.4.1 We think that consideration should be given to the need for special procedures to be followed in regard to amendments to the boundaries, powers and functions of the SPR.
 - 4.4.2 This offers an assurance that the SPR will be protected against the whims of a central government wishing to concentrate its power. There is a recent example in our own history of this having been done, and it is reasonable that the Constitution should contain safeguards against such actions.
 - 4.4.3 Because circumstances change and the future can never be foreseen, constitutions should be capable of being amended to meet changed circumstances. Possibly some objective standard should be prescribed which would be justiciable in a court if disputed. Provision could also be made for a special role for the SPR in the making of any amendments which affect their boundaries, powers or functions.
- 4.5 Fiscal powers and financial allocation
- 4.5.1 It stands to reason that SPR's will have divergent financial and developmental capabilities.
 - 4.5.2 Provision could be made for a fiscal commission to be involved in the allocation process, and for an objective standard to be followed (i.e. reasonable, having regard to the national interest and the interests of the SPR) which would be justiciable and a safeguard against the abuse of power.

4.6 Exclusive or concurrent powers, and residual powers

- 4.6.1 Any constitution that makes provision for the allocation of powers to more than one level of government, has to address the issue of where particular powers reside.
- 4.6.2 The Codesa principle that "appropriate and adequate" legislative and executive powers and functions shall be vested in each level of government to enable each to function effectively, does not specify where residual powers will lie, nor does it specify the basis for the allocation of powers either exclusively or concurrently, or how possible conflicts in respect of the exercise of concurrent powers will be resolved. Whilst there are no clear rules for determining these issues, we think that there is a need to address them in the Negotiating Council and to establish whether they can be made the subject of a constitutional principle or principles.
- 4.6.3 Where there are concurrent powers, the Central Government usually has an overriding power, but this can be made subject to objective criteria to prevent abuses. We suggest that this be debated, as well as the site of residual powers, and possible criteria for determining how the allocation of powers should be made.
- 4.6.4 The question of asymmetry of powers has been raised by a number of participants. It is a matter which calls for careful consideration. We would appreciate receiving a more detailed explanation of what particular participants have in mind so that we can deal with this matter in a later report.

5. CONSTITUTION MAKING PROCESS

- 5.1 From the proposals on the constitution making process submitted to us on Constitutional Issues by the participants, it appears that:
 - 5.1.1 There exists an overall unanimity that South Africa, [including the TBVC states] requires a new constitutional dispensation to replace the present one;
 - 5.1.2 The parties hold divergent views on the constitution making process and consequently on the process of transition to a new constitutional order;
 - 5.1.3 The proposals of the parties on the creation of a new constitution or constitutions for South Africa evince substantive differences on two cardinal issues:
 - 5.1.3.1 The structure, composition and function of the constitution making body, and
 - 5.1.3.2 The mechanism of transition from the present to a new constitutional order.

5.2 The proposals of the parties

There are differences between the various proposals. They have been developed over a period of time, during which positions have been modified in part to meet the concerns of some of the participants. Allowing for differences in emphasis and detail, the proposals of the parties may be classified **within two categories:**

- 5.2.1 On constitution making, an elected constituent assembly acting as a national constitution making body, on the one hand, and the present Negotiating Forum ["MPNP"] acting as a constitution making body, on the other.
- 5.2.2 On constitutional transition, a one phase transition or two or more phases of transition.

5.3 The structure, function and composition of CA.

One proposal which in broad terms has the support of a number of parties is that a CA should draw up and adopt the final new Constitution, subject *inter alia* to the following important qualifications.

- 5.3.1 Members of the CA shall be elected on the basis of a non racial unqualified franchise including citizens of the TBVC States, in an electoral system based on regional and national proportional representation within the CA.
- 5.3.2 The CA shall be sovereign and not limited in any way in its constitution making mandate subject to what is stated hereinbelow:
- 5.3.3 The CA shall fashion a new constitution within the framework of binding the general constitutional principles agreed upon in the MPNP.
- 5.3.4 The CA shall be required to adopt the new constitution within fixed time frames, by predetermined and entrenched adoption procedures and shall be subject to an agreed dead-lock breaking mechanism.
- 5.3.5 Regional boundaries for purposes of elections of the CA shall be determined by the Multi Party Negotiation Council upon the recommendation of the Commission on demarcation of SPR.

5.4 The other proposal, supported broadly by participants opposed to the CA, is that the present negotiation forum should draft and adopt the final national constitution/s subject to the following:

- 5.4.1 The MPNP should agree beforehand on the form of state, the boundaries, powers and functions of SPR as well as on constitutional principles;
- 5.4.2. A panel of experts appointed by MPNP should draft the national constitution:

- 5.4.3 Simultaneously, or in interaction with the drafting of the national constitution, "people at ground level" must negotiate and determine SPR constitutions in accordance with the constitutional principles set at national level.
 - 5.4.4. The constitutions of regions or states shall be drawn up and adopted by regional, multi party fora, or referenda, or regional constituent assemblies.
 - 5.4.5. Legislative organs of the respective SPR shall pass their national and SPR constitution.
 - 5.4.6. Elections shall take place on a national as well as SPR levels in terms of the new national and respective regional constitutions.
- 5.5 One of the participants appears to propose that the present negotiating forum draft and adopt a transitional constitution:
- 5.5.1 Which will be drafted in accordance with and amended or replaced by and only within the framework of agreed, justiciable and specially entrenched constitutional principles;
 - 5.5.2 Which shall be a fully fledged constitution;
 - 5.5.3 Which shall not be amended or repealed in any other manner or by any other procedure than that prescribed by its own provisions;
- 5.6 Whilst subscribing to the views of the general category described in 5.4 hereabove, one of the parties holds a distinct view that:
- 5.6.1 The demarcation, powers and functions governing at least two States - "an Afrikaner state and the new South Africa there might be more", should be negotiated beforehand by all interested parties, presumably within the multi-party negotiation process.
 - 5.6.2 Such constitutions of the confederal states or states within a commonwealth should be legislated into power by the existing South African parliament. It is argued that only the present parliament can lawfully transfer its powers to the new states.

5.7 Transitional/interim process

Two broad approaches emerge from the submissions of the parties in respect of constitutional transitional arrangements:

- 5.7.1 The group that favours constitution-making in the MPNP:
 - 5.7.1.1 Rejects the notion of a two-phased transition to a final national constitution;
 - 5.7.1.2 Consequently, they oppose the establishment of a transitional executive council, elections leading to a CA, the CA itself, an interim government of national

- unity, or any form of transitional authority, and a transitional constitution;
- 5.7.1.3. They seek prior determination of the form of state and, obviously of SPR boundaries, functions and power;
- 5.7.1.4. They all support the principle of asymmetrical SPR powers and of the principle of a "bottom up" constitution making process in terms whereof the regions draft and adopt separate, distinct and autonomous constitutions, on the one hand, and the MPNP adopts the national constitution which will not override the autonomous constitutions of the SPR.
- 5.7.1.5. They resist the holding of elections at a national or regional level at any stage before the SPR constitutions have been predetermined by the SPR themselves.
- 5.7.1.6. They all oppose the termination or amendment of the present constitutional dispensation including the TBVC states prior to the final adoption of the constitutions for the SPR and the national constitution.
- 5.7.1.7 All but one which advances a confederal model, propose a "federal" constitutional order within one country.

5.7.2 The two-phased model generally speaking is characterised by:

- 5.7.2.1 The determination of the constitutional principles by the MPNP;
- 5.7.2.2 The demarcation of regions by the MPNP for purposes of elections;
- 5.7.2.3 Installation of a transitional executive council. [Some parties hold that the TEC should function in terms of the transitional constitution whilst others hold that it should function in terms of agreements by the MPNP.]
- 5.7.2.4 The adoption of a transitional constitution
- 5.7.2.5 A firm election date should be proclaimed and a formal election process should commence.
- 5.7.2.6 Once elections have been held:
 - 5.7.2.6.1 The new parliament will be installed [some parties advocate for legislative as well as constitution making functions by the new parliament].
 - 5.7.2.6.2 A new multi-party executive government will be structured, and
 - 5.7.2.6.3 Newly structured regional, [including TBVC states] and local government levels will be phased in, and finally

- 5.7.2.7 The constituent assembly/parliament adopts [on some versions amend, the transitional constitution] a new constitution replacing the transitional one.

6. **PROPOSALS OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES.**

- 6.1 No significant progress can be made by the parties without a significant resolution of what appears to be mutually exclusive approaches to the constitution making process. Historically two predictable modes of constitution making have come to be:
- 6.1.1 *Pouvoir Constituant* - has been utilised to create a new constitution following upon a new and distinct historical moment such as a total collapse of a regime or a revolution. In this case the new constitution would not owe its existence to the old.
- 6.1.2. *Pouvoir Constitué* - existing constitutional order is amended and thus the new order derives its legitimacy and continuity from the old.
- 6.2 The present constitutional impasse exhibits features of both of the aforementioned approaches. Here it may be said that the new constitution cannot derive its legitimacy, popular acceptability and democratic character from the existing constitutional dispensation. A mere amendment of the existing constitutional order would not suffice. The major source of legitimacy would be a democratic process signifying an irreversible and "cleansing" break from an undemocratic constitutional order. On the other hand it may be argued that a new constitution may not and cannot come into being without the explicit co-operation of the existing constitutional order.
- 6.3 Can the differences that exist in regard to the process be resolved? A possible solution which may be worth exploring in the Negotiating Council is the careful and sensitive formulation of mutually acceptable principles of regional government, adequate constitutional principles and provision for the democratic creation and adoption of a final constitution.
- 6.4 Each of the following constitutional processes could be examined in that context and given effect to as instruments of reconciling the competing concerns of the parties:
- 6.5 Adequate principles of regional government including:
- 6.5.1 The idea of a special role for regions in the formal amendment procedure of the constitution, especially on matters affecting regions;
- 6.5.2 The concept of regional representation in the central legislature;

6.5.3 A list of justiciable criteria limiting the exercise of the override to prevent the party at the centre from exercising such powers for the purpose of penalising regional opponents;

6.5.4 Agreed criteria for the determination of regional boundaries, and powers.

6.6 Justiciable and binding constitutional principles.

6.7 Special majorities.

6.8 Entrenched and justiciable rights.

B. VIOLENCE

EXECUTIVE SUMMARY

REPORT NUMBER TWO OF THE TECHNICAL COMMITTEE ON VIOLENCE: FRIDAY 21 MAY 1993

The report contains the following recommendations:

1. All parties at the Multi-Party Negotiating Process should sign the National Peace Accord to indicate that they all are committed to a peaceful process.
2. More information is requested on a proposed Peace Corps.
3. Various proposals on strengthening the National Peace Accord should be submitted to the sub-committee of the National Peace Committee dealing with it.

**REPORT NUMBER TWO OF THE TECHNICAL COMMITTEE ON
VIOLENCE: FRIDAY 21 MAY 1993**

1. Two of the members of this Technical Committee have been changed. Ms S Vos has replaced Mr W Felgate and Mr M Phillips has replaced Mr S Mufamadi.
2. This Committee has received submissions as listed in the Annexure to this report :
3. The Committee has taken careful note of its brief to consider the submissions and other documents in order to:
 - 3.1 Analyse the causes of violence; and
 - 3.2 Establish further steps and mechanisms to deal with these issues.
4. The Committee believes it is essential that recognition is taken of those institutions which are already in existence to deal with the problem of violence, and where these institutions are suitable, it is the intention of this Committee that the institution or institutions, should handle those matters pertaining to violence which are relevant and directed to it. If there are no known suitable institution, then this Committee may recommend a new institution be established to deal with the problem.
5. The Committee had decided to process the submissions on an "issue" basis, in that the Committee has examined all the submissions to identify issues. These may relate to the causes of violence, steps to be taken to prevent it or dealing with violence, once it has been done. So far over 90 issues have been identified. These issues have been collated into the major areas of resolution by the following groupings of institutions:
 1. Political parties
 2. South African Government
 3. Other Governments or Administrations
 4. Peace structures
 5. Armed formations
 6. Other
6. It must be remembered that this Committee does not see itself as an investigative body, which assesses the veracity of allegations that may be included in the submission before it. However, all issues will be tested against

existing processes such as the Goldstone Commission and the NPC sub-committee dealing with "Strengthening of the Peace Accord"

7. The common thread that runs through all the submissions is the conviction expressed by the parties that the current violence must be reduced and preferably ended, in order for the practical process of political negotiations between parties to go on without tension, rancour and, in extreme, without breaking down, as well as for the practical implementation of the agreements of negotiations to proceed successfully and flow through to free and fair elections uninhibited by violence and intimidation.
8. This Committee will attempt to make recommendations on each issue which has been identified in the submissions.
9. All parties at the Multi-Party Negotiating Process must sign the National Peace Accord.
This Committee supports the proposal that recommends all parties involved at the Multi-Party Negotiating Process should become signatories to the National Peace Accord. This must be the starting point of an indication to the country that all the parties are committed to a peaceful settlement for the future of our land. It is suggested that any party at the Multi-Party Negotiating Process which is not a signatory to the National Peace Accord should be persuaded to do so, recognising that this would be an important symbol to the country that all parties/ administrations/ organisations involved in negotiations are committed to peace and a peaceful outcome of the negotiating process.
10. Peace Corps
A submission has been made recommending a Peace Corps. Before this Committee can consider this fully it is requesting further proposals from the parties including the principles, functions and desirability of a Peace Corps and its role in reducing the level of violence present.
11. The following issues should be directed to the sub-committee of the National Peace Committee charged with the strengthening of the National Peace Accord:
 - 11.1 Infringements of the National Peace Accord
A proposal has been made that there should be penalties for infringements of the Peace Accord.

11.2 Government proposals for the strengthening of the National Peace Accord

These proposals include both non-statutory mechanisms and statutory mechanisms to strengthen the Peace Accord. This whole proposal should be sent to the sub-committee for the strengthening of the Peace Accord for their consideration.

11.3 Peace Accord has no teeth

A submission has indicated that the Peace Accord appears to be a "dog with no teeth". This submission gives no indication of how the Peace Accord itself could be strengthened by giving it teeth.

11.4 Alleged transgressions of the Peace Accord

The Democratic Party has made some suggestions on mechanisms to deal with alleged transgressions of the Peace Accord and these also should be conveyed to the sub-committee for their attention.

12. Police Board

The Democratic Party has made recommendations for the Police Board to be given more functional autonomy. As the Police Board is a structure of the Peace Accord this should be submitted to the sub-committee dealing with the strengthening of the Peace Accord.

13. Proposals which relate to the strengthening of the Peace Accord only have been dealt with in this report.

PR Hatty
(Chairperson)
21 May 1993

SUBMISSIONS TO THE TECHNICAL COMMITTEE ON VIOLENCE

Submissions received and dealt with:

- 2.1 Opening statement by Dr FT Mdlalose, National Chairperson of the IFP, to the Negotiating Council, 26 April 1993
- 2.2 Resolution to ensure peaceful conditions for constitutional negotiations and free political activity in South Africa
- 2.3 Solidarity Party
- 2.4 Inyandza National Movement
- 2.5 Venda Government
- 2.6 Submission to the Negotiating Council: United Peoples Front
- 2.7 South African Government proposals to the Technical Committee on Violence as to measures to be taken to curb violence, 13 May 1993
- 2.8 African National Congress Submissions to Technical Committee on Violence, 12 May 1993
- 2.9 South African Government proposals for strengthening the National Peace Accord, 13 May 1993
- 2.10 Office of the Military Council, Republic of Transkei: Recommendations on the formulation of a negotiations agenda, 28 April 1993
- 2.11 Submission by the Democratic Party, 10 May 1993
- 2.12 Government of the Republic of Bophuthatswana - Initial submission on violence
- 2.13 Ciskei Government submission - Violence
- 2.14 Submission by the Afrikaner Volksunie
- 2.15 Venda Government position paper on violence
- 2.16 Input by Transkei Government
- 2.17 Comments on draft National Peace Accord: Republic of Ciskei
- 2.18 Violence and prospects for democracy in South Africa:
HW Vilakazi
- 2.19 Proposal for stopping violence among Africans: HW Vilakazi
- 2.20 Proposal for a march/ rally for end of violence among Africans:
HW Vilakazi
- 2.21 Submission by the Conservative Party to the Technical Committee on Violence
- 2.22 Position Paper on causes of violence which threaten the negotiation process and the effective implementation of the NPA: Cape Delegation of Traditional Leaders, 23 April 1993
- 2.23 Report of the Gender Advisory Committee to Codesa 2
- 2.24 Submission: Natal Indian Congress, 13 May 1993
- 2.25 Report of the directorate: Internal Peace Institutions, 1993

New submissions:

- 2.26 Submission to the Technical Committee on violence: Ximoko Progressive Party
16 May 1993
- 2.27 Violence: Second input by the Transkei Government
- 2.28 Press statement by the honourable Justice RJ Goldstone, 8 March 1993
- 2.29 Position paper on causes of violence which threaten the negotiating process and
the undermining of the effective implementation of the National Peace Accord:
Cape Delegation of Traditional Leaders
- 2.30 Submission to the Technical Committee on Violence: Intando Yesizwe
- 2.31 Submission: Transvaal/ Natal Indian Congress
- 2.32 Supplementary submission to violence: Ciskei Government
- 2.33 Submission on violence: United People's Front
- 2.34 Submission: Inyandza National Movement
- 2.35 First position paper of the Inkatha Freedom Party, 18 May 1993

**C. FUNDAMENTAL RIGHTS DURING THE
TRANSITION**

**TECHNICAL COMMITTEE ON FUNDAMENTAL
RIGHTS DURING THE TRANSITION
SECOND PROGRESS REPORT - 21 MAY 1993**

1. BACKGROUND

This Report endeavours to take into account submissions received by the Committee up to 12h00 on 19 May 1993. The Committee has also given due weight to sentiments expressed at the meeting of the Negotiating Council on 18 May 1993.

The Committee has received some helpful and creative submissions, many of which will have to be considered once again when a "final" Bill of Rights is drafted by an appropriate constitution-making authority. The Committee is, however, acutely aware of the fact that its proposals will have to be restricted, as far as possible, to the transitional period only and that it is not its task to draft a Bill of Rights for South Africa. At the same time the Committee remains convinced that the way in which fundamental rights and freedoms are entrenched during the transition (and the degree of success with which this could be done) will inevitably impact on the legitimacy of the means and mechanisms for the protection and enforcement of these rights and freedoms in the eventual dispensation.

The rights and freedoms identified in this Report will therefore have to be formulated with the necessary circumspection and will have to be contained in an instrument (albeit transitional in nature) which will ensure their effective protection and enforcement without pre-empting the right of a constitution-making authority to draft the eventual Bill of Rights.

In this Report the committee has not yet embarked upon the precise formulation of relevant rights and freedoms, since it appeared from the Negotiating Council meeting on 18 May that there was not yet agreement amongst delegates on which types of rights and freedoms should be included during the transition. A methodology for deciding on the inclusion of rights and freedoms is proposed and the rights and freedoms are once again listed and classified. If the Negotiating Council reaches agreement on this general approach, the Committee will proceed to formulate these rights and freedoms and submit its formulations to the Negotiating Council.

At the Negotiating Council Meeting of 18 May it also became clear that some members of the Council did not fully envisage all the implications of the way in which the rights and freedoms which were listed in the First Report were to be protected. Some members, for example, expressed concern about the apparent exclusion of references to the protection of gender rights. In this instance, the Committee opted for a general reference to "equal protection and equal benefit of the law" which would, in its view, more effectively outlaw discrimination of all types than if a list of possible grounds of discrimination is specifically included. The Committee has therefore decided to

add explanatory notes to certain rights and freedoms listed in this Report.

2. CATEGORISATION OF RIGHTS

In its First Report the Committee, as a guide to its deliberations, distinguished the following three categories of rights and freedoms in the context of the entrenchment of fundamental rights and freedoms during the transitional period:

- (i) minimal or essential rights and freedoms which must be accommodated;
- (ii) desirable rights and freedoms, i.e. those which ought to be accommodated, and
- (iii) debateable rights and freedoms, the inclusion of which is uncertain at this stage.

The First Report reflected the Committee's initial position on the accommodation of the first category of rights and freedoms only.

In view of suggestions made at the meeting of the Negotiating Council on 18 May, the Committee has refined the above classification and is now also including more precise criteria for classification. What follows is the result of this endeavour.

In the Committee's view the fundamental rights and freedoms which may be regarded as relevant to the transitional process can be categorised by reference to the process itself. The Committee understands that for its purposes the "transitional period" extends up to the commencement of Rights adopted by a constitution-making authority and includes the period up to the election for that authority.

It should, however, be emphasised firstly that the categorisation which follows is not intended as a prioritisation of rights and freedoms. Some rights and freedoms are, in other words, not "more important" than others. Secondly, although rights and freedoms directly relevant to the process of transition constitute a point of reference, it is very difficult to entrench these rights without duly recognising other rights which constitute a foundation upon which the first-mentioned class of rights can be realised.

Finally, it must be borne in mind that although there are various criteria for the classification of rights and freedoms, the classification suggested in this report is merely a practical one for purposes of the transition. In this context the following categorisation is proposed and used in this Report:

- (I) **Basic rights and freedoms necessary to ensure democracy during the transition.** These include:

- (i) rights and freedoms directly concerned with the transitional process as a political process, and
- (ii) rights and freedoms which will have to be entrenched in order to ensure the meaningful realisation of the rights and freedoms directly concerned with the transition itself.

The rights and freedoms belonging to this First Category are also time-honoured and not controversial, and are widely recognised in national and international human rights literature and thinking.

Since rights referred to in (ii) above may also be seen as general rights vital to the exercise of the rights referred to in (i) above, the former rights will, in the Committee's exposition, be dealt with first and will be referred to as the "First Sub-Category". Rights referred to in (i) above will, in the Committee's exposition, constitute the "Second Sub-Category".

- (II) Rights and freedoms aimed at achieving the overall security and well-being of all during the transition.
- (III) Rights and freedoms conducive to the overall security, well-being and upliftment of all people under conditions of political and socio-economic reconstruction.

2.1. FIRST CATEGORY

The basic rights and freedoms necessary to ensure democracy during the transition.

2.1.1. FIRST SUB-CATEGORY

The following rights and freedoms will have to be entrenched in order to ensure the meaningful realisation of the rights and freedoms directly concerned with the transition itself:

- 2.1.1.1. The right to dignity which includes the right of detained and convicted persons to be treated with dignity.
- 2.1.1.2. Freedom of conscience, religion, thought, belief and opinion.
- 2.1.1.3. The right to personal freedom, including the right not to be detained without trial.

[Comment: Attention may have to be given to the terms of Section 29 of the Internal Security Act 74 of 1982 in this context during the

transition.]

- 2.1.1.4. The right to equal protection and equal benefit of the law.

[**Explanatory Note:** This right is to be qualified by the affirmative action provision mentioned in 2.3. below. It furthermore includes the right not to be subjected to direct or indirect discrimination on any ground whatsoever including race, ethnic origin, colour, gender, sexual orientation, age, disability, religion, creed or conscience. The Committee at this stage prefers a general formulation of the right to equality since specific reference to the particular grounds for non-discrimination may have a restrictive rather than extensive effect on the prohibition of discrimination.]

- 2.1.1.5. Freedom from servitude and forced labour.

- 2.1.1.6. Freedom from physical, mental or emotional torture or inhuman or degrading treatment or punishment.

- 2.1.1.7. The right to move freely.

- 2.1.1.8. The right to have disputes settled by a court of law or other independent forum.

- 2.1.1.9. The right to life.

[**Explanatory Note:** This right itself is not controversial but rather its interpretation and the extent to which it should be applied. The Committee recommends that for purposes of the transition the present situation with regard to the death-penalty and abortion be maintained.]

2.1.2. SECOND SUB-CATEGORY

The following rights and freedoms are directly concerned with the transitional process as a political process:

- 2.1.2.1. Freedom of speech and expression which shall include freedom of the press and other media.
- 2.1.2.2. The right to assemble and demonstrate with others peacefully and unarmed and to submit petitions.
- 2.1.2.3. Freedom of association.

- 2.1.2.4. The right to form and join political parties and the freedom to make political choices.
- 2.1.2.5. The right to vote and to stand for election to public office.
- 2.1.2.6. The right of access to that information which is necessary for the implementation of a person's rights.
- 2.1.2.7. The right to reasonable, procedurally proper and lawful administrative decision-making.
- 2.1.2.8. The rights to reasons for administrative action which affects a persons's rights.

[**Explanatory Note to 2.1.2.7 and 2.1.2.8:** The inclusion of these rights under this category justified, since actions of the administration relevant to, for instance, the election process should be open to scrutiny.]

2.2. SECOND CATEGORY

The following rights and freedoms are aimed at achieving the overall security and well-being of all during the transition:

- 2.2.1. Language and cultural rights.
- 2.2.2. The right to form trade unions and employers' organisations and to engage in collective bargaining.
- 2.2.3. Freedom of choice of residence and to pursue a livelihood anywhere in South Africa.
- 2.2.4. The right to leave and to return to South Africa, including the right to a passport.
- 2.2.5. The right of arrested or detained persons:
 - to be informed of the reasons for arrest or detention;
 - to be detained under conditions consonant with human dignity;
 - to be given access to a legal and a medical practitioner, and
 - to visits by family, friends and religious counsellors.

The right of accused persons:

- to remain silent and not to be obliged to make statements before or during trial;
- to be brought before a court of law within 48 hours of arrest;
- to a lawyer provided by the State where the interests of justice so require;
- to a fair trial in public within a reasonable period;
- to be presumed innocent until the contrary is proved;
- to be informed of the consequences of electing to remain silent or not to testify;
- to examine witnesses and to testify;
- not to be sentenced to inhuman punishment;
- not to be convicted of an offence of which he or she has been convicted or acquitted previously;
- to have recourse to a higher court by way of appeal or review;
- to be tried in a language he or she understands or to have the proceedings interpreted to him or her;
- to be sentenced within a reasonable time after conviction, and
- not to be tried for the commission of an act which was not an offence at the time when it was committed.

2.2.6. The right to privacy, including the integrity of the home as well as freedom from search and seizure and violation of personal communications.

[Explanatory Note: The Committee expresses reservations about too absolute a protection of the integrity of the home, since this may unduly restrict investigations into complaints of spouse battering and child abuse.]

2.2.7. Freedom to participate in economic activity.

2.2.8. The rights to strike and to lock out.

[Explanatory Note: The Committee can see no theoretical justification for the inclusion of one of these rights while the other is excluded.]

2.2.9. The right to own property.

[**Explanatory Note:** This right will be subject to the general limitations clause. A strategy for dealing with specific limitations to this right is also suggested - see 3. below.]

2.2.10. The right not to be deprived of citizenship.

2.2.11. The right to an environment which is safe and not detrimental to the well-being of the population.

[**Explanatory Note:** The inclusion of this right in the present category will at this stage only be warranted if it is formulated negatively and therefore restrictively. If formulated positively and extensively it will have to be considered for inclusion in the Third Category.]

2.2.12. Freedom from eviction from a person's lawful home.

2.2.13. The right of children to a basic education and basic health services and not to be subject to neglect, abuse or forced labour.

[**Comment:** The urgency of entrenching certain basic children's rights during the transition was highlighted in a submission from the National Children's Rights Commission.]

2.2.14. The right of equal access to State or State-aided educational institutions.

[**Explanatory Note:** The Committee deems explicit reference to this right necessary in view of the urgent need to redress the present inequalities in the educational sector.]

2.3. THIRD CATEGORY

Examples of rights which are conducive to the overall security, well-being and upliftment of all people under conditions of political and socio-economic reconstruction are:

- 2.3.1. the right to the basic essentials of life, including the right to food and water necessary for survival, shelter from the elements and basic health care;
- 2.3.2. marriage and family rights;
- 2.3.3. the right to a basic nutrition;

- 2.3.4. social security rights, including the rights of aged and disabled people;
- 2.3.5. children's rights other than those listed under Category 2, including the right of a child to be cared for by his or her parents;
- 2.3.6. educational rights other than those listed under Category 2;
- 2.3.7. employers' and employees' rights other than those listed under Category 2;
- 2.3.8. rights and freedoms related to the arts, science and recreation;
- 2.3.9. women's rights promoting substantive equality (over and above the formal equality provided for in 2.1.1.4. above);
- 2.3.10. the right to invoke customary international law in determining disputes, etc.

Apart from considering inclusion of the above (and other) rights and freedoms in an eventual Bill of Rights, the designated constitution-making authority will also have to consider:

- qualifying the right to equal protection by providing for affirmative action (see 2.1.1.4. above);
- including a specific reference to the retention or abolition of capital punishment (see 2.1.1.9. above);
- dealing with abortion in specific terms (see 2.1.1.9. above);
- specifically limiting the right to own property (see 2.2.9. above), and
- formulating environmental rights more positively and extensively (see 2.2.11. above).

[**General Comment:** The Committee is of the opinion that the rights and freedoms listed in Categories 1 and 2 above should be included for protection during the transitional period while rights in Category 3 can be considered for inclusion in an eventual Bill of Rights. It would be highly undesirable to subject the rights and freedoms listed in Category 1 to compromise. This is not true to the same extent of all the rights and freedoms listed in Category 2.]

3. LIMITATION AND SUSPENSION

Very few rights and freedoms are unlimited. The Committee is therefore of the opinion that during the transition provision will have to be made for the limitation of the rights and freedoms mentioned in 2.

The Committee suggests the following points of principle for the consideration of the Council in relation to including the following matters in a legislative instrument providing for the entrenchment of fundamental rights and freedoms during the transition:

3.1. A general Limitations/Circumscriptions Clause.

Any limitation placed upon the fundamental rights during the transition shall:

- 3.1.1. only be valid if authorised by law of general application;
- 3.1.2. only be valid if necessary, reasonable and justifiable in a free, open and democratic society;
- 3.1.3. not derogate from the general substance of the right in question;
- 3.1.4. be proportional to the danger sought to be addressed; and
- 3.1.5. not limit certain stipulated rights and freedoms e.g. freedom of conscience, freedom from torture.

It should, furthermore, be emphasised that due to the controversy surrounding the right to own private property, a specific limitations clause for this right (if it is included) might well be desirable. This, however, will have to be considered at the stage when rights and freedoms in the Third Category above are debated with a view to their inclusion in a constitutional instrument of some sort.

3.2. A Suspension Clause.

- 3.2.1. Suspension of a fundamental right is only to be allowed as a result of a declared state of emergency and only where the existence of the State or the safety of the public generally is threatened by war, invasion, general insurrection/riot or natural disaster.
- 3.2.2. The implementation of emergency measures shall be necessary to restore peace or order and shall permit suspension of the protected rights and freedoms only to the extent demanded by the situation.
- 3.2.3. Any declaration of a state of emergency shall be for a limited period of time.
- 3.2.4. Any declaration of a state of emergency shall be ratified within a limited period of time by a specified majority of the directly elected members of the highest legislative authority.

- 3.2.5. Any measures that will apply during a state of emergency shall be ratified within a limited period of time after their adoption by a specified majority of the directly elected members of the highest legislative authority.
- 3.2.6. No emergency measure shall grant immunity to officers of the State in respect of their unlawful conduct during a state of emergency.

4. ENFORCEMENT

At this stage the Committee is not proposing particular enforcement mechanisms. This will be dealt with in a later Report. The Committee would, however, be assisted were the Council to agree in principle to the justiciability of any legislative instrument regulating the transitional period at least to the extent that it entrenches fundamental rights and freedoms.

5. RECOMMENDATIONS AND CONCLUSION

The Committee recommends to the Negotiating Council that it:

- 5.1. agrees in principle to the inclusion, in a legislative instrument of some sort, of the rights and freedoms listed in the First and Second Categories together with a general limitations clause;
- 5.2. agrees in principle to the justiciability of the legislative instrument referred to in 5.1. above at least to the extent that it entrenches fundamental rights and freedoms;
- 5.3. instructs the Committee to submit formulations of the rights and freedoms listed in the First and Second Categories to a subsequent meeting of the Negotiating Council;
- 5.4. agrees that the inclusion of the rights in the Third Category is open to further debate and cannot be taken further by the Committee in the absence of express instructions.

The committee wants to emphasise its view that the most viable Bill of Rights for South Africa in the eventual dispensation will not necessarily be any particular Bill proposed by any individual, organisation, expert body or any one of the parties to the Negotiating Process. It will rather have to be one to which all parties substantially agree and with which they and their constituencies will feel comfortable.

Prof. H. Corder
Prof. L. M. du Plessis (C)
Mr. G. Grove
Ms. S. Nene
Adv. Z. Yacoob

**D. TRANSITIONAL EXECUTIVE
COUNCIL (TEC)**

SECOND REPORT OF THE TECHNICAL COMMITTEE ON THE TRANSITIONAL EXECUTIVE COUNCIL AND SUB-COUNCILS / 21 MAY 1993

PROGRAMME OF WORK AND THE REPORT OF THE TECHNICAL COMMITTEE ON THE TRANSITIONAL EXECUTIVE COUNCIL AND ITS SUB-COUNCILS

- 1 The technical committee has designated its future programme of work as the specification and elaboration of the powers of the Transitional Executive Council and its sub-councils and the mode of exercise of these powers.

As this topic concerned the very "nuts and bolts" of the Transitional Executive Council it was deemed inappropriate to furnish a report on this aspect until all the participants' submissions have been received. The deadline for the submissions was 17H00 on Wednesday 19 May 1993, which was after this report had been drafted. We would however make the point that once this task has been completed it may be necessary to revisit aspects of the structure and function of the Transitional Executive Council and its sub-councils.

- 2 In regard to the Transitional Executive Council and its sub-councils' powers, the technical committee recognises its tasks as follows:

- 2.1 The specification of the powers of the three less contentious sub-councils in respect of which, it is believed, the technical committee will be able to make proposals relatively expeditiously. These three sub-councils are Finance, Regional and Local Government and Foreign Affairs.

In our view, it may be advisable to defer the consideration of the Regional aspect of the Regional and Local Government sub-council until greater clarity emerges from those committees dealing with interim/ transitional regional arrangements.

- 2.2 The definition of the Law and Order sub-council's powers are considered of critical importance. The committee is currently considering this issue.
- 2.3 The definition of the Defence sub-council's powers which involves peculiar and developing considerations. This topic will be addressed after the above.
- 2.4 The definition and specification of any general powers, if any, of the Transitional Executive Council which the committee deems necessary to supplement the above powers.

- 3 The committee wishes to draw attention to an error contained on page 7 of our first interim report. In our view the participants in the Transitional Executive Council should not be represented by more than ONE member in any sub-council.

NOTE: The previous report has suggested that parties could be represented by two members in any sub-council.

- 4 In regard to the structure and operation of the Transitional Executive Council, the committee now wishes to supplement its initial report with a section on Finances which reads as follows:

9. **Finances**

- (1) The Transitional Executive Council shall have the necessary legal status and capacity to open and administer its own financial accounts.
- (2) The Transitional Executive Council shall have a seat of office and for the purposes set out in sub-paragraph (1) shall appoint its own executive officer.

NOTE: The need to approve guidelines for the Transitional Executive Council's staffing, its administration and operation, to secure and furnish accommodation timeously, and to prepare a budget suggests that a decision, in principle, on a Transitional Executive Council should be made sooner rather than later.

A decision will also need to be made regarding the body which will decide on the appropriate budget of the Transitional Executive Council.

SUMMARY OF INPUTS RECEIVED UNTIL 13H00 ON WEDNESDAY 19 MAY 1993

In alphabetical order, the following organisations have made submissions relating to the brief of the Committee. The import of each submission is briefly stated:

1 African National Congress:

The African National Congress has submitted a comprehensive document entitled 'Legislative Framework for a Transitional Executive Council'. The submission is an elaboration on the report of Working Group 3 of Codesa.

2 Afrikaner-Volksunie:

The Afrikaner-Unie maintains that the transition can only be planned once a new constitution has been adopted.

3 Bophuthatswana:

In view of its proposals on constitutional matters, which were not made available to the Committee, the Government of the Republic of Bophuthatswana is of the opinion that there is no need for a Transitional Executive Council.

4 Conservative Party:

The Conservative Party, in a general submission on the negotiating process, expresses a view from which it can be inferred that the Conservative Party would regard the work of the technical committee on the Transitional Executive Council as premature.

5 Ciskei:

The Government of Ciskei shares the view of Bophuthatswana that there is no need for a Transitional Executive Council, but adds that if it is decided that there should be such a body, Ciskei reserves its right to make inputs regarding -

- the composition
- definition

- terms of reference
- authority
- and general matters

relating to such a body.

6 Democratic Party:

Two submissions have been received from the Democratic Party.

6.1 The first deals with the following matters:

- 6.1.1 The Transitional Executive Council should continue after the first election with a different composition and with increased authority.
- 6.1.2 A sub-council on finance should also be entrusted with responsibility for socio-economic development.
- 6.1.3 A sub-council on foreign affairs should also assist with the improvement of trade, finance, sporting and other international relations and liaison with foreign monitoring groups during the transition.
- 6.1.4 Members of governments/administrations should not be members of the Transitional Executive Council and sub-councils.
- 6.1.5 No political organisation should have more than one representative on a sub-council.

6.2 In addition to some editorial and consequential changes to the committee's proposal for the Transitional Executive Council and sub-councils, the second report contains the following suggestions:

- 6.2.1 It reinforces the Democratic Party's contention in 6.1.4 that members of governments/administrations should not be members of the Transitional Executive Council or sub-councils.
- 6.2.2 Regional government should be part of a sub-council's brief in a generic sense to include existing provincial administrations, self-governing territories etc.
- 6.2.3 The sub-council on finance should have a broader mandate to include social, economic and developmental issues impacting on fair and free elections.

- 6.2.4 No party should be allowed to have more than one member on a sub-council.

7 **Natal Indian Congress:**

The NIC proposes that:

- 7.1 The terms of reference of the TEC should be expanded to include "levelling the playing field" and "creating a climate of free political activity".

- 7.2 A sub-council on education should also be established.

An unspecified reference to decision making also occurs in the submission.

8 **National Peoples Party of SA:**

The following points emerge from the NPP submission:

- 8.1 Full support for the need for the Transitional Executive Council.
- 8.2 The Transitional Executive Council should have full cabinet status.
- 8.3 Each participant in the MPNP should have at least one representative on the Transitional Executive Council. No participant should have more than one representative on a sub-council.
- 8.4 Each member of the Transitional Executive Council should serve on at least one sub-council.
- 8.5 No provision should be made for substitutes.
- 8.6 "Levelling of the playing fields" should be mentioned as an objective.
- 8.7 A sub-council for social development should be established.
- 8.8 The Transitional Executive Council should have the power to call to its meetings any political office bearer or official responsible for a matter before it.
- 8.9 Members of the Transitional Executive Council and sub-councils should be remunerated equally and certain discrepancies indicated should be avoided.

9 Pan Africanist Congress of Azania:

The PAC proposes the following:

- 9.1 That the transitional body should be called the Transitional Executive Authority, that it should have full executive powers in respect of its area of jurisdiction, and that the current government relinquishes its powers over those matters. (These views are reinforced in the PAC submission on the constituent assembly/constitution making body.)
- 9.2 Constitutional changes to provide for the situation in 9.1 should not amount to an interim or a new constitution.
- 9.3 Composition: multi-party, with one non-voting representative from each of an unspecified number approved international bodies; it would further appear that the Independent Elections Commission, the Independent Media Commission and Independent Telecommunications Board, a Commission on Security Forces including Armed Formations and a Commission on defined aspects of Finance should also form part of the composition of the TEA; specifics concerning the number and type of representation were not provided.
- 9.4 In its submission on a constituent assembly/constitution making body, the PAC states that the TEA should through its commissions prepare for elections for an 'unfettered Constituent Assembly' with the sole task of drafting a new constitution, a task which should be completed within 18 months (it is not clear from the submission whether the preparation for the election and the drafting of the constitution should both be completed within 18 months, or only the latter.)

10 Solidarity Party:

The Solidarity Party expresses the view that the Transitional Executive Council and sub-councils should be established as soon as possible.

11 South African Government:

Apart from specific inputs regarding the powers of sub-councils, a submission by the South African Government on matters relating to other Technical Committees, has the following bearing on the Transitional Executive Council:

- 11.1 Legislation for the institution of the Independent Elections Commission should have the approval of either the Multi-Party Negotiating Process or the Transitional Executive Council.
- 11.2 The chairperson of the Adjudication Tribunal (as part of the IEC structure) could be 'designated' by the Multi-Party Negotiating Process or by the

Transitional Executive Council.

12 **Transkei:**

A letter from the Chairman of the Military Council of Transkei to the Planning Committee was also tabled in the Committee. However, the letter is not of direct relevance to the brief of the Committee.

13 **Ximoko Progressive Party:**

While supporting the idea of a TEC, the XPP expresses concern about the practicability of the proposed structures unless the system of the TEC and sub-councils would also play a role during the full transitional period.

**LIST OF SUBMISSIONS RECEIVED BY THE TECHNICAL COMMITTEE ON THE
TRANSITIONAL EXECUTIVE COUNCIL AND SUB-COUNCILS AFTER THE
FINALISATION OF THE SECOND REPORT**

SEE ITEM 1 OF THE SECOND REPORT

- 1 Position of the Inkatha Freedom Party.
- 2 Department of Justice and Constitutional Affairs - Kangwane.
- 3 Intando Yesizwe Party.
- 4 Transvaal Indian Congress.
- 5 African National Congress:
 - 5.1 Terms of Reference for a Sub-Council on Local and Regional Government.
 - 5.2 Proposed Terms of Reference for the Transitional Executive Council Sub-Council on Defence.
 - 5.3 Restructuring Local Government - Political, Financial and Administrative structures during the Pre-Interim Period.

**E. INDEPENDENT ELECTORAL
COMMISSION (IEC)**

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.

- 9.1.3.1 the State President;
- 9.1.3.2 the Council;
- 9.1.3.3 Parliament; or
- 9.1.3.4 any registered political party or any 100 eligible voters, provided that no such Application by such party or such voters, shall be heard save with leave of the Chief Justice, who shall first be required to certify as to the existence of probable cause.

9.2 In considering any such Application, the Appellate Division shall find that such good and sufficient reason exists for the termination of the appointment of a member of the Commission only in the event of:

- 9.2.1 serious misconduct bearing upon a member's fitness for office;
- 9.2.2 unfitness or incapacity for office, including continued ill health;
- 9.2.3 a material breach of the preconditions and qualifications referred to in 7.3 above;
- 9.2.4 any other substantial reason which the court considers inconsistent with a member's continuance in office.

9.3 Any vacancy arising in consequence of the provisions of this section shall be dealt with in accordance with the procedures envisaged by clause 7.5.

10. Conditions of appointment

Members of the Commission shall serve on a full-time basis, and shall receive such

remuneration, allowances and privileges as may be determined by the Council, with the concurrence of the Minister of Finance.

CHAPTER THREE RECONSTITUTION OF COMMISSION

11. Reconstitution of the Commission

11.1 Notwithstanding the provisions of Section 8, the Commission may be reconstituted at any time if required, in order to undertake the same or similar functions and responsibilities in respect of future national elections, as it has undertaken in respect of the Transitional Elections, in the event that Parliament is dissolved and new elections called in terms of the Constitution.

11.2 The nomination and appointment of members to the reconstituted Commission (including if it is deemed appropriate, persons seconded by Accredited International Organisations and/or Foreign Governments) shall be effected by the State President upon the advice of Parliament, acting in terms of a Resolution passed by the same majority as may be required in order to effect an amendment to the Constitution. If such Resolution is not supported by the required majority in Parliament, the nomination and appointment of the members of the reconstituted Commission shall be effected by the State President acting on the advice of a majority decision of a full bench of the Appellate Division, comprising the Chief Justice and not less than six (6) other Appeal Court judges.²⁰

²⁰

The Technical Committee's concern is that an expeditious procedure is necessary in the event that Parliament is unable to establish the required majority. Alternative possibilities might include a decision by the Chief Justice acting on his own, or a panel of judges comprising possibly the Chief Justice and the Judge President of each of the Provisional or Regional Divisions of the Supreme Court.

- 11.3 In the event of a vacancy arising on the reconstituted Commission, the provisions of Section 7.4 shall mutatis mutandis apply, but the reference to the Forum or the Council thereunder, shall be deemed to be a reference to the full bench of the Appellate Division constituted in the manner as aforesaid.

CHAPTER 4

PROCEDURE AND ADMINISTRATION

12. Procedural Matters

- 12.1 The Commission may determine its own procedures, and shall hold meetings at such intervals as circumstances may require. Meetings may be convened at the instance of the Chairperson or Vice-Chairperson, or at the instance of any two (2) other members of the Commission.
- 12.2 The quorum for any meeting of the Commission shall be seven (7) members, save in respect of the Commission's adjudication of the final result and acceptability of the Transitional Elections and any by-elections, in respect of which the necessary quorum shall include all members of the Commission.
- 12.3 Subject to the special quorum and majority requirements stipulated in respect of the Commission's adjudication of the result and acceptability of the Transitional Elections, all decisions of the Commission shall be by simple majority. In the event of an equality of votes, the Chairperson (or in his/her absence, the Vice-Chairperson, or acting Chairperson) shall have a casting vote.
- 12.4 The Commission may appoint such sub-committees, whether as standing sub-committees or otherwise, as it may consider necessary for the effective execution of its functions, provided that the Commission shall retain the power to rescind or vary and amend decisions taken by any such sub-

committee.

- 12.5 Any such sub-committee may include persons who are not members of the Commission, but the Chairperson of any such sub-committee shall be a member of the Commission.
- 12.6 Any member of a sub-committee who is not in the full-time employment of the State shall receive such remuneration (and allowances, if any) as the Commission may determine with the concurrence of the Minister of Finance.

13. Accountability and Finance

- 13.1 The Commission shall determine and submit to the Council for its approval. Estimates of its anticipated expenditure in carrying out its duties and functions in terms of this Act, covering such periods as may be appropriate and subject to amendment as may be necessary from time to time.
- 13.2 Upon approval by the Council of such Estimates, the necessary funds shall be made available by the State.
- 13.3 The Chief Executive Officer of the Commission shall serve as "Accounting Officer" and shall bear the responsibility envisaged by such office in terms of the Statutes.
- 13.4 The Accounting Officer shall ensure that the Commission keeps full and proper records of all its expenditures and of all assets, liabilities and financial transactions, and prepares periodic financial statements in the format required by the Auditor-General, and generally takes steps to ensure that all reasonable management measures are adopted so that assets, services and resources are obtained, safeguarded and utilised in the most economic, efficient and effective manner, and that the requirements of the Auditor-General are duly satisfied.

13.5 The Estimates and Accounts of the Commission shall be subject to audit by the Auditor-General who shall report thereon to the Council and to Parliament.

14. Guarantee by State

The State guarantees, where required, all commitments and liabilities of the Commission.

15. Administration

The Commission shall have power to do all such things as may be necessary in order to fulfil its mandate, and without limitation thereto, may :

- 15.1 Appoint staff, fix remuneration and determine such emoluments and benefits as it may deem reasonable and appropriate.
- 15.2 Purchase, hire or otherwise acquire movable or immovable property necessary for the performance of its functions.
- 15.3 Enter into agreements with any person, including the State, for the performance on its behalf of any specific act or function or the rendering of any specific service.
- 15.4 Insure itself and its members, staff, visitors and the public against loss, damage, risk or liability which may be suffered or incurred.
- 15.5 Open and operate bank accounts with the Reserve Bank or any other registered financial institution.
- 15.6 In general, perform such acts as may be necessary or expedient for the achievement of its objects.

16. Powers, duties and functions of the Commission

16.1 The Commission shall be charged with responsibility for the organisation, conduct and supervision of the Transitional Elections, and shall be vested with all such powers, discretions and authorities as may be necessary to enable it effectively to undertake such responsibility.

16.2 In order to carry out its various functions, the Commission shall be empowered to establish the necessary functional sub-structures and to regulate their powers, duties and responsibilities, as it may deem appropriate in order to ensure a free and fair election.

Such functional sub-structures shall include²¹ :

16.2.1 An Election Administration Directorate, which shall have the responsibilities referred to in 17;

16.2.2 An Election Monitoring Directorate, which shall have the responsibilities referred to in 18;

16.2.3 An Election Adjudication Directorate, which shall have the responsibilities referred to in 19.

16.3 In establishing such functional sub-structures, the Commission shall be entitled to make provision for the co-option and assistance of legal experts and other suitably qualified persons including persons who may be nominated for this purpose by one or more of the Accredited International Organisations.

²¹ The Democratic Party proposes a further structure responsible for the issuing of voter documentation.

- 16.4 Each such Directorate shall operate independently of the others, but shall be accountable and subject to the overall management and control of the Commission, which notwithstanding such delegation, shall retain the power to issue final directives and to rescind or vary and amend any decision taken by such functional sub-structures.

CHAPTER FIVE

THE ELECTION ADMINISTRATION DIRECTORATE

17. Responsibilities of the Election Administration Directorate

The Election Administration Directorate²² constituted in terms of 16.2.1 shall have the following functional responsibilities, viz:-

- 17.1²³ The education of the voter public²⁴ concerning democratic principles and values, and the electoral process; including free and peaceful political campaigning; the secrecy of voting and other relevant matters, utilising such means and media as it may deem appropriate, including the distribution and publication of literature, advertisements, and otherwise through radio, television and public print media.

²² The South African Government proposes the appointment of a Chief Electoral Officer and Secretariat, charged with the administration and conduct of the elections. Alternatively, it proposes that the Commission itself should administer these matters through a sub-Council.

²³ The Democratic Party suggest that the first task of the Commission should be to draft a new Electoral Act, although it also urges that "most electoral rules should be determined in the Act".

²⁴ A submission from the Gender Advisory Committee recommends that special attention be given to encouraging the full participation of women in the elections.

- 17.2 Procedures for determining the eligibility²⁵ and identification²⁶ of voters²⁷.
- 17.3 The determination of whether voter lists shall be prepared, and if so, the supervision of the process of preparing such lists; and determining polling districts and electoral divisions, as it may deem necessary.
- 17.4 The registration of political parties and candidates entitled to participate in the Transitional Elections and the preconditions and formalities²⁸ applicable to such registration.
- 17.5 Provision for the application, registration and approval of proposed names for Political Parties and their respective logos, symbols, and campaign colours.

²⁵ The criteria for eligibility are substantive issues which need to be specified in the legislation. What is envisaged by this clause are merely procedural issues.

²⁶ The ANC's submission contains detailed suggestions concerning the important issue of how voters may be identified. (See paragraphs 4.4.6; 7 & 14 of their submission). If the Technical Committee is required to formulate proposals with respect to identification of voters, it will need to give that matter further consideration and if necessary obtain expert advice.

²⁷ The Democratic Party suggests that the Commission should also take a pro-active role in voter registration and the issuing of the necessary ID documentation, possible in conjunction with its own voter education programme.

²⁸ The issue of criteria and procedure for registration of Political Parties is an important matter. The ANC in its submission (clause 9) makes detailed suggestions with reference to the preconditions and formalities to be satisfied before registration of a Political Party may be granted. The Technical Committee has not had a sufficient opportunity to consider in detail the prerequisites that are appropriate. The Democratic Party has suggested a requirement of deposits, which would be forfeited, together with other financial electoral assistance, by any party which received less than one percent (1%) of the national vote.

17.6 The enforcement against all registered political parties, candidates and others, of the Electoral Code of Conduct set out in Schedule A²⁹, to this Act, including the application of appropriate penalties for violations as prescribed therein. (Such penalties to include inter alia, at the discretion of the Commission, the suspension or forfeiture of rights to election privileges, such as access to television, radio and the rights to media advertising and such financial assistance as may be available to registered political parties and candidates).

17.7 The election and appointment of returning officers, polling and counting officers and other necessary electoral personnel, who may not be persons who hold or have held any Political Office during a period of three (3) years preceding the date of their appointment.³⁰

17.8 The identification of polling stations and the determination of times³¹

²⁹ The Technical Committee has received three suggested Codes from the SA Government, the ANC and the DP respectively, but has not yet had time to apply its mind adequately to the formulation of such Code. It does, however, support the proposition that the content of such Code and the penalties or consequences for infringements should be defined by the Statute.

An issue to be determined is whether the jurisdiction of the Commission and its Adjudication Tribunal should be limited to acts and omissions committed by Political Parties and Candidates, or whether it should also be in a position to take steps against other individuals and organisations who may have not themselves subscribed the Electoral Code of Conduct.

In the submission of the SA Government, a provision is proposed which would deem an offence committed by an official or representative of a Political Party to be the offence of that party unless the contrary is proved, and in appropriate circumstances the Political Party can be declared "unlawful" and precluded from participating in this and future elections for a period of up to five (5) years.

³⁰ In the ANC submission, it is suggested that membership of a Political Party should also be a disqualification.

³¹ In the ANC's submission it is proposed that voting should take place over a period of three (3) days.

and places³² for voting, including the stipulation of places where particular voters shall be permitted to cast their votes.

- 17.9 The conditions and formalities applicable to Special and Postal Votes.³³
- 17.10 The form and content of ballot papers.³⁴
- 17.11 Arrangements for ensuring the secrecy and security of the ballot and the protection of ballot papers and of voters.³⁵
- 17.12 Arrangements for the counting of votes and the determination of results.
- 17.13 Circumstances in which ballot papers may be rejected.
- 17.14 The determination of legitimate electioneering expenses and the permitted source and application of political campaign funds.

³² In the ANC's submission (clause 13) it is suggested that a voter should be permitted to vote "in the region in which he or she resides or works". The Democratic Party suggests the opposite, namely, that forcing voters to vote within their areas of residence could create conditions susceptible to intimidation.

³³ Without repeating the provisions of the Electoral Act, it is assumed that the same or similar provisions shall be made applicable to this election.

³⁴ In the ANC's submission (clause 15) it is specified that the ballot form should be single-columned and in alphabetical order.

³⁵ The Democratic Party advocates an indelible mark on voters' hands to prevent repeated voting, and proposes various measures to be adopted at polling stations in order to prevent intimidation of voters.

- 17.15 The obligation to disclose as a matter of public record the receipt and the source of any contribution to election campaign expenses in excess of R1,000.00.³⁶
- 17.16 The promulgation of appropriate regulations governing political advertising to be determined in consultation with the Independent Media Commission.³⁷

³⁶ In the ANC's submission it is proposed that this obligation should relate to contributions in excess of R10,000.00. The IFP/KwaZulu Government submission supports the principle of disclosure. The Democratic Party raises the possibility of placing limits on campaign funding "to keep the playing field level."

³⁷ The relative terrain and authority of this Commission in relation to matters falling within the jurisdiction of the proposed Media Commission needs to be clarified. One possibility would be that the decisions of the Media Commission with reference to matters involving issues arising from the election should be subject to appeal to this Commission.

The PAC has drawn attention to the inter-dependence of the Electoral Commission, the Media Commission and the Council.

The Democratic Party advocates equal air time on radio and TV for all participating political parties.

17.17 The application by reference and notice of any of the provisions of the Electoral Act No. 45 of 1979, as amended, or any other legislation which may have reference to the Transitional Elections and the electoral process.³⁸

CHAPTER SIX

ELECTION MONITORING DIRECTORATE

18. Responsibilities of the Election Monitoring Directorate

The Election Monitoring Directorate³⁹ constituted in terms of 16.2.2 shall have the following functional responsibilities⁴⁰ viz:

³⁸ An issue to be resolved is precisely the ambit of jurisdiction of the Election Commission with reference to other laws, and in particular the Electoral Act. In the ANC's submission (4.4.7) the Commission is to be given unqualified powers to amend by regulation any existing law which in its opinion restricts free political activity or access to voters. In the South African Government's submission [7(4)(a)] the Commission is to review existing electoral legislation and make recommendations with regard to the need for amendment.

The ANC's submission (4.4.9) also proposes that the Commission should have authority to give directions with reference to matters affecting the election to any government authority including the police and defence force.

The Democratic Party envisages that the Commission might utilise the services of Government Departments 'on an agency basis'. The Democratic Party also suggests a new Electoral Act to be drafted by the Commission.

³⁹ The South African Government proposes 'a Monitoring Committee' comprising three (3) expert and impartial persons.

⁴⁰ In the alternative proposal of the South African Government, it is suggested that the monitoring function be transferred to the National Peace Secretariat (clause 13). Whilst advocating an independent Monitoring Body, the Democratic Party suggests that functioning Peace Committees should also be used to 'ensure' and 'monitor' security.

- 18.1 The appointment of local and international observers, scrutineers and election support staff.
- 18.2 The establishment of investigative facilities and review procedures, which shall include the right to issue and execute search warrants, subpoenas, and to seize any items as evidence of alleged infringements of the Electoral Code of Conduct.
- 18.3 The establishment on a country-wide basis of facilities to observe, monitor and verify the process of the elections, before, during and after polling.
- 18.4 Recommendations for preventing the intimidation of voters, candidates and political parties.
- 18.5 The investigation and prosecution before the Commission, where appropriate, of any infringement of the Electoral Code of Conduct.
- 18.6 The issuance of Notices of Infringement and Warnings concerning alleged or threatened breaches of the Electoral Code of Conduct.

CHAPTER SEVEN

THE ELECTION ADJUDICATION DIRECTORATE

19. Responsibilities of the Election Adjudication Directorate

The Election Adjudication Directorate⁴¹ constituted in terms of 16.2.3 shall have the following functional responsibilities viz:

⁴¹ The DP proposes that this Directorate should be chaired by a Judge. The SA Government suggests that it should comprise five (5) persons who have held judicial office or who have practised law or been academic lawyers for at least ten (10) years.

- 19.1 To serve as the final arbiter⁴² of claims, issues and disputes (subject to a right of appeal to the Commission) as may be submitted concerning any matters affecting the campaign, conduct and results of the Transitional Elections; provided that the Directorate may decline to consider any such claims or disputes as may not have been formally notified to the Commission in the prescribed manner, within a period of 21 days of the alleged occurrence.
- 19.2 To establish and determine the powers and procedures of appropriate special tribunals for the speedy investigation and adjudication of complaints concerning alleged electoral irregularities, including any refusal or attempt to impede access to venues, voters, and political meetings, corrupt practices, intimidation or other breaches of the Electoral Code of Conduct; provided that an appeal shall lie to the Commission in respect of decisions made by any such special tribunals.

CHAPTER EIGHT

ADJUDICATION OF ELECTION RESULTS

20. Adjudication of Election Results

- 20.1 Upon completion of the ballot, the Commission shall be required within a period of 21 days to determine and certify the final results of the Transitional Elections, and to declare whether, and if so then to what extent, such elections have been conducted in a manner which has been substantially free and fair⁴³. In effecting such determination, the

⁴² In the submission of the SA Government (clause 8) the right of the Courts to co-existent jurisdiction is reserved. This would appear to create the possibility of a conflict of authority.

⁴³ The Democratic Party suggests a dual certification process involving firstly the Commission (which in their proposal comprises only South African citizens) and secondly international monitors.

Commission may accept or reject the result of the poll as a whole, or it may accept such result in part and reject such result in part.

20.2 The acceptance and certification of the results of the elections, as substantially free and fair, shall not be of force and effect unless a majority of at least eight (8) members of the Commission shall have concurred in such finding.⁴⁴

20.3 In the event of such results, or any part thereof, being not accepted and certified as aforesaid, the Commission shall determine and cause to be implemented such steps (including the organisation, conduct and supervision of new elections) as it may deem appropriate, in order to achieve a free and fair election.⁴⁵

20.4 Notwithstanding the foregoing, the Transitional Elections shall not be set aside by reason of any untoward occurrence, mistake, or non-compliance with the provisions of the Act or the Electoral Code of Conduct, if it appears to the Commission, that the elections were conducted substantially in accordance with the prescribed principles, and that such mistake or non-compliance did not materially affect the outcome thereof.

⁴⁴ In the submission, it is implicit that a simple majority of the members of the Commission would suffice.

⁴⁵ None of the submissions contains a very clear proposal regarding the consequences in the event of the election being not certified as free and fair.

CHAPTER NINE
MISCELLANEOUS PROVISIONS

21. Jurisdiction

There shall be no appeal from any decision by the Commission but its proceedings shall be subject to review before any Provincial Division of the Supreme Court, or, with the leave of the Chief Justice, direct to the Appellate Division.⁴⁶

22. Successors to the Forum

In this Act, where any rights or prerogatives are conferred upon the Forum, such rights or prerogatives shall be assumed by the Council from the date of its establishment in terms of the relevant Statute. Upon dissolution of the Council, such rights and prerogatives shall be assumed by Parliament.

23. Delegation

Save in respect of its duty to adjudicate the Election results in terms of 20, the Commission may delegate any power or duty conferred upon it in terms of this Act to any person or other body, or authorise such person or other body, including the State, to perform any duties assigned to it hereunder.

⁴⁶

In the ANC's submission, the Commission is to have 'exclusive jurisdiction' to apply and interpret this law. Its decisions are to be final.

24. Offences relating to voting procedures, polling stations and voting equipment

24.1 Any person who⁴⁷ :

24.1.1 forges or counterfeits or fraudulently destroys any ballot paper or a mark, stamp or note on any ballot paper; or

24.1.2 deliberately without due authority supplies any ballot paper to any person; or

24.1.3 fraudulently places into any ballot box any paper other than a ballot paper handed to him in terms of this Act; or

24.1.4 fraudulently takes out of any polling station any ballot paper; or

24.1.5 deliberately without due authority destroys, opens, uses or otherwise interferes with any ballot box, voting compartments, instrument, form, document or other equipment used or intended for use at any polling station;

shall be guilty of an offence and liable on conviction to a fine not exceeding R100 000,00 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

24.2 In any indictment, summons or charge for an offence in relation to ballot papers, ballot boxes or voting equipment in the Transitional Elections the

⁴⁷ A few additional offences are envisaged in the South African Government's submission, including a statutory offence committed by 'any person who offends a member of the Commission, the Chief Electoral Officer or his Secretariat or any person charged with the administration of an election, the Monitoring Committee, the Adjudicating Tribunal or any person connected therewith' ...

the property in such papers, boxes or equipment may be stated to be vested in the Commission.

25. Personation

Any person who :

25.1 during the Transitional Elections applies for a ballot paper in the name of some other person, whether living or dead, or of a fictitious person, or who gives a vote in the name of any such person; or

25.2 having previously voted, again votes or applies for a further ballot paper;

shall be guilty of an offence and liable on conviction to a fine not exceeding R100 000,00 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

26. Undue influence and bribery

Any person who, directly or indirectly, by himself or by any other person :

26.1 makes use or threatens to make use of any violence, force or restraint, or inflicts or threatens to inflict any injury, damage, harm or loss, upon or against, or does or threatens to do anything to the disadvantage of, any person in order to induce or compel any person to vote or to refrain from voting in the Transitional Elections or on account of any person having voted or refrained from voting in the Transitional Elections; or

26.2 by any such means as aforesaid or any fraudulent device or contrivance induces, compels or prevails upon any voter to vote or to give or refrain from giving a particular vote in the Transitional Elections, or impedes or prevents the free exercise of the franchise by any voter in the Transitional

Elections; or

26.3 gives, lends or procures, or agrees to give, lend or procure, or offers or promises, any money or other reward to or for any voter or any other person, in order to induce such voter or any other voter to vote or to give or to refrain from giving a particular vote in the Transitional Elections; or

26.4 receives or contracts for any money or other reward for himself or for any other person, on account of voting, giving or agreeing to give, or refraining or agreeing to refrain from giving, a particular vote in the Transitional Elections;

shall be guilty of an offence and liable on conviction to a fine not exceeding R100 000,00 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

27. **Obstructing proceedings and officers**

Any person who wilfully obstructs or disturbs any proceedings under this Act at a polling station or wilfully obstructs or interferes with any member of the Commission, or any officer or other person appointed by the Commission in the exercise of their powers or the performance of their duties in terms of this Act, shall be guilty of an offence and liable on conviction to a fine not exceeding R10 000,00 or to imprisonment for a period not exceeding three years, or to both such fine and such imprisonment.

28. **Infringement of Security**

28.1 Every officer or other person appointed by or under this Act in attendance at a polling station shall maintain, and aid in maintaining, the secrecy of the voting at that polling station, and shall not communicate, except for some purpose authorised by law, to any person any informa-

tion likely to threaten the secrecy of the voting.

- 28.2 Subject to the provisions of this Act, no person shall interfere with or attempt to interfere with a voter when giving a vote, or otherwise attempt to obtain at a polling station information as to how any voter at that polling station is about to vote or has voted, or communicate at any time to any person any information obtained at a polling station as to how any voter at such polling station is about to vote or has voted, or as to the number, if any, on the ballot paper handed to any voter at such polling station.
- 28.3 No voter shall directly or indirectly induce any voter to display a ballot paper, after a vote has been given, in such a manner as to make known to any person how the voter has voted.
- 28.4 No person shall place upon any ballot paper any mark or writing whereby a voter on that ballot paper may be identified.
- 28.5 Every person in attendance at the determination of the result of the Transitional Elections shall maintain, and aid in maintaining, the secrecy of the voting, and shall not attempt to ascertain at such determination, or communicate any information obtained at such determination as to, the manner in which any particular voter has voted.
- 28.6 Subject to the provisions of this Act, no person shall attempt to ascertain, or directly or indirectly assist in ascertaining, how any voter has voted.
- 28.7 Any person who, in the exercise of powers or the performance of duties in terms of this Act, has obtained knowledge as to the vote which any voter has given, shall not disclose such knowledge except in reply to a question lawfully put in the course of proceedings in any court.

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28.8 No person shall, except upon the order of any court or as authorised by this Act, break the seal of, or open, any packet sealed in terms of this Act.

28.9 Any person who contravenes, or fails to comply with, any provision of this section, shall be guilty of an offence and liable on conviction to a fine not exceeding R10 000,00 or to imprisonment for a period not exceeding three years, or to both such fine and such imprisonment.

29. Prohibition of opinion polls during the Transitional Elections

29.1 No person shall, during a period of six (6) weeks⁴⁸ prior to the date of commencement of the Transitional Elections, conduct an opinion poll in respect of the support enjoyed by Political Parties or candidates, or by the policies they advocate, or publish the results of any such opinion poll conducted during such period.

29.2 The provisions of the preceding sub-section shall not prohibit the obtaining of opinions in the course of canvassing for votes on behalf of Political Parties or candidates or the publishing of the result of such obtaining of opinions.

29.3 Any person who contravenes any provision of 29.1 shall be guilty of an offence and liable on conviction to a fine not exceeding R10 000,00 or to imprisonment for a period not exceeding three (3) years, or to both such

⁴⁸ In the ANC's submission it is proposed that this period should be two (2) weeks. (In the Electoral Act, the effective period is plus-minus six (6) weeks).

The Democratic Party also raises the possibility of regulations controlling mass rallies and marches during the last two weeks before the election.

fine and such imprisonment.

30. Voter not required in legal proceedings to disclose vote

No-one who voted in the Transitional Elections shall be required in any legal proceedings to state how they voted.

31. Exemption from duties, taxes and fees

Notwithstanding anything to the contrary in any other law contained, no duty, tax or fees shall be payable by the Commission to the State in respect of anything done or any transaction under this Act or in respect of any document required in connection therewith.

32. Regulations

The Commission shall be empowered to make regulations providing for such matters as are specifically, or by necessary inference, contemplated, and generally for achieving the objects and purposes of this Act. Such regulations may prescribe penalties for the contravention or failure to comply therewith. The Commission may likewise prescribe the form and content of any document or form which may be required for the carrying out of the provisions of this Act.

33. Application of the Act to a Referendum

Upon the advice of the Forum, the Council or Parliament, the State President may by Proclamation in the Gazette declare that the provisions of this Act shall apply to the holding of a Referendum; and in such circumstances may require that the Commission utilise the powers and discretions conferred upon it hereunder, for the purpose of organising and conducting an appropriate Referendum, either nationally or within any particular region/s and on any specified issue/s.

34. Short title

This Act shall be called "The Independent Electoral Commission Act, 1993".

**F. INDEPENDENT MEDIA COMMISSION
AND INDEPENDENT
TELECOMMUNICATIONS AUTHORITY**

EXECUTIVE SUMMARY OF THE INDEPENDENT MEDIA COMMISSION BILL

1. The technical committee has prepared an early draft of a Bill to establish an Independent Media Commission.
 2. The objects of the Commission shall be:
 - 2.1 to ensure equitable treatment of political parties by broadcasting services; and
 - 2.2 to ensure that state-financed publications are not used to advance the interests of any political party;

so as to contribute towards the promotion and creation of a climate favourable to free political participation and a free and fair election.
 3. To achieve these objects, the Bill contains provisions on:
 - 3.1 political broadcasts on public sound broadcasting services;
 - 3.2 political advertisements on sound broadcasting services;
 - 3.3 equitable treatment of political parties by all broadcasting services;
 - 3.4 state-financed publications.
 4. The Commission shall comprise of seven persons to be appointed by the State President on the recommendation of the TEC/MPF.
 5. The Bill contains provisions to ensure the impartiality and necessary expertise of the Commission.
 6. The Bill contains provisions on hearings, inquiries and determinations by the Commission.
 7. The Commission shall dissolve on the completion of the first election.
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SECOND REPORT OF THE TECHNICAL COMMITTEE ON INDEPENDENT MEDIA COMMISSION AND THE INDEPENDENT TELECOMMUNICATIONS AUTHORITY/21 MAY 1993.

1. The Committee has met on a number of occasions since the submission of the last report.

2. The Committee has received submissions from the following parties:

ANC
Bophuthatswana Government
Ciskei Government
Conservative Party
Democratic Party
IFP and Kwazulu Government
PAC
South African Government
Venda Government

3. The Committee has prepared a draft IMC Bill, which is attached. This Bill is based on the terms of reference of the Committee, the submissions received from political parties, assistance received from a number of experts and discussions of the Committee itself.

4. Most of the submissions received by the Committee dealt with the ITA/IBA. In so far as there were submissions which dealt with the IMC, the Committee has tried to incorporate in its recommendations as many of these submission as possible. However, the following submissions are not reflected at present in the recommendations of the Committee:

4.1 The submission received from the Ciskei Government to the effect that the IMC should have no jurisdiction in relation to the TBVC states. Ciskei submits that the TBVC states should enjoy regional autonomy and the IMC and ITA should be regionally based. The Committee feels that this is an issue ought to be dealt with by the Technical Committees dealing with constitutional matters and the Transitional Executive Council.

4.2 The submission received from the Democratic Party to the effect that IMC members should be appointed following a process of open hearings. The Committee did not feel that this was appropriate, bearing in mind that the IMC has a transitional function. It should be established by the TEC /MPF immediately upon the commencement of the IMC Act.

4.3 The submissions received from the PAC to the effect that the Committee ought to address the question of the print media in terms of the levelling of the playing fields in the period leading up to the elections. The Committee is of the view that it would be inappropriate to try and regulate the print media in the transitional period, since this would constitute an unwarranted

infringement of freedom of expression. The reason why broadcast is treated differently is that the frequency spectrum is public property and ought therefore to be regulated in the public interest. Similarly, state-financed publications, which are financed by revenue received from tax payers, should not be involved in the realm of party politics.

5. The Committee felt that state information services ought to be treated differently from state-financed publications. In the IMC Bill, we have dealt only with state-financed publications. The Committee understands that state information services would deal, inter alia, with statements made and press releases issued by the State President, the central government, Ministers and their ministries, state departments, and the South African Communication Service, as well as the equivalent bodies in the self-governing territories and the TBVC states. The Committee is of the view that the state information services ought to be dealt with as follows:

- 5.1 All such statements and press releases ought to be issued via a central point, namely the South African Communication Service;
- 5.2 Insofar as a political party is of the view that such a statement or press release runs counter to the promotion and creation of a climate favourable to free political parties participation and the holding free and fair elections, this political party may refer a complaint to the IEC or the TEC to deal with.

The Committee is of the view that it is appropriate that the political parties should resolve such issues. It is not felt appropriate to have these issues adjudicated by a body such as the IMC. It may well be that the political parties will decide to introduce additional measures to address statements and press releases emanating from certain state information services.

6. The Committee has a similar view with regards to any written material published, any statement made or press release issued by any political party, party representative or candidate during the transition period. In other words, insofar as a political party of the view that such material, statement or press release runs counter to the promotion and creation of a climate favourable to free political participation and the holding of free and fair elections, this political party may refer a complaint to the IEC or TEC.
7. The Committee hopes to have completed an Independent Broadcasting Authority Bill (the name of this Bill is still the subject of discussion) by the end of next week i.e. Friday 28 May 1993.

