

EMBARGOED

UNTIL TABLING IN THE NEGOTIATING COUNCIL

[7]

GENERAL EXPLANATORY NOTE

**THIRD DRAFT
OF THE INDEPENDENT ELECTORAL COMMISSION ACT**

**SUBMITTED BY THE TECHNICAL COMMITTEE
TO THE NEGOTIATING COUNCIL
OF THE MULTI-PARTY NEGOTIATING PROCESS**

17 AUGUST 1993

1. The Technical Committee submits herewith its Third Draft of a proposed Independent Electoral Commission Act for the further consideration of the Negotiating Council.
2. The Technical Committee reports that it has made good progress in the preparation of a new Electoral Act, which will contain a number of provisions, including the Electoral Code of Conduct, previously located in the earlier drafts of the Act. A first Draft of the new Electoral Act will be tabled by the Technical Committee shortly. There is naturally a close interdependence and synergy between these two pieces of legislation, which have likewise to be "harmonised" with the new Constitution, and the Act which establishes a Transitional Executive Council.
3. The annexed Third Draft of the Independent Electoral Commission Act represents a substantial revision of which has been reformulated in the light of the Technical Committee's further consideration, and various new inputs, including:
 - 3.1 The substantive debate which took place in the Negotiating Council on 20 July 1993.
 - 3.2 The Minutes and Report of the Ad Hoc Committee appointed by the Planning Committee with reference to certain provisions upon which divergent views were expressed in the Negotiating Council, viz Sections 7, 16, 17, 18.3 and 21 of the Second Draft of the Act.
 - 3.3 Consultations which have recently taken place between the Technical Committee and representatives of the International Community (UN; OAU; EEC and Commonwealth Observer Missions), with particular reference to the envisaged role of the International Community in the composition of the proposed Independent Electoral Commission.
 - 3.4 A meeting held by the Technical Committee with Dr A Gildenhuys, Director of the National Peace Secretariat, in order to clarify the possible role of the Peace Accord structures in the process of electoral monitoring.
 - 3.5 Further submissions received from a number of NGO's concerned with the

electoral process and in particular voter education.

4. A large number of textual and "organisational" changes have been effected in the draft, as a result of which it has not seemed appropriate to mark and individually highlight each and every individual change of wording. However, to assist members in their consideration of the latest draft, appropriate footnotes have again been provided, which draw attention to the more significant changes and the reasons therefore. An indication has also been given where the Technical Committee has itself experienced a divergence of views. In such cases the majority view is expressed in the text of the draft Act, and the minority view is recorded by way of footnote. References in (***BOLD ITALICS***) have also been provided in order to indicate the numbers of similar provisions in the earlier (second) draft of the Act.
5. With reference to the composition of the Commission, it is relevant to report, as indicated in the appropriate footnote to Section 7.1, that the Technical Committee has been advised by representatives of the International Organisations concerned, that they share a common view that:
 - 5.1 International Representatives should preferably be appointed in a personal capacity. Names may be suggested, but it is preferred that they be not nominated or co-opted by the International Organisations.
 - 5.2 International Members should be accorded the full rights of membership but should not be accorded the right to vote.
6. With reference to a suggestion made in the Negotiating Council regarding the possible role of the Peace Accord structures and a concern with regard to undesirable duplication of roles, the Technical Committee has met with Dr A Gildenhuis on 6 August 1993. At this meeting, the Committee was informed that the envisaged roles of the Commission's Monitors and the established roles of the Peace Secretariat Monitors were indeed separate and distinct. Dr Gildenhuis envisaged that the Peace Accord structures could provide important assistance to the Commission's Monitors and to International Observers, as it has already done with reference to the International Observer Missions. It is also his view that the Peace Secretariat could be of assistance in community-based facilitation and mediation in the course of the electoral campaign period. However, it would be undesirable for the Peace Accord Monitors to be involved in the role envisaged for the Commission's Monitors, as this would imply their making value judgments in certain circumstances. In the opinion of Dr Gildenhuis, this could prejudice their existing role, and the consensual basis of decision-making within the National Peace Accord.

7. Issues to which the Negotiating Council may wish to give particular attention, include the following:
- 7.1 The Role of the International Community
Sections 1.12, 7.1 and 11.1.
 - 7.2 The Role of the Commission's "Monitors"
Sections 1.14 and 18.1.
 - 7.3 The Role of "Observers" and the distinction drawn between "NGO Observers" and "International Observers"
Sections 1.12 and 18.2.
Sections 1.16 and 18.3.
 - 7.4 The definition of "Party" and its extended application to bodies not registered under the Electoral Act
Sections 1.19, 16.6.4 and 25.
 - 7.5 The definitions of "Public Office" and "Political Office" and the various constraints, disqualifications and prohibitions applicable to members of the Commission
Sections 1.18, 1.20, 7.2 to 7.6.
 - 7.6 The reformulation of the "Objects of the Commission"
Section 5.
 - 7.7 The proposal with regard to the obligation upon Commissioners to make (public) disclosure of their financial affairs
Section 7.5.
 - 7.8 The procedure applicable to the removal of members of the Commission, and the role of the Appellate Division in this instance
Section 9.
 - 7.9 The specified majority required for the reconstitution of the Commission and the re-selection of Commissioners
Section 11.1.

- 7.10 The envisaged obligation upon Parties to make disclosure of financial contributions received for campaign purposes
Section 16.4.
- 7.11 The proposed investigatory powers of the Monitoring Directorate
Sections 18.4 and 18.5.
- 7.12 The composition and role of Special Electoral Tribunals
Section 19.
- 7.13 The composition and role of the Election Appeal Tribunals with particular reference to the divergence between the Ad Hoc Committee and the Technical Committee
Section 20.
- 7.14 The consequences of an Election being considered as having been only partly "free and fair"
Section 21.4.
- 7.15 The principle that there should be no appeal from decisions of the Commission, and the principle that a review should lie to the Appellate Division
Section 22.

THIRD DRAFT

**SUBMITTED FOR THE FURTHER CONSIDERATION OF THE
NEGOTIATING COUNCIL, MULTI-PARTY NEGOTIATING PROCESS**

**BY THE TECHNICAL COMMITTEE ON THE
INDEPENDENT ELECTORAL COMMISSION ACT**

17 August 1993

THE INDEPENDENT ELECTORAL COMMISSION ACT

To provide for the establishment of an Independent Electoral Commission to assume responsibility for the administration, organisation, conduct, supervision, monitoring and adjudication of Elections for the National Assembly/Constitutional Assembly, and for such other Legislatures as are constituted in respect of States, Provinces or Regions in terms of the Constitution, and to make special provision for the conduct of Referenda under the supervision of the Commission; and to provide generally for the necessary powers, duties and functions of the Commission, and for the establishment of its necessary sub-structures, including an Election Administration Directorate and an Election Monitoring Directorate; and to provide for the establishment of special Electoral Tribunals and Electoral Appeal Tribunals for the enforcement of an Electoral Code of Conduct; and to provide for matters connected therewith¹.

¹ The Long Title has been revised in consequence of a number of substantive revisions contained in the new text of the Act.

CHAPTER 1

INTERPRETATION AND APPLICATION OF THE ACT

1. DEFINITIONS

In this Act, unless the context indicates otherwise :

- 1.1 **"Chief Executive Officer"** means a person appointed to such office by the Commission in terms of section 16(2). *(Previous Section 1.1)*
- 1.2 **"The Commission"** means the Independent Electoral Commission constituted in terms of this Act. *(Previous Section 1.2)*
- 1.3 **"The Constitution"** means the Constitution of the Republic as enacted in terms of the Constitution of the Republic of South Africa Act, 1993 (No ... of 1993).
(New Section)
- 1.4 **"Elections"** means the first and subsequent Elections conducted in terms of the Electoral Act for the National Assembly/Constitutional Assembly and for the SPR Legislatures; and including Referenda conducted under the supervision of the Commission in terms of Section 30².
(Previous Section 1.3)
- 1.5 **"The Electoral Act"** means the Electoral Act, 1993 (No ... of 1993).
(New Section)
- 1.6 **"The Electoral Code of Conduct"** means the Code of Conduct binding upon parties, candidates and others, as prescribed in terms of the Electoral Act³.
(Previous Section 1.4)

² The revised definition has been amended to reflect the appropriate terminology as presently conceived in the draft Constitution.

³ This definition has been amended to reflect the transposition of the Electoral Code from this Act to the new Electoral Act which is in the course of preparation.

- 1.7 **"Eligible Candidates"** means persons qualified to serve as members of Parliament, or as members of an SPR Legislature, in terms of the Constitution, the Electoral Act, and other Transitional Legislation.
(Previous Section 1.5)
- 1.8 **"Eligible Voters"** means any person entitled to vote in the relevant Election, in terms of the Constitution, the Electoral Act, and other Transitional Legislation⁴.
(Previous Section 1.6)
- 1.9 **"The Forum"** means the body so designated as part of the Multi-Party Negotiating Process.
(Previous Section 1.7)
- 1.10 **"The Independent Media Commission"** means the Commission established in terms of the Independent Media Commission Act, 1993 (No. ... of 1993), to provide for the equitable treatment of political parties by broadcasting services, and for the monitoring of State-financed publications, and matters connected therewith.
(Previous Section 1.8)
- 1.11 **"International Members"** means persons drawn from the International Community, and appointed to serve as members of the Commission, without voting power, as envisaged by Sections 7.1 and 11.1.
(Previous Section 1.9)
- 1.12 **"International Observers"** means persons appointed as representatives of the United Nations, the Organisation of African Unity, the European Economic Community, the Commonwealth and any other International Governmental Organisation or Foreign Governments accredited for this purpose by the Sub-Committee on Foreign Affairs of the Transitional Executive Council during its term of office, and thereafter by the Department of Foreign Affairs, in order to observe and report upon the electoral process.
(New Definition)

⁴ The criteria for eligibility will be defined in the new Constitution as amplified by the new Electoral Act in the course of preparation.

- 1.13 **"Judicial Office"** means any appointment as a judge of the Supreme Court, whether permanent or on an acting basis.
(New Definition)
- 1.14 **"Monitors"⁵** means persons appointed by and accountable to the Election Monitoring Directorate by whom they are mandated to observe and report upon the electoral process as contemplated by Section 18.1.
(New Definition)
- 1.15 **"National Assembly/Constitutional Assembly"** means the body so designated in terms of the Constitution.
(New Definition)
- 1.16 **"NGO Observers"** means persons appointed by and accountable to Non-Governmental Organisations (NGO's), established both within and outside the Republic, by whom they are mandated to observe and report upon the electoral process, and who are duly registered with the Electoral Monitoring Directorate in terms of Section 18.2.
(New Definition)
- 1.17 **"Parliament"** means the body so designated in terms of the Constitution.
(Previous Section 1.10)
- 1.18 **"Political Office"** means any executive appointment or official position involving political activity in the service of a party, whether involving remuneration or not and including any elected or nominated public representative of a party.
(Previous Section 1.11)

⁵ A distinction is drawn between "Monitors" who are officially appointed and accountable to the Commission through its Directorate, and "Observers" who are not appointed by the Commission and fall into two categories viz "International Observers" and "NGO Observers", as respectively defined.

1.19 **"Party"** means any political party, organisation or movement, entitled to participate in an Election by reason of its having duly registered⁶ as such in terms of Section ... of the Electoral Act; and any unregistered political party, organisation or movement which is deemed to have participated in an Election by reason of its having publicly supported or opposed the policies, candidates or cause of any such registered party, organisation or movement, or which propagates non-participation in any Election or the non-acceptance of the certified results declared by the Commission.

(Previous Section 1.12)

1.20 **"Public Office"**⁷ means any appointment or position in the service of the State, or any corporate or other body, institution, or concern, owned and/or controlled, directly or indirectly, by the State; and including any such appointments or positions in the Legislative, Executive or Judicial organs of the State at any level of Government, but excluding academic appointments at universities and tertiary educational institutions.

(Previous Section 1.13)

1.21 **"Referenda"**⁸ means any Referenda conducted under the supervision of the Commission in accordance with the provisions of Section 30.

(New Definition)

1.22 **"The Regulations"** means the Regulations promulgated in terms of this Act.

(Previous Section 1.14)

⁶ It is envisaged that only "parties" registered in terms of the Electoral Act shall be entitled to participate in Elections. However, there may be other bodies which support or oppose such registered parties or which campaign against the Election itself, and who are by definition brought within the ambit of the Act and the proposed Electoral Code.

⁷ This definition has been amplified as proposed in the Negotiating Council to include appointment at all levels of Government and to exclude academic appointments at universities. (This latter exclusion is probably unnecessary as universities and tertiary educational institutions are independently constituted, although they are financially dependent on the State. However, in view of concerns expressed, certain terminology has been included, to place the matter beyond doubt).

⁸ This definition has been included as proposed in the Negotiating Council.

- 1.23 **"The Republic"** means the Republic of South Africa, including the TBVC and Self-Governing States.⁹ *(Previous Section 1.15)*
- 1.24 **"The Self-Governing States"** means those areas which formerly constituted part of the Republic, and which are presently administered as Self-Governing States in terms of the relevant Constitutional legislation. *(Previous Section 1.16)*
- 1.25 **"SPR Legislatures"** means the legislatures to be established in terms of the Constitution, with legislative competence in respect of such States, Provinces and Regions as are thereby constituted. *(Previous Section 1.17)*
- 1.26 **"The State"** means the Republic, the TBVC and the Self-Governing States. *(Previous Section 1.18)*
- 1.27 **"The TBVC States"** means Transkei, Bophuthatswana, Venda and Ciskei. *(Previous Section 1.19)*
- 1.28 **"The Transitional Executive Council"** means the Transitional Executive Council established in terms of the Transitional Executive Council Act, 1993. *(Previous Section 1.20)*
- 1.29 **"The Transitional Legislation"¹⁰** means the legislation to be enacted in consequence of the proceedings of the Forum, including the Constitution of South Africa Act, 1993 (No ... of 1993); the Transition to Democracy Act, 1993 (No. ... 1993); the Independent Media Commission Act, 1993 (No. ... 1993); the Independent Broadcasting Authority Act, 1993 (No. ... 1993); the Electoral Act, 1993 (No ... of 1993); and ... *(Previous Section 1.21)*
- 1.30 **"This Act"** includes the Regulations prescribed thereunder. *(Previous Section 1.22)*

⁹ As noted in earlier drafts, the inclusion of reference to the TBVC and Self-Governing States is conditional upon the outcome of the negotiations in progress.

¹⁰ This definition has been amplified to include reference to the new Electoral Act.

2. APPLICATION OF THIS ACT

The provisions of this Act shall apply in respect of the first Elections to be conducted for the National Assembly/Constitutional Assembly¹¹ and the SPR Legislatures established in terms of the Constitution, the Electoral Act, and the other Transitional Legislation; and thereafter the provisions of this Act shall apply, notwithstanding the dissolution of the originally-constituted Commission in terms of Section 8, in respect of subsequent elections for the National Assembly/Constitutional Assembly and/or the SPR Legislatures, or any of them, and in respect of Referenda conducted under the supervision of the Commission in terms of Section 30. *(Previous Section 2)*

3. BINDING ON THE STATE AND STATE PRESIDENT

3.1 ¹²This Act shall be binding upon the State, including its various Legislative, Executive and Judicial organs at all levels of Government; and to the extent that its provisions may conflict with the inherent powers of the State, or with the provisions of any other Statute, save for the other Transitional Legislation, it shall supersede and override such powers and provisions, insofar as they relate to the conduct and supervision of Elections, Referenda, and the other matters dealt with in terms of this Act.

3.2 This Act shall likewise be binding upon the State President, who shall be obliged to act in accordance with the advice of the Forum, or its successors in terms of Section 24. *(Previous Section 3)*

¹¹ This phrase has been substituted for "Parliament" in conformity with the current terminology used in the draft Constitution.

¹² The text of this sub-section has been altered to clarify that the Act is binding at all levels of Government and that it supersedes all other legislation, save only for the other "Transitional Legislation".

CHAPTER 2

ESTABLISHMENT OF COMMISSION

4. ESTABLISHMENT OF COMMISSION

There shall be established a body to be known as "THE INDEPENDENT ELECTORAL COMMISSION", which shall be a juristic person, and which shall be constituted in the manner, and shall serve for the term contemplated by Section 8.

(Previous Section 4)

5. ¹³OBJECTS OF THE COMMISSION

The objects of the Commission shall be:

- 5.1 To administer, organise, conduct and supervise, free and fair Elections for the National Assembly/Constitutional Assembly and the SPR Legislatures, in accordance with the provisions of the Electoral Act and including also Referenda as contemplated by Section 30.
- 5.2 To appoint and co-ordinate the activities of Monitors¹⁴, to register and regulate the activities of NGO Observers and to facilitate and assist the role of International Observers.
- 5.3 To undertake any such adjudicatory function as may be assigned to the Commission in terms of the Transitional Executive Council Act, 1993 and the other Transitional Legislation.

¹³ The previous formulation of this clause incorporated both objects and powers and this has been edited in order to make the text less "dense" and to transfer those provisions dealing with powers to Section 16 of the Act.

¹⁴ This provision reflects the distinction drawn between "Monitors" and "Observers" - the latter term reflecting two categories.

- 5.4 ¹⁵To establish special Electoral Tribunals and Electoral Appeal Tribunals in order to adjudicate and determine claims, issues and disputes arising in the course of an Election, and to enforce compliance with the Electoral Code of Conduct.
- 5.5 To undertake and promote education of the voter public with particular regard to the propagation of democratic principles and values, the understanding of the electoral process and mechanisms, the right to free political canvassing and campaigning, the secrecy of voting, and other relevant matters¹⁶.
- 5.6 To determine and certify the results of Elections and to declare to what extent such Elections have been free and fair, and to take the necessary actions in consequence of its determination.

6. ¹⁷INDEPENDENCE OF THE COMMISSION

- 6.1 The Commission shall function without political or other bias; and shall be independent and separate from political parties, and the Forum, and from the Central, TBVC, Self-Governing and SPR Governments, and from the Transitional Executive Council, and any Ministry, department, authority, sub-council or organ thereof, save insofar as the Commission in the exercise of its powers and discretions, may choose to delegate certain specific functions to any such instances.

¹⁵ This sub-section reflects the substantive changes made to this version of the Act in relation to the establishment of Special Electoral Tribunals (Section 20) and Election Appeal Tribunals (Section 21).

¹⁶ This object has been amplified to affirm the role of the Commission in regard to Voter Education.

¹⁷ A number of textual changes have been made without introducing any new principles in this section.

- 6.2 All powers of the Central, TBVC, Self-Governing, and SPR Governments and of such other bodies, sub-structures, and organs thereof as are referred to in Section 6.1, shall, insofar as they relate to the administration, organisation, conduct and supervision of an Election, be deemed to have been derived from, and shall be subordinate to, the Commission, to whom such Governments and such bodies, sub-structures, and organs shall be accountable for such of their acts and decisions as may, in the opinion of the Commission, influence or affect an Election.
- 6.3 The Commission shall submit periodic written reports concerning its acts and decisions, which reports shall be delivered simultaneously to the Forum or its successors in terms of Section 24, and to the State President, and such reports shall be public documents.

(Previous Section 6)

7. COMPOSITION OF THE COMMISSION

7.1 The Commission shall comprise not less than seven (7) and not more than eleven (11) members, who shall be appointed by the State President upon advice of the Forum, or its successors in terms of Section 24, and who shall be impartial, respected and suitably qualified persons, who are themselves eligible voters, and who represent a broad cross-section of the population, including women; on condition that the composition of the Commission may also include, as additional members, such number of persons drawn from the International Community¹⁸, not exceeding five (5), as may be appointed by the State President upon the advice of the Forum, or its successors in terms of Section 24. Such international members shall have the same rights and prerogatives as other members of the Council, including the right to receive notice of, and to attend, speak and participate at all meetings, but they shall have no vote, and shall not constitute part of any quorum required in terms of this Act.

7.2 It shall be a precondition for the eligibility and appointment of all members of the Commission :

7.2.1 That they shall be appointed in their individual capacities, and shall serve impartially and with independence (notwithstanding any personal opinion, preference or party affiliation), and that all voting and decision-making shall be exercised in good faith, and without fear, favour, bias or prejudice.

¹⁸ The Technical Committee noted the views expressed during the debate in the Negotiating Council and subsequently has taken note of the report of the Ad Hoc Committee. As reported in the accompanying memorandum, the Technical Committee has met informally with representatives of the Observer Missions of the United Nations, the European Economic Community, the Organisation of African Unity, and the Commonwealth. It was the unanimous view of the representatives who met the Technical Committee that : (i) International Representatives should be appointed in a personal capacity. Names may be suggested, but it is preferred that they be not nominated or co-opted by the International Organisations; (ii) International Members should be accorded the full rights of membership but should not be accorded the right to vote. It is believed that the present text reflects the views and preferences conveyed to the Technical Committee by the International Representatives. On the basis of the advice received by the Technical Committee, the proposal made by the Ad Hoc Committee regarding "nominees of the International Community" has not been followed.

- 7.2.2 ¹⁹That they shall serve in a full-time capacity, to the exclusion of any duty or obligation arising out of any other other employment, occupation or the holding of any other office, and that they shall not during their term of office accept appointment or nomination to any Political or Public Office, whether remunerated or otherwise.
- 7.2.3 That they shall not in any manner, whether directly or indirectly, give support to, or oppose, any of the parties or candidates participating in the Elections, or any of the issues in contention between such parties or candidates.
- 7.2.4 That no person who has held Public or Political Office²⁰ during a period of eighteen (18) months²¹ prior to the date of her/his appointment shall be eligible to serve as a member of the Commission, provided this constraint shall not preclude the appointment of persons who have held judicial office during the relevant period.
- 7.3 No member shall by her/his membership, association, statement, conduct or in any other manner, place in jeopardy her/his perceived independence, or in any other manner damage the credibility, impartiality, independence, and integrity of the Commission.

¹⁹ This provision has been rephrased in the light of views expressed in the Negotiating Council. The Technical Committee has noted the suggestion made by the Ad Hoc Committee regarding this provision and feels that the present formulation may satisfy the intention to accommodate leave of absence without requiring a formal resignation from positions which may be currently held.

²⁰ As suggested in the Negotiating Council this disqualification now applies equally to Public Office and Political Office. The proviso ensures that the holding of judicial office does not represent a disqualification. No reference is made to academic office in view of the new formulation of the definition "Public Office".

²¹ A minority of the Technical Committee feel that this period should in fact be increased to thirty-six (36) months as originally proposed.

- 7.4 ²²Members of the Commission shall throughout their term of office be debarred and precluded from:
- 7.4.1 making private use or profit from any confidential information gained as a result of their appointment and activities as members of the Commission;
 - 7.4.2 divulging any such information to any third party save in the course and scope of their official duties and with the concurrence of the Commission;
 - 7.4.3 accepting any remuneration, emolument, or benefit, of whatsoever nature, which arises out of any other employment, occupation or the holding of any other office, unless specifically authorised thereto by the State President, acting on the advice of the Forum or its Successors in terms of Section 24;
 - 7.4.4 being interested or concerned, directly or indirectly in any company, business or concern which has a direct or indirect beneficial interest in transactions entered into by the Commission, unless specifically authorised thereto by the State President, acting on the advice of the Forum or its successors in terms of Section 24.
- 7.5 ²³Within 30 days of appointment to the Commission, each member shall submit to the Forum or its successors in terms of Section 24, a written statement of all assets owned, directly or indirectly, by such member, and of all income received or accrued by such member, and of all offices and appointments held by such member, during the twelve month period immediately preceding appointment to the Commission.

²² This is a new provision containing a number of constraints on members of the Commission which are designed to ensure "transparency", integrity and complete independence of the Commission.

²³ This is a new provision suggested by the Technical Committee as a further measure to ensure financial "transparency" insofar as the interests of members of the Commission are concerned. One member of the Technical Committee has expressed concern as to the need to balance the public interest with the right to privacy, and would favour some "mechanism" which might facilitate disclosure whilst preserving confidentiality.

7.6 The following disqualifications shall apply to persons who serve as members of the Commission:

7.6.1 No person shall during his term of office as a member of the Commission, be eligible for appointment to any Public Office, and such ineligibility shall persist for a period of eighteen (18) months reckoned from the date upon which such term of office shall have terminated²⁴.

7.6.2 No person shall during her/his term of office as a member of the Commission, be eligible to serve as a member of the Forum, the Transitional Executive Council, Parliament or any SPR Legislature, and such ineligibility shall persist for a period of eighteen (18) months reckoned from the date upon which such member shall have ceased to serve on the Commission.

7.6.3 No person who has served as a member of the Commission shall be eligible to serve as a member of the Parliament or SPR Legislature for which the Commission was responsible to conduct Elections, during the term of such Parliament or Legislature²⁵.

²⁴ A suggestion was made in the Negotiating Council that this provision should be qualified to permit the appointment of ex-members to judicial and academic positions. As already indicated, the Technical Committee is of the view that academic appointments are not affected by this provision in view of the revised definition of "Public Office". Insofar as judicial office is concerned, the Committee remains of the view, with due respect, that the period of debarment (18 months) is relatively brief, and that the principle of prohibiting appointments which could be perceived as "reward" is of sufficient importance to maintain the prohibition in its present form. However, the Technical Committee will naturally abide the decision of the Negotiating Council with regard to this matter.

²⁵ The final clause has been altered to correct an error occurring in the previous draft.

- 7.7 ²⁶The State President, on the advice of the Forum or its successors in terms of Section 24, shall designate two (2) members of the Commission as Chairperson and Vice-Chairperson respectively. In the absence of both such designated Chairperson and Vice-Chairperson, the remaining members of the Commission shall by simple majority nominate another of their members as Acting Chairperson, provided that the international members shall not be eligible to serve as Chairperson, Vice-Chairperson or Acting Chairperson.
- 7.8 In the event of any member of the Commission resigning, or for any other reason ceasing to hold office, the State President shall, upon the advice of the Forum, or its Successors in terms of Section 24, either allow such appointment to lapse (provided there remains at least the minimum number of members stipulated in Section 7.1), or upon the advice of the Forum or its Successors as aforesaid, the State President shall make a new substituted appointment of some other suitably qualified person/s.
- 7.9 Nothing herein stipulated shall preclude the State President at any time, from effecting additional appointments of members to the Commission, within the numerical limits stated in Section 7.1, on condition that any such further appointments shall likewise be effected only upon the advice of the Forum or its Successors in terms of Section 24.

(Previous Section 7)

8. TERM OF THE COMMISSION

In respect of each Election, 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 to be determined upon advice of the Forum or its Successors in terms of Section 24, and the Commission's appointment shall thereafter continue until it has completed its mandate, and has been dissolved by the State President by proclamation in the Gazette; provided that such dissolution of the Commission shall not be effected by the State President, save upon the advice of the Forum or its Successors in terms of Section 24; and provided further that, in respect of each Election, the Commission shall not be dissolved until the last-occurring of:

²⁶ The Technical Committee has noted the reference by the Negotiating Council to the alternative formulation suggested in the IMC Bill, but with respect feels that its own version of this provision may be preferable.

8.1 The certification of such Election as having been substantially free and fair, including similar certification in respect of any such further Elections as may have been ordered by the Commission in terms of Section 21.4.

8.2 The final determination of all issues and disputes arising from such Election, as may have been referred to the Commission and/or the appropriate Directorate, for adjudication in terms of this Act.

(Previous Section 8)

9. TERMINATION OF APPOINTMENT

9.1 Notwithstanding the provisions of Sections 7 and 8, the appointment of a member of the Commission may be terminated at any time, but only in the following circumstances, viz :

9.1.1 At any time, at the instance of the member concerned, by resignation in writing delivered to the State President.

9.1.2 ²⁷In consequence of an Order to this effect by a full bench of the Appellate Division, which shall include the Chief Justice or Acting Chief Justice at the relevant time, provided the Court is satisfied as to the existence of good and sufficient reason therefor as contemplated by Section 9.2, pursuant to an Application lodged by or on behalf of :

9.1.2.1 the State President;

9.1.2.2 the Transitional Executive Council;

9.1.2.3 the Parliament, or any SPR Legislature; or

²⁷ The Technical Committee has taken note of strong reservations expressed with regard to the status of the present judiciary, and its envisaged role in the removal of members of the Commission. The Technical Committee is not unanimous with regard to its views. There exists a minority of members who would prefer that this role be exercised not by the Appellate Division as presently envisaged, but rather by a specially constituted Court appointed for this purpose by the State President on the advice of the Forum or by the Forum or TEC. The majority view favours the proposed role of the Appellate Division as reflected in the present draft, and does not favour a transfer of this power to the Forum or the Transitional Executive Council, which both represent political, as distinct from judicial, bodies.

- 9.1.2.4 any Party²⁸ duly registered in terms of the Electoral Act and eligible to participate in the relevant Election, or at least one hundred (100)²⁹ eligible Voters; on condition that no such Application by such Party or such Voters, shall be heard save with the prior leave of the Chief Justice, or in her/his absence the Acting Chief Justice, who shall first be required to satisfy him/herself as to the existence of probable cause, and who shall be entitled to impose such conditions upon the grant of leave, including the imposition of time limits for the institution of any such proceedings, as s/he may consider appropriate.
- 9.2 In considering any such Application, the Appellate Division shall determine that good and sufficient reason exists for the termination of the appointment of a member of the Commission, in the event of :
- 9.2.1 serious misconduct; or
- 9.2.2 unfitness or incapacity, including continued ill health; or
- 9.2.3 a material breach of the preconditions and prerequisites specified in Sections 7.2, 7.3, 7.4 or 7.5³⁰;
- 9.2.4 any other reason which the Court consider material and inconsistent with such member's continuance in office.
- 9.3 Any vacancy arising in consequence of the termination of appointment of a member in accordance with Section 9 shall be dealt with in terms of the principles and procedures stipulated in Section 7.6.

(Previous Section 9)

²⁸ The right of a Party to bring this application has now also been provided for.

²⁹ The Technical Committee has considered the proposal that this number should be increased to 1 000 but prefers to leave the provision at its present level.

³⁰ The reference to the further provisions containing constraints on members of the Commission are now also referred to.

10. CONDITIONS OF APPOINTMENT

Members of the Commission shall receive such remuneration, allowances and privileges as may be determined by the Forum or its Successors in terms of Section 24, after consultation with the Minister of State Expenditure.

(Previous Section 10)

CHAPTER 3

RECONSTITUTION OF THE COMMISSION

11. RECONSTITUTION OF THE COMMISSION

11.1 If new Elections are called in terms of the Constitution, the Commission shall be reconstituted and the consequent selection and appointment of the members of such reconstituted Commission (including also, if deemed appropriate, International Members), shall be effected by the State President, upon the advice of Parliament, acting in terms of a Motion which shall require to be passed by the same majority as may be necessary to effect an amendment to the Constitution. If such Motion is not supported by the required majority in Parliament, the consequent selection and appointment of the members of such reconstituted Commission shall be effected by the State President, acting in accordance with an order of a full bench of the Appellate Division, which shall include the Chief Justice or Acting Chief Justice at the relevant time³¹.

³¹ As indicated, there is a minority view on the Technical Committee that a special Court should be constituted to assume the role presently envisaged in respect of the Appellate Division. There is also a minority view that the selection and appointment of a reconstituted Commission should be determinable by a simple majority in Parliament. The provision as drafted reflects the majority view on the Technical Committee. It must be emphasised that the role of the Appellate Division as envisaged would only apply in the event of a need for a deadlock-breaking mechanism in consequence of Parliament being dissolved and new Elections called in terms of the Constitution. The majority view holds that the composition of the Commission is a matter of such importance that it requires more than a simple majority in Parliament, which could represent the views of the majority Party.

- 11.2 In the event of a vacancy arising at any time in such reconstituted Commission, including the event of termination of the appointment of a member of the Commission in terms of Section 9, the procedures envisaged by Section 7.7 shall *mutatis mutandis* apply, save and except that any reference therein to the advice of the Forum or its Successors in terms of Section 24, shall be deemed to be a reference to the order of the full bench of the Appellate Division³², constituted in the manner stipulated in Section 11.1. (Previous Section 11)

³² One member of the Technical Committee would prefer that the presently constituted Appellate Division should have no special status or role in this legislation.

CHAPTER 4

PROCEDURE, FINANCE 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 any time, at the instance of the Chairperson or Vice-Chairperson, or at the instance of any two (2) other members of the Commission.
- 12.2 A quorum for any meeting of the Commission shall be the greater of five (5) or a majority of the members of the Commission eligible to vote at the relevant time, save in respect of the Commission's determination and Certification of the results of an Election or Referendum in terms of Section 21, including the decision as to whether such Election or Referendum is considered to have been substantially free and fair, in respect of which the necessary quorum shall be all members of the Commission eligible to vote, save and except for such members as may be unable to attend by reason of serious illness, disability, incapacity or other compelling circumstance³³.
- 12.3 Subject to the stipulated quorum and majority requirements in respect of the Commission's determination and certification of Election and Referendum results, all decisions of the Commission shall be by simple majority. In the event of an equality of votes, the Chairperson (or in her/his absence, the Vice-Chairperson or Acting Chairperson) shall have a casting vote.

³³ The concern expressed in the Negotiating Council about the proper quorum is reflected in the amended wording of this section.

- 12.4 The Commission may appoint such sub-committees, whether as standing or special purpose sub-committees, as it may consider necessary for the effective implementation of its duties and responsibilities, provided that the Commission shall at all times, and notwithstanding such delegation, retain the power to review, rescind, and vary any decisions taken by such sub-committees.
- 12.5 Such sub-committees 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. The Commission may also at its discretion, include legal and other experts, and persons who are not citizens of the Republic. In appointing members of such Sub-Committees, the Commission shall seek to ensure the involvement of a broad cross-section of the population, including women³⁴.
- 12.6 All members of sub-committees who are not in the full-time employment of the State shall receive such remuneration (and allowances, if any) as the Commission may determine, after consultation with the Minister of State Expenditure, and with the appropriate Sub-Council of the Transitional Executive Council during its term of office. *(Previous Section 12)*

13. ACCOUNTABILITY AND FINANCE

- 13.1 The Commission shall determine and submit for approval by the Forum, or its Successors in terms of Section 24, estimates and if necessary, supplementary estimates of expenditure anticipated in the execution of its duties and functions in terms of this Act, covering such periods as it may deem appropriate.
- 13.2 Upon approval by the Forum or its Successors as aforesaid, the necessary funds envisaged by such estimates shall be made available by the State.
- 13.3 The Chief Executive Officer of the Commission shall be charged with responsibility for accounting for the financial affairs of the Commission, on the basis that :

³⁴ The last sentence has been included in deference to concerns and sentiments expressed within the Council and elsewhere.

- 13.3.1 Such charge shall be deemed *mutatis mutandis* to be a charge by the Treasury upon such Chief Executive Officer as contemplated in terms of Section 15A(1) of the Exchequer Act, No. 66 of 1975, as amended.
- 13.3.2 The Chief Executive Officer shall not be an "Accounting Officer" as defined in Section 1 of the Exchequer Act, but all powers and duties which such "Accounting Officer" may exercise or be required to perform in respect of a portion of a vote, are hereby assigned to the Chief Executive Officer under Section 15A(2) of the said Act.
- 13.3.3 The financial affairs of the Commission shall for purposes of Section 15A(1) of the Exchequer Act not be dealt with as "a trading and related account" but shall be deemed to be "a particular portion of a vote whereof accounts are kept separately".
- 13.3.4 The Auditor-General shall have the same duties and powers set out in the Auditor-General Act, No. 52 of 1989, as amended, in respect of all accounts maintained by the Commission.
- 13.4 The Chief Executive Officer shall ensure that the Commission keeps full and proper records of all its income and expenditures, and of all its assets, liabilities and financial transactions, and that periodic financial statements are prepared in the format required by the Auditor-General, and that appropriate steps are taken 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 Forum or its Successors in terms of Section 24, and to Parliament.

(Previous Section 13)

14. GUARANTEE BY STATE

The State guarantees, where required, all commitments and liabilities of the Commission incurred in the execution of its responsibilities in terms of this Act.

(Previous Section 14)

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 and dismiss staff, and generally specify terms of employment as it may deem reasonable and appropriate. In appointing such staff the Commission shall ensure representation of a broad cross-section of the population, including women³⁵.
- 15.2 Fix remuneration and determine emoluments and benefits after consultation with the Minister of State Expenditure, and with the appropriate Sub-Council of the Transitional Executive Council during its term of office.
- 15.3 Purchase, hire or otherwise acquire movable or immovable property as may be necessary for the performance of its functions and duties.
- 15.4 Enter into agreements with any person, including the State, for the performance on its behalf of any specified act or function or the rendering of any service.
- 15.5 Insure itself and its members, staff, visitors and the public generally against loss, damage, risk or liability which may be suffered or incurred.
- 15.6 Open and operate bank accounts with the Reserve Bank or other registered financial institution approved for this purpose by the Reserve Bank.
- 15.7 In general, perform such acts and do such things as may be necessary or expedient for the achievement of its objects.

(Previous Section 15)

³⁵ The latter sentence has been included to conform with the affirmative theme expressed earlier.

16. POWERS³⁶, DUTIES AND FUNCTIONS OF THE COMMISSION

- 16.1 The Commission is hereby charged with sole responsibility for the administration, organisation, conduct and supervision of free and fair Elections called from time to time in terms of the Constitution and the Transitional Legislation, and for measures for preventing the intimidation of voters, candidates and political parties, and it is accordingly vested with all such powers, discretions and authorities as it may require in order to effectively undertake such mandate.
- 16.2 The Commission shall also be responsible for the education of voters concerning democratic principles and values; the electoral process and mechanisms; the right to free political canvassing and campaigning; secrecy of voting; and other relevant matters; by means of literature and the use of other media as it may deem appropriate, including distribution and publication of suitable literature, advertisements, and dissemination through radio, television and the public print media, having due regard to the variety of languages spoken and varying levels of education throughout the Republic; and by means of workshops, seminars and meetings.
- 16.3 The Commission shall be responsible for the establishment of appropriate Special Electoral Tribunals as contemplated by Section 19 and for the establishment of appropriate Election Appeal Tribunals as contemplated by Section 20, and shall further be responsible to establish an Election Adjudication Secretariat to co-ordinate and assist the Special Electoral Tribunals and the Election Appeals Tribunals with the administration of their proceedings and the performance of their functional responsibilities³⁷.

³⁶ As indicated, this provision has been considerably amplified to consolidate the powers which were previously dispersed in various provisions of the earlier drafts.

³⁷ This provision now reflects the envisaged establishment of Special Electoral Tribunals and Election Appeal Tribunals, with the role of the former Election Adjudication Directorate translated into an accessory role of an Election Adjudication Secretariat (*vide* Sections 19 and 20).

- 16.4 The Commission shall be empowered to promulgate and enforce Regulations covering the obligation to disclose, as a matter of public record, the receipt and source of any contribution (whether in cash, specie, credit, right of use or otherwise) representing a value in excess of R10,000.00, which is promised or received by any Party for the purpose of funding its' election expenses and/or for the promotion of any candidacy, or propagating any of its' policies or political objectives.
- 16.5 The Commission may promulgate Regulations governing the permissible nature and content of political advertising, which shall be determined and enforced by the Commission, in conjunction with the Independent Media Commission and/or the Independent Telecommunications Authority.
- 16.6 The Commission shall have such executive and regulatory powers as may prove necessary for the implementation of its objects, including but without limitation thereto:
- 16.6.1 all powers necessary for the establishment of conditions conducive to the conduct of free and fair Elections, which in respect of the first Elections shall be exercised in conjunction with the Transitional Executive Council;
 - 16.6.2 all powers necessary for implementation of its duties and responsibilities in terms of the Electoral Act;
 - 16.6.3 all powers necessary for implementation of its duties and responsibilities in terms of this Act, with particular reference to its ultimate responsibility to determine the Election results and to certify such Elections as having been conducted in a manner which is substantially free and fair;
 - 16.6.4 enforcement of the Electoral Code of Conduct and the regulation of the conduct of all persons and of all parties, candidates, departments of State and all organs of Central, SPR and Local Government (including the Security and Defence Forces), insofar as such conduct may promote or inhibit the achievement of free and fair Elections.

- 16.7 The Commission shall be empowered to appoint a Chief Executive Officer and to establish and co-ordinate the necessary functional sub-structures and to regulate their powers, duties and responsibilities, as it may deem appropriate to ensure a free and fair election.

Such functional sub-structures shall include :

- 16.7.1 ³⁸**An Election Administration Directorate**, which shall consist of a Chief Director : Administration, and such other officials as the Commission may deem fit, and which shall have the responsibilities referred to in Section 17; and
- 16.7.2 **An Election Monitoring Directorate**, which shall consist of a Chief Director : Monitoring, and such other officials as the Commission may deem fit, and which shall have the responsibilities referred to in Section 18³⁹.
- 16.8 In establishing such functional sub-structures, the Commission shall be entitled to make provision for the co-option, employment or assistance of legal experts and other suitably qualified or experienced persons, including persons who are not citizens of the Republic.
- 16.9 In effecting the appointment of the Chief Directors and Secretary aforesaid, the Commission shall invite and consider, but shall not be bound by, the advice of the Forum or its successors in terms of Section 24⁴⁰.

³⁸ The Technical Committee has noted the suggestion of the Ad Hoc Committee with regard to this sub-clause, but feels that in relation to the formulation of the new Electoral Act which is presently in the course of preparation, the present version of this clause may be preferable. The role previously envisaged in respect of the Chief Electoral Officer is to a large extent subsumed by the Commission itself, and the Committee does not feel it appropriate to stipulate specifically how many Officers and Deputies should be nominated.

³⁹ As indicated, the role previously envisaged in respect of an Election Adjudication Directorate has now been reformulated by reason of the establishment of Special Electoral Tribunals (Section 19) and Election Appeal Tribunals (Section 20), as read with Section 16.3 which now envisages the establishment of an Election Adjudication Secretariat.

⁴⁰ This provision has been inserted in the light of a suggestion made in the Negotiating Council.

16.10 ⁴¹Each such Directorate and Secretariat shall operate independently of the others, but shall be accountable and subject to the overriding management and control of the Commission, acting through its Chief Executive Officer, which notwithstanding such delegation, shall retain the power to issue final directives and to review, rescind, and vary any decisions taken by such Directorates, Secretariat, or their functional sub-structures.

(Previous Section 16)

⁴¹ The Technical Committee took note of the edited version suggested by the Ad Hoc Committee, but in the light of other changes now made to the Act, feels that the present formulation is appropriate.

CHAPTER 5

ELECTION ADMINISTRATION DIRECTORATE

17. ⁴²RESPONSIBILITIES OF THE ELECTION ADMINISTRATION DIRECTORATE

The Election Administration Directorate shall have the responsibilities assigned to it in terms of the Electoral Act.

⁴² The role of the Election Administration Directorate is now dealt with in detail in terms of the provisions of the new Electoral Act currently in the process of preparation.

The substantive provisions formerly contained in Section 17 have been excised from this Act and transferred to the Electoral Act which is currently in the course of preparation. It is no longer proposed that Commission should have power to suspend the application and to stipulate alternative provisions to those which will be contained within the new Electoral Act. Other matters will be the subject of Regulations to be prescribed under this Act and/or the Electoral Act.

CHAPTER 6

ELECTION MONITORING DIRECTORATE

18. RESPONSIBILITIES OF THE ELECTION MONITORING DIRECTORATE

The Election Monitoring Directorate shall have the following functional responsibilities⁴³, viz :

- 18.1 The appointment and co-ordination of Monitors⁴⁴, to observe and report upon the electoral process, including political meetings, canvassing, advertising and other campaigns.
- 18.2 The registration and regulation of NGO Observers⁴⁵, and the publication of guidelines and, if deemed necessary, a Code of Conduct binding upon all such Observers.
- 18.3 The facilitation of the role of International Observers⁴⁶ and the provision of information and assistance as may be required to enable them to perform their designated responsibilities.

⁴³ The Technical Committee has taken note of the proposals made in the Negotiating Council that the role envisaged by this Directorate should be substantially performed by or in conjunction with the National Peace Secretariat. As proposed, a meeting has taken place between the Technical Committee and Dr A Gildenhuys who has confirmed that although the Peace Secretariat will be able to provide logistical and other support to the Electoral Monitoring Process, he does not consider it appropriate that the structures of the Peace Secretariat should get involved "in making value judgments" as may be required of Monitors appointed by the Commission.

⁴⁴ As amplified in the definition, the term "Monitors" implies persons appointed by and accountable to the Commission.

⁴⁵ The term "NGO Observers" is now defined as including both local and international NGO Observers who may be registered with, but are not appointed, by the Directorate.

⁴⁶ The International Observers, as defined, constitute a special category who are not susceptible to "registration and regulation" by the Commission. One member of the Technical Committee is of the view that no distinction should be drawn between the provisions affecting NGO Observers and International Observers, and that they should all be subject to registration and regulation by the Commission.

- 18.4 The investigation of alleged infringements of the Electoral Code of Conduct, and of alleged offenses in terms of this Act and the Electoral Act, and where necessary the institution of appropriate proceedings before the special Electoral Tribunals or the Courts, as the case may be⁴⁷. *⁴⁸
- 18.5 The issuance and execution of appropriate search warrants, subpoenas and the seizure of items required in connection with the investigation of alleged infringements of the Electoral Code of Conduct or other Electoral offenses, with the assistance of the Police and/or Defence Forces, as may be requested by the Commission⁴⁹.
- 18.6 The co-ordination of meetings between the various parties participating in the Election, with a view to mediating and, if possible, resolving issues and disputes arising in the course of the Election and preceding campaign, by negotiation and mutual agreement⁵⁰.
- 18.7 The issuance of Preliminary Warnings and Notices of Infringement concerning alleged or threatened breaches of the Electoral Code of Conduct. *(Previous Section 18)*

⁴⁷ The role of the Monitoring Directorate includes the investigation of offenses and the institution of proceedings before the contemplated Special Electoral Tribunals, or in the case of criminal offences, before the Courts.

⁴⁸ This provision is a modified version of the suggestion made by Ad Hoc Committee, but the power to issue search warrants, and effect seizure of items with the assistance of the Police and SADF if necessary has been retained as reflected in 18.5. The Technical Committee feels that the possession of such powers by the Commission may be of some importance.

⁴⁹ It has been sought to clarify that the assistance of the Police and Defence Forces is only of relevance in the event that the Commission requires and requests such assistance in pursuance of its search and seizure powers.

⁵⁰ This provision makes provision for the advice received by the Technical Committee from a number of International sources and from the National Peace Secretariat, with regard to the importance of constituting appropriate fora within which the Political Parties themselves can attempt to resolve issues without recourse to formal adjudication or other intervention by the Commission or its Directorates.

CHAPTER 7

SPECIAL ELECTORAL TRIBUNALS

19. ESTABLISHMENT OF SPECIAL ELECTORAL TRIBUNALS⁵¹

- 19.1 The Commission shall appoint such Special Electoral Tribunals with jurisdiction in respect of defined geographical areas as it may be necessary, in order to adjudicate and determine all claims, issues and disputes concerning alleged electoral irregularities, including any attempt to impede access of parties to venues, voters, media, meetings or any undesirable or corrupt practices, and alleged instances of intimidation, or breaches of the Electoral Code of Conduct.
- 19.2 Each such Special Electoral Tribunal shall comprise one or more, but not more than three, persons appointed to this office by the Commission who shall be persons having appropriate knowledge and experience, of whom the Chairperson shall be a legal practitioner, being either an attorney, advocate, magistrate, or academic lawyer at a university or tertiary educational institution, with not less than ten years working experience in such capacity.
- 19.3 The function of the Special Electoral Tribunal shall be to serve as final arbiter of claims, issues and disputes (subject to a right of appeal to an Electoral Appeals Tribunal) as may be submitted for adjudication in the prescribed manner by the Adjudication Secretariat, or by any party, candidate, eligible voter or other interested person, concerning matters affecting the campaign, conduct and results of the Elections.
- 19.4 The Special Electoral Tribunals shall be entitled in respect of any claim, issue or dispute falling within their jurisdiction to impose such administrative and other penalties and sanctions as it may deem appropriate upon the relevant political parties, candidates and others guilty of having infringed the Electoral Code of Conduct or Electoral Act, as the case may be.

⁵¹ This is a new provision which sets out the Technical Committee's proposals with reference to the establishment of Special Electoral Tribunals, their composition, powers and functions.

- 19.5 Notwithstanding the foregoing, the Special Electoral Tribunals may decline to consider any claims or disputes as may not have been formally notified to the Adjudication Secretariat in the prescribed manner, within a period of 14 days reckoned from the date upon which the relevant fact became known to the complainant; and provided further that in the event of such claim, issue or dispute involving acts or decisions constituting a criminal offence in terms of this Act, the Electoral Act, or any other law, the matter shall be referred to the Attorney General for prosecution in the appropriate Court.
- 19.6 In establishing the Special Electoral Tribunals, the Commission shall determine appropriate powers and procedures, which shall be directed to the speedy investigation and determination of matters in issue.
- 19.7 The Electoral Tribunals shall have all such powers as may be necessary to subpoena and examine witnesses, administer the oath, receive evidence, hear argument, investigate matters *mero motu*, and generally to conduct its proceedings and to cause matters in issue to be investigated and determined.
- 19.8 All decisions by the Special Electoral Tribunals shall be subject to appeal and review to the Elections Appeal Tribunal, in accordance with the regulations.

CHAPTER 8

ELECTION APPEAL TRIBUNALS

20. ESTABLISHMENT OF ELECTION APPEAL TRIBUNALS⁵²

- 20.1 The Commission shall be required to establish one or more Electoral Appeal Tribunals, as it may deem necessary from time to time in order to hear and determine appeals and reviews from the Special Electoral Tribunals, duly noted in terms of the regulations.
- 20.2 The decisions of the Electoral Appeal Tribunals shall be subject to no further appeal or review.
- 20.3 The Electoral Appeal Tribunals shall comprise three persons appointed by the State President on the advice of the Commission, of whom:
- 20.3.1 the Chairperson shall be a senior judge of the Supreme Court⁵³;
 - 20.3.2 one shall be a judge of the Supreme Court, or an attorney, advocate or magistrate of not less than ten years experience, or a lecturer in Law at a university or other tertiary educational institution of not less than ten years experience; and
 - 20.3.3 one shall be some other suitably qualified person.

⁵² The Ad Hoc Committee proposed the appointment of an Appeal Tribunal which would in effect be a "super Commission" to which decisions of the Commission might themselves be appealed and reviewed. The Technical Committee considered this proposal, but was not in agreement therewith, as it represented a substantial departure from the principle of a powerful independent Commission. Accordingly, this provision reflects the Technical Committee's alternative suggestion of Special Appeal Tribunals to hear appeals from the Special Electoral Tribunals. The present provision may need to be amplified, and has been inserted at a late stage in the drafting of the Act, in order to reflect the present views of the Technical Committee, which is also concerned to preserve the "sovereignty" of the Commission itself.

⁵³ The special status accorded to members of the present judiciary does not meet with the approval of one member of the Technical Committee.

- 20.4 The Commission may prescribe by Regulation rules and procedures to be followed by the Electoral Appeal Tribunals in the conduct of their proceedings.
- 20.5 The Electoral Appeal Tribunals shall determine their own procedure with a view to the speedy and effective resolution of the matter in issue with due regard to the principles of justice.

CHAPTER 9

CERTIFICATION OF ELECTION RESULTS

21. CERTIFICATION⁵⁴ OF ELECTION RESULTS

- 21.1 Upon completion of the ballot, the Commission shall be required as expeditiously as possible, but in any event within a period of ten (10) days of the close of the Poll, to determine and certify the results of the Elections, and to declare whether, and, if so, then to what extent, it considers that such elections have been conducted in a manner which was substantially free and fair.
- 21.2 In effecting such determination, the Commission may accept or reject the result of the poll as a whole, or it may accept or reject such results in respect of a particular SPR Legislature, or geographic district or region for the purposes of voting.
- 21.3 The acceptance and certification of the results of the Elections, or any portion thereof, as substantially free and fair, shall not be of force and effect unless a majority of the members of the Commission eligible to vote, representing at least seventy-five percent (75%) thereof, shall have concurred in such finding.

⁵⁴ The term "certification" appears to be preferable to "adjudication".

- 21.4 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 the circumstances, in order to achieve a substantially free and fair election result, and with due regard to the needs and exigencies of the Constitution⁵⁵.
- 21.5 Notwithstanding the foregoing, the result of an Election shall not be rejected merely by reason of some untoward occurrence, mistake, or non-compliance with the provisions of this Act, or of the Electoral Code of Conduct, if it appears to the Commission that the Elections were conducted substantially in accordance with the prescribed requirements, and that such occurrence, mistake or non-compliance was unlikely to have materially affected the result.
- 21.6 The Commission's determination, certification and evaluation of the Election results, and its further decisions in terms of Section 21.4 shall be final and not subject to appeal or review to any Court.

(Previous Section 20)

⁵⁵ The Technical Committee is aware of the extremely difficult situation which could arise in the event of the Election being "substantially free and fair" in most areas of the country, but being subject to conditions that are unacceptable in certain limited areas. The implications of such a situation in a Proportional Representation system are extremely difficult to deal with. In respect of an SPR Election, one can envisage that new elections could be called in respect of that particular legislature. Moreover a "remedy" systems is available of Proportional Representation which have "multi-member" constituencies. However, the implications of such a situation in respect of a simple unified system of Proportional Representation are extremely problematical. The Technical Committee notes these concerns, and awaits advice from the Technical Committee on Constitutional Affairs with regard to their specific proposals in relation to the system of Proportional Representation. In due course, consultation will be necessary between the two Technical Committees in order to consider this difficulty.

CHAPTER 10

MISCELLANEOUS PROVISIONS

22. JURISDICTION

There shall be no appeal from any decision by the Commission, but its proceedings shall be subject to review direct to the Appellate Division⁵⁶. Any such review shall be conducted on an urgent basis, and shall be disposed of by the Courts as expeditiously as possible. *(Previous Section 21)*

23. SUCCESSORS TO THE FORUM

In this Act, where rights and prerogatives are conferred upon the Forum in terms of this Act, such rights and prerogatives shall be assumed by the Transitional Executive Council, or appropriate Sub-Council thereof, as from the date of its establishment in terms of the Transitional Executive Council Act, 1993. Upon dissolution of the Transitional Executive Council, such rights and prerogatives shall thereafter devolve Parliament and/or by the relevant SPR Legislature, in respect of Elections or Referenda to be conducted for Parliament and/or the SPR Legislature concerned, as the case may be⁵⁷.

(Previous Section 22)

⁵⁶ It is proposed that any review of the proceedings of the Commission, should be directed to the Appellate Division, and not to a Provincial Division as previously envisaged. Although the present version reflects the majority view, there are two members of the Technical Committee who feel strongly that reviews of the Commission should be directed to a specially constituted Court, rather than to the Appellate Division.

As indicated, the Technical Committee was unanimous in its disagreement with the provision suggested by the Ad Hoc Committee of "an Appeal Court" to which decisions of the Commission itself might be appealed. This concept of a "super Commission" appeared to devalue the status of the Commission with reference to matters in respect of which the Technical Committee believed that its decision and discretion should be final. There is also agreement concerning a right of review. Appeals could result in significant delays and dislocation of the electoral process.

⁵⁷ An addition has been made at the end of this Clause to make provision for the rights and prerogatives of SPR Legislatures.

24. DELEGATION

Save in respect of its duty to certify the Election results in terms of Section 21, the Commission may delegate any power or duty conferred upon it hereunder, to any person or other body, or authorise such person or other body, including the State, to perform any duties assigned to it hereunder; provided⁵⁸ that such power or duty may not be further delegated without the prior consent of the Commission, which shall not be divested of any such power as it may legitimately delegate in terms of this provision.

(Previous Section 23)

25. OBSTRUCTING PROCEEDINGS AND OFFICERS

Any person, including a Party⁵⁹, who wilfully obstructs the Commission, its Directorates, or any of their respective agents and officers, in the execution of their duties, or who prevents or impedes any acts or procedures taken in terms of this Act, or who wilfully obstructs or interferes with any person appointed by the Commission in the exercise of their duties, shall be guilty of an offence and liable on conviction to a fine not exceeding One Hundred Thousand Rand (R100 000,00), or to imprisonment for a period not exceeding five (5) years, or to both such fine and such imprisonment.

(Previous Section 24)

26. INFRINGEMENT OF SECRECY⁶⁰

26.1 Every member of the Commission and all its officers, employees and agents, shall maintain, and aid in maintaining, due secrecy concerning all matters affecting their official duties and responsibilities hereunder, and shall not communicate except for some legitimate purpose authorised by law, any information likely to cause advantage or prejudice to any Political Party, or candidate, or which is likely to place in jeopardy the impartiality of the Commission, or of its acts and decisions.

⁵⁸ This proviso has been inserted in order to deal with certain concerns expressed in the Negotiating Council.

⁵⁹ The reference to a Party (as defined) has been included to broaden the scope of the offence.

⁶⁰ A typographical error in the title has been corrected.

- 26.2 Any person who, in the exercise of powers or the performance of duties in terms of this Act, has obtained knowledge as to the affairs of any Political Party, candidate or voter, shall not disclose such knowledge to any person, other than as required in the course and scope of her/his duties or in response to a question lawfully put in the course of proceedings in any Court.
- 26.3 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 One Hundred Thousand Rand (R100 000,00) or to imprisonment for a period not exceeding five (5) years, or to both such fine and such imprisonment. *(Previous Section 25)*

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27. EXEMPTION FROM DUTIES, TAXES AND FEES

Notwithstanding anything to the contrary contained in any other law, no duty, tax or fees shall be payable by the Commission to the State in respect of anything done or any transaction entered into under this Act, or in respect of any document required in connection therewith. *(Previous Section 27)*

28. REGULATIONS⁶²

- 28.1 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.
- 28.2 Such regulations may prescribe penalties for the contravention or failure to comply therewith, not exceeding Forty Thousand Rand (R40 000,00) or imprisonment for a period of two (2) years.

⁶¹ The former provision dealing with the prohibition of opinion polls has been removed from this Statute and transferred to the new Electoral Act in the course of preparation.

⁶² This Clause has been sub-divided and amplified in order to define inter alia the penal limits of offences created by Regulation.

28.3 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. *(Previous Section 28)*

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29. APPLICATION OF THE ACT TO A REFERENDUM

Upon the advice of the Forum, or its Successors in terms of Section 24, or upon the advice of an SPR Legislature, 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 purposes of organising and conducting appropriate Referenda, either nationally or within any particular region/s, or in respect of any specified population group, or any specified issue/s.

(Previous Section 30)

30. SHORT TITLE

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

(Previous Section 31)

⁶³ The former provision dealing with the Electoral Code of Conduct has been removed from this Act and will form part of the new Electoral Act in the course of preparation.

THIRD DRAFT OF INDEPENDENT ELECTORAL COMMISSION ACT

SUMMARY OF CLAUSE CHANGES

A. Clauses unchanged and approved

1.1; 1.2; 1.10; 1.22; 1.23; 1.24; 1.26; 1.27;1.30; 9.1; 12.1; 12.3 - 12.5; 13; 14; 15.3 - 15.7; 16.7; 16.3; 18.7; 27; 29; 30.

B. Clauses reworded for reasons of drafting only (including new clauses)

Long Title; 1.3; 1.4; 1.5; 1.6; 1.7; 1.8; 1.9; 1.11; 1.13; 1.17; 1.21; 1.25; 1.28; 1.29; 2; 3; 4; 6; 8; 9.1.2.4; 9.2; 11; 16.2; 16.3; 16.4; 16.5; 18.4 - 18.5; 23; 25; 26.

C. Clauses which have been substantially changed

1.12; 1.14; 1.15; 1.16; 1.18; 1.19; 1.20; 5; 7; 7.4; 7.5; 10; 12.6; 15.1; 15.2; 16.6; 16.9; 17; 18.2; 18.3; 18.6; 21.6; 24; 28.

D. Clauses where the Technical Committee has made alternative proposals

7.1 including sub-section 7.2.2; 7.6.1; 7.7; 12.2; 16.1; 16.7.1; 16.10; 19; 20; 22.

THIRD DRAFT OF INDEPENDENT ELECTORAL COMMISSION ACT

SUMMARY OF CLAUSE CHANGES

A. Clauses unchanged and approved

1.1; 1.2; 1.10; 1.22; 1.23; 1.24; 1.26; 1.27; 1.30; 9.1; 12.1; 12.3 - 12.5; 13; 14; 15.3 - 15.7; 16.7; 16.3; 18.7; 27; 29; 30.

B. Clauses reworded for reasons of drafting only (including new clauses)

Long Title; 1.3; 1.4; 1.5; 1.6; 1.7; 1.8; 1.9; 1.11; 1.13; 1.17; 1.21; 1.25; 1.28; 1.29; 2; 3; 4; 6; 8; 9.1.2.4; 9.2; 11; 16.2; 16.3; 16.4; 16.5; 18.4 - 18.5; 23; 25; 26.

C. Clauses which have been substantially changed

1.12; 1.14; 1.15; 1.16; 1.18; 1.19; 1.20; 5; 7; 7.4; 7.5; 10; 12.6; 15.1; 15.2; 16.6; 16.9; 17; 18.2; 18.3; 18.6; 21.6; 24; 28.

D. Clauses where the Technical Committee has made alternative proposals

7.1 including sub-section 7.2.2; 7.6.1; 7.7; 12.2; 16.1; 16.7.1; 16.10; 19; 20; 22.