

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.

3.8 Campaign Funding / Expenditure

The present proposal which requires the reporting of all campaign donations in excess of R1,000.00 has received certain adverse comment. Two parties have proposed that this amount should be increased to R10,000.00, and that a lower limit might serve to inhibit individual donations by reason of possible intimidation.

One party has suggested that the provisions of the draft which empower the Commission to regulate disclosure of donations and to define legitimate campaign expenditure be deleted in their entirety.

Concern has also been expressed with regard to the possibility of a debarment by the Commission of the continued use of Government owned vehicles and Airways for political work. It has been suggested that such debarment might unfairly disadvantage certain parties.

3.9 Role of the Appellate Division

One party has expressed concern regarding the suggested role of the Appellate Division as a deadlock-breaking mechanism, in the event of a failure by Parliament to achieve the required majority to call a new election. However, the need for some deadlock-breaking mechanism is self-evident.

3.10 Rural Women Constituency

A representation has been received with reference to the need to take special measures to ensure that women living under indigenous systems of law and authority are effectively enabled to participate freely in the proposed elections.

Prof D Davis
Dr F Ginwala
Adv H R Laubscher
Mr S K Ndlovu
Mr R B Rosenthal