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

12

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-

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".

THIRD REPORT TO THE NEGOTIATING COUNCIL BY THE TECHNICAL COMMITTEE ON THE INDEPENDENT ELECTORAL COMMISSION

3 JUNE 1993

1. In terms of its brief, the Technical Committee tabled its initial draft of a proposed Independent Electoral Commission Act at the meeting of the Negotiating Council held on 21 May 1993. The draft was prepared by three members of the Committee - Mr R B Rosenthal, Prof D Davis and Adv H R Laubscher - in view of the conflicting simultaneous commitment of Mr S K Ndlovu to the SABC Board Panel, and the fact that Dr F Ginwala was only subsequently appointed as a member of the Committee.
2. Written submissions in response to this first draft have been received from six delegations represented in the Negotiating Council, viz:
 - * The African National Congress
 - * Ciskei Government
 - * The Democratic Party
 - * KwaZulu Government
 - * South African Government
 - * Venda Government

These latest submissions are presently under consideration by the Technical Committee, in conjunction with the earlier submissions received from:

- * The African National Congress
- * Bophuthatswana Government
- * Democratic Party
- * Inkatha Freedom Party
- * KwaZulu Government
- * PAC
- * South African Government
- * Transkei Government
- * United People's Front
- * Venda Government

and

- * Gender Advisory Committee
- * Lawyers for Human Rights
- * The Rural Women Constituency/ies

3. The Negotiating Council has not yet had the opportunity to consider and debate the various submissions of this Technical Committee, incorporating its initial draft of the proposed Independent Electoral Commission Act. Certain of the latest submissions were only received within the last 24 hours, and the Technical Committee has therefore not been able to give adequate attention to some of the issues which have been raised. In the circumstances, it has been considered appropriate to defer any reformulation of the initial draft Act, pending a debate in the Negotiating Council, and the opportunity for the Technical Committee to confer with particular regard to a number of substantive issues on which divergent views have been expressed.

Such issues include the following:

3.1 Ambit of Committee's Brief

The draft Act which has been tabled provides, in accordance with the Committees' Terms of Reference, for the establishment of an Independent Electoral Commission and for its powers, responsibilities and prerogatives. In the view of the South African Government, the Committee has exceeded its mandate in this initial draft, more particularly, in dealing with matters which have constitutional implications and matters which might have been regulated by a new Electoral Act.

The present Electoral Act presupposes voter registration, constituency representation, and a racially-based franchise. It contemplates the Director-General : Home Affairs as Chief Electoral Officer and various powers vested in the Minister of Home Affairs. In the circumstances, the Technical Committee has deemed it appropriate to include within its draft Statute, various provisions which are necessary in order to supersede inappropriate provisions in the present Electoral Act.

The Committee requires urgent clarification as to whether its mandate includes the drafting of a new Electoral Act, or whether this should be left to the Commission or some other body. The Committee has some concern as to the prudence of deferring certain pivotal issues involving matters of principle, in preference to reach agreement regarding the appropriate parameters at this stage.

3.2 Composition of the Commission

The role of international representatives in the composition and activities of the Commission requires some clarification. At present, certain divergent views have been expressed in the submissions. For example:

- 3.2.1 A proposal which envisages international representatives serving as full participating and voting members of the Commission.
- 3.2.2 A proposal which envisages international representatives serving only in a (non-voting) consultative capacity.
- 3.2.3 A proposal which envisages such representatives constituting themselves as a parallel and separate authenticating body.

The reference in the draft Statute to "persons seconded" by accredited international organisations and/or foreign governments has given rise to some concerns. There appears to be broad agreement amongst the parties that any such international representatives, are to be appointed in their personal capacities, and not by reason of, or subject to, secondment.

3.3 Voter Eligibility

The draft Statute envisages a universal suffrage for all South African (including TBVC) citizens of 18 years and more, subject to very limited exceptions, relating principally to criminality and mental disorder.

In the submission of one of the parties, it is proposed that eligibility for voting should be extended beyond the present legal bounds of citizenship, to include certain additional categories of persons, such as those who are married to a South African citizen, or who have one South African parent, or who have been continuously resident in South Africa for at least five (5) years.

With reference to "criminality", concern has been expressed that the existing provisions of the Electoral Act could exclude persons currently holding leadership positions amongst participating political parties. Accordingly, a new formulation is necessary, and various alternatives have been proposed, including:

- 3.3.1 The limited exclusion of persons convicted of corrupt or illegal practices, and disqualified under this Act or the Electoral Act; and/or

3.3.2 The specific inclusion of prisoners awaiting trial; and/or

3.3.3 The unqualified inclusion of all prisoners irrespective of their prior convictions and offenses.

3.4 Disqualification of Commissioners

In the Technical Committee's draft, it has been proposed to disqualify as Commissioners any person who has held "political office" during a period of three (3) years immediately prior to the elections, and thereafter to disqualify Commissioners from holding "public office" for a further period of three (3) years thereafter. This proposal has received support from some parties, but others have expressed concern with regard to the practical implications of such dual disqualifications. The example was cited of Commissioners who might have held political office during the recent past, and of Commissioners who might have been eligible to serve in a new judiciary.

3.5 Certification of Results

The consequence of the elections being declared not free and fair by the required majority of the Commission, needs further consideration. The present draft Statute - which has been based upon the assumption of both National and Regional lists - envisages that the Commission would be empowered to require new elections to take place only within regions where unsatisfactory conditions had prevailed. The effect of such arrangements in the context of a proportional representation system, premised upon only national candidate lists without there also being regional lists, would create a fundamental problem.

3.6 Jurisdiction

It has been proposed - and the Committee agrees with this view - that the ambit of the Commission's jurisdiction should not be confined as presently drafted, to regulating and adjudicating the conduct of political parties only, but should also include the power to regulate and adjudicate the conduct of other bodies, officials and of individuals, to ensure free and fair elections.

3.7 Financial Constraints

Certain parties have expressed concern with reference to the prerequisite of the Minister of Finance's approval in relation to the remuneration to be paid to members of the Commission.