

SECOND REPORT and EXECUTIVE SUMMARY

21 MAY 1993

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

21 MAY 1993

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

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

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

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

this draft, and intends to discuss these issues with the Technical Committee on Constitutional Matters.

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

EXECUTIVE SUMMARY

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

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

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

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

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

Section 1. 17 contains a definition of "The Transitional Elections", which states that the Act applies only to the elections of a new parliament.

4. Section 2 provides, however, that the Act will remain in force until such time as it is repealed by Parliament. Until so repealed, it will be possible for a new Independent Electoral Commission to be reconstituted in terms of the Act, in order to perform similar functions in respect of any future election or Referendum, as the case may be.

5. Section 3 is intended to ensure that the Act and Regulations promulgated thereunder by the Independent Electoral Commission, in respect of the conduct

and supervision of the Transitional Elections, will override any other statute or regulations which might be in conflict therewith. Theoretically, it might have been preferable to undertake an audit of every Act and regulation on the statute book, and to repeal or amend any conflicting provision specifically. However, such an audit would be time-consuming and probably impracticable given the present time constraints. Section 3 is designed to circumvent this difficulty. The overriding power conferred on the Commission is limited to the ambit of the Act and Regulations as they affect the conduct and supervision of national elections and other matters dealt with therein.

6. Section 4 establishes the Commission.

7. Section 5 states the objects of the Commission.

8. Section 6 ensure that the Commission should function as an institution independent and separate from government and any official body or other authority. In terms of Section 6.3 the Commission will have a duty to submit written reports on its acts and decisions to the State President, copies of which will be delivered to the Forum or the Council, and will constitute documents available to the public.

9. Section 7 provides for the composition of the Commission, which it is proposed should comprise not less than seven (7) and not more than eleven (11) persons. The present draft makes provision for the secondment of representatives from accredited international organisation and/or foreign governments. The number of such international representatives has been left open, and guidance is also sought in respect of their status. (For example, whether they should serve merely as observers or as full members, voting or non-voting).

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

10. Section 8 provides that the Commission is to be constituted from a date to be fixed by the State President by Proclamation in the Gazette, after consultation with the Forum, and shall only be dissolved by the State President upon advice of the Transitional Executive Council or Parliament after:

- (a) Confirmation by the Commission that the Transitional Elections have been substantially free and fair; and after
- (b) the final determination by the Commission of all issues and disputes which might have arisen in consequence of the Elections.

11. Section 9 deals with the circumstances in which a member's appointment can be terminated. This includes resignation by the member, and the withdrawal of the official nomination of any international representative. Application for the removal of a member can also be made to the Appellate Division of the Supreme Court by the State President, the Transitional Executive Council, or any registered political party or one hundred eligible voters; provided that insofar as such party or voters are concerned, the Chief Justice must first give leave for such application to be brought. The Appellate Division can order the removal of a member of the Commission only in the event of serious misconduct or incapacity bearing upon a member's fitness for office. This would include continued ill health, and a material breach of the preconditions and qualifications referred to in Section 7 (see paragraph 10 above), or any other substantial reason which the Court considers inconsistent with the member's continuation in office. The application must be heard by the Chief Justice and not less than six (6) other Appeal Court judges.

12. Section 10 deals with the remuneration and conditions of appointment of members of the Commission.

13. Section 11 states that the Commission may be reconstituted, if necessary, in order to undertake the same or similar functions and responsibilities in respect of future elections which may be called in terms of the Constitution. The nomination and appointment of members of a reconstituted Commission shall be effected by the State President upon the advice of Parliament, acting in terms of a resolution passed by the same majority as is necessary to amend the Constitution. If parliament is deadlocked, and unable to establish the required majority to nominate a new Commission, then the deadlock breaking mechanism is that the nomination and appointment of the reconstituted commission will be effected by the State President, on the advice of a majority decision of the full bench of the Appellate Division, comprising the Chief Justice and not less than six (6) other Appeal Court judges.

14. Sections 12-15 deal with procedure, administration, financial accountability and a Guarantee by the State for the commitments of the Commission.

15. Section 16 deals with the powers, duties and functions of the Commission. In particular it is envisaged that the Commission shall set up three (3) separate Directorates, viz: an Election Administration Directorate, an Election Monitoring Directorate and an Election Adjudication Directorate. The Commission shall be entitled to co-opt suitably qualified persons including nominees from accredited international organisations to assist these Directorates.

Section 16.4 provides that each Directorate shall operate independently of the others, but will be accountable and subject to the overall management and control of the Commission.

16. Section 17 sets out the responsibilities of the Election Administration Directorate, including the role of voter education, determining the eligibility and identification of voters, the enforcement of an electoral Code of Conduct, administering the obligation to disclose the receipt and source of each financial contribution to a political campaign in excess of R1,000.00; and the promulgation of regulations governing political advertising, to be determined in consultation with the Independent Media Commission. It should be noted that the administrative details involving proof of eligibility and identification of voters has not yet been specified, and will require further consideration and technical advice. Guidance is required from the Negotiating Council whether detailed provisions are to be included in this Act or left to the Commission to determine, in view of the obvious need for substantial amendments to the existing Electoral Act. Provision is made for an electoral Code of Conduct to become Schedule A to this Act. This Code has not yet been drafted by the Committee, which has thus far received only two draft submissions from the negotiating parties in this regard.

17. Section 18 provides for the Election Monitoring Directorate. In particular Section

18.2 envisages that this directorate shall have investigative powers, including the right to issue and execute search warrants, and to seize items as evidence of alleged infringements of the electoral Code of Conduct.

18. Section 19 provides for the responsibilities of the Election Adjudication Directorate. Section 19.1 provides that this Directorate shall serve as the final arbiter of claims, issues and disputes affecting the campaign, conduct and results of the Transitional Elections, save that there is to be a final right to appeal to the Commission.

19. Section 20 deals with the Commission's final adjudication of the election results. It is provided that the Commission shall be required within a period of 21 days after completion of the ballot, to determine and certify the final results of the Transitional Elections, and to declare whether, and if so to what extent, such elections have been conducted in a manner which has been substantially free and fair. Section 20.2 provides that a simple majority is not sufficient to certify the result of the election, and a majority of at least eight (8) members is required. In the event that the Commission finds that the poll was partly unfree and unfair, Section 20.3 empowers it to implement such steps as it may deem appropriate in order to achieve a free and fair election result. This could enable the Commission to take limited action in a particular region, without having to hold a completely new national election, in the event that there were unacceptable conditions in a limited area of the country only.

20. Section 21 provides that the Commission's decisions are not subject to appeal, but may be reviewed by a Provincial Division of the Supreme Court, or with the leave of the Chief Justice by the Appellate Division.
21. Section 22 provides for the succession of the rights and prerogatives of the Forum firstly by the Transitional Executive Council, and ultimately by Parliament.
22. Section 23 empowers the Commission to delegate any of its' powers, save only for its' duty in respect of the final adjudication of the election results.
23. Sections 24-28 deal with electoral offences, and have been drafted along the lines of the existing provisions of the Electoral Act.
24. Section 29 prohibits the conduct of opinion polls during a period of six (6) weeks prior to the date of commencement of the Transitional Elections. (In terms of the present Electoral Act, the effective period of the prohibition is six-and-a-half weeks). There have been submissions to the effect that this period should be shorter, say two (2) weeks. Guidance is required also in respect of this matter.
25. Section 30 protects the secrecy of voting from disclosure in court proceedings.
26. Section 31 exempts the Commission from liability for fiscal duties, taxes and fees.
27. Section 32 empowers the Commission to promulgate regulations, and penalties for contraventions. It also empowers the Commission to prescribe voting forms and other necessary documents.
28. Section 33 provides that upon advice of the Forum, the Council or Parliament, the State President may declare this Act applicable to the holding of a Referendum, which could be conducted either nationally, or in any particular region/s, and on any specified issues.
29. Section 34 contains the Short Title of the Act.