



REPUBLIC OF NAMIBIA

LAW REFORM AND DEVELOPMENT COMMISSION

ELECTORAL LAW REFORM PROJECT (ELRP)

**REVISION AND REFORM OF THE NAMIBIAN ELECTORAL ACT
(ACT No. 24 of 1992)**

- A Background and Consultative Discussion Paper -

by

Gerhard K.H. Töttemeyer

Commissioned and Published by the Law Reform and Development Commission

LRDC 19

**Windhoek, Namibia;
June 2012**

ISSN 1026-8405

ISBN 978-99945-0-053-6

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***Number of publication and ISSN and ISBN numbers not printed on all copies.**



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LRDC 19

Windhoek, Namibia;
June 2012

ISSN 1026-8405

ISBN 978-99945-0-053-6

LAW REFORM AND DEVELOPMENT COMMISSION

The Namibian Law Reform and Development Commission (the LRDC) is a creature of statute established by **Section 2** of the **Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991)**.

The core mandate of the Commission is to undertake research in connection with all branches of law and to make recommendations for the reform and development thereof.

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This publication of the Law Reform and Development Commission of Namibia is issued with the financial assistance of the Namibia Institute for Democracy (NID) which secured the funding for the engagement of Professor Emeritus Gerhard K.H. Töttemeyer from the Embassy of the Government of Republic of Finland to the Republic of Namibia, and the Swedish International Development Agency (SIDA).

Foreword

Central to any democratic process is the conduct of elections done regularly under conditions that instill confidence in the integrity of not only the electoral process, but also the very democracy under which such elections are conducted.

A *sine qua non* to such integrity in any electoral process is the existence of a credible legal framework, which establishes an independent Electoral Management Body (EMB) competent to conduct all electoral activities in a manner that engenders respect for the outcome of elections.

Namibia has established a reliable electoral culture through which the President, Members of the National Assembly, Regional Council (and National Council) and Local Authorities are elected periodically through a Party List System and a First Past The Post (Winner Takes All) system accordingly. Yet time and again, post elections, it becomes evident that for both the EMB and the participants in the electoral contests, electoral rules could have been better implemented, interpreted and definitely differently understood – and nothing exhibits these realizations better than the electoral challenges which ensue. As a young democracy, few things are more important than the avoidance of post electoral misunderstandings, which can degenerate into civil strife and illegitimate governance.

Therefore, the Law Reform and Development Commission (LRDC) found it necessary to ensure that following 9 amendments to the Electoral Act, 1992 (Act No. 24 of 1992), the statute books needed some drastic cleaning up. With the assistance of the Namibia Institute for Democracy (NID), backed up by contributions from the Finnish Embassy and the Swedish International Development Agency (SIDA), the expertise of Professor Gerhard K.H. Töttemeyer who braved the vastness of Namibia to attend to consultations with the public, following input from most political parties.

This report, Revision and Reform of the Namibian Electoral Act (Act No. 24 of 1992) does three things: Firstly, it provides an update compendium of the electoral process of Namibia, complete with its problems and advantages. Secondly, it records the many suggestions and inputs made of the electoral process throughout the country and through the various *fora* the LRDC was able to participate at. Thirdly, it provides a necessary thought provoker of what ought to be considered in the next round of law making – how could all the wrongs be made right in the electoral process. The document is therefore a competent accompaniment to the further consultations arranged by the LRDC with political parties, the EMB and other stakeholders leading to the drafting of the draft laws, and it will certainly qualify as a must read for any commentator of the electoral process during the reform and beyond. Hopefully it demystifies many of the concepts laden in the electoral process and provides a handy reference for all considerations made and need to be made for any planning of an electoral process.



Sacky Shanghala

Chairperson: Law Reform and Development Commission

June 2012

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Preface

This report, containing a total of 59 specific recommendations for electoral law reform in Namibia, is the result of an extensive consultative process with all electoral stakeholders in Namibia during the period January 2011 to April 2012. This process, which was conducted by the Electoral Law Reform Project team consisting of the Law Reform and Development Commission in Namibia (LRDC), the Namibia Institute for Democracy (NID) and the Electoral Commission of Namibia (ECN), consisted of a series of public hearings in all regions of Namibia, consultative workshops, meetings and discussions with stakeholders, experts and academics, an investigation into international best practices, a literature study as well as a study of all relevant national laws and international treaties and conventions signed and/or ratified by the Government of the Republic of Namibia.

The project team wishes to thank all persons, political parties, civil society organizations, the media, churches, governmental ministries and agencies and other institutions who have made inputs during this consultative process and who have made available their time and resources to contribute to this project.

Specific thanks are due to:

Mr. Sacky Shanghala, Chairperson of the Law Reform and Development Commission, for his dynamic and enthusiastic leadership during all phases of the consultative and report writing process.

Prof. G.K.H. Töttemeyer, first Director of Elections in Namibia and subsequent Deputy-Minister of Regional and Local Government and Housing, for the compilation and writing of the report.

Mr. Theunis Keulder, Executive Director of the Namibia Institute for Democracy, for the expert overall management of the project.

Staff and support personnel of the LRDC, the NID and the ECN for their commitment in the implementation of all activities related to this project.

Ms. Elaine Thompson for the editing of the report.

The Embassy of Finland and the Swedish International Development Agency (SIDA) who have jointly funded this project through funding agreements with the Namibia Institute for Democracy (NID).

Abbreviations

AU	African Union
CEO	Chief Electoral Officer
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
EC	Electoral Commission
ECN	Electoral Commission of Namibia
EISA	Electoral Institute of Southern Africa
EMB	Electoral Management Body
ID	Identity Document
IDEA	International Institute for Democracy and Electoral Assistance
IEC	Independent Electoral Commission
LRDC	Law Reform and Development Commission
NBC	Namibian Broadcasting Corporation
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organization
NICRO	National Institute for Crime Prevention
NID	Namibia Institute for Democracy
NLRD	Namibia Law Reform and Development Commission
OAU	Organization of African Unity
RDP	Rally for Democracy and Progress
SADC	Southern African Development Community
SWAPO	South West African People's Organization of Namibia
TRS	Two-Round-System
UDHR	Universal Declaration of Human Rights (1948)
UNDP	United Nations Development Programme
UNTAG	United Nations Transition Assistance Group

Executive Summary

Underlying this project study are many questions and issues. Hitherto the Electoral Act (Act No. 24 of 1992) has been reviewed nine times. Time has become opportune to revisit the Act and to consolidate, revise, restructure and reform it.

For this reason a study has been made of the electoral systems in SADC countries and of international norms and practices.

During the consultative process it has become evident that distrust, skepticism and little confidence exists amongst the public towards the Electoral Commission (EC), the Directorate of Elections and the electoral process. The Electoral Management Body (EMB), which includes the Electoral Commission and the Directorate of Elections, are accused of not performing their role efficiently and effectively. Its competence, efficiency, capacity and impartiality are doubted. Furthermore, the EMB is not considered as an autonomous and independent body.

At stake are the functional positioning of the EMB and its performance. This is duly addressed in the Report when attending, amongst others, to new legal arrangements such as the establishment of new acts. A separate act on the Electoral Commission and a separate Electoral Act - as is the practice in most SADC countries - is proposed. Of equal relevance is a stronger relationship between the Electoral and Delimitation Commissions and to consider the institution of a separate act on political party funding. It is also recommended that the EC should be tasked with conducting referenda when the opportunity arises. A bill to that effect should be drafted.

The question tested in the Report is whether electoral bodies have hitherto conducted elections professionally and in an efficient way and if not, what can be considered as obstacles. Was the environment conducive to free, fair, transparent, trusted, responsible and credible elections? Could the electoral institutions perform their tasks free of any pressure or coercion from outside, as the credibility, impartiality and independence of the EMB depend on the degree of external interference.

Is electoral justice duly practiced? Are the principles of integrity, participation, acceptance, lawfulness, impartiality, fairness, professionalism, transparency, efficiency and service-mindedness duly followed by the EMB and are democratic values fully integrated in the electoral process?

Elections are an important ingredient and a cornerstone of democracy. They are an exercise in pluralism and, as such, an essential element in a democratization process. Democratization cannot be separated from the empowerment of people, the observance of human rights and the promotion of equality, mutual security and dignity. Regular ballots give citizens the opportunity to register their approval or disapproval of the government in power. Through elections, civil society can voice its political opinion on governance and political representatives. Elections are

conducted within the national, regional and local space. They involve the electorate and political bodies.

Twenty-two years of Namibian independence and a multitude of elections have given a clear indication of issues to be improved in the electoral process. During the consultative process as part of this project, various issues have come to the fore that need urgent and in-depth attention. Such issues not only relate to the technical process how elections are run, but also to the institutional framework and the electoral process itself.

Beginning with the EMB, one of the recommendations is to strengthen the independence of the Electoral Commission. Amongst others, it would be advisable to delegate the appointment of the Electoral Commissioners to the National Assembly and the appointment of the Director of Elections to the Electoral Commission.

The Report also attends to policy issues. Does the present practiced electoral system comply with expectations and quality of elections? Does it serve its purpose? Could there be a better system in place? Could electoral procedures and mechanisms, such as the registration, voting and counting processes be improved?

Considering the vastness of the country and relating it to electoral task performance, the decentralization of EMB responsibilities at management and administration level should be seriously considered. Decentralization could involve many tasks, such as voter registration and voter education. A definite shortcoming is the absence of a body entrusted with electoral adjudication.

Other issues that are addressed in the Report are the relationship between the Electoral Commission, registered political parties and the public, and how it can be improved. The issue of fair time-sharing of political parties on radio and television needs particular attention. Of concern is also what controlling mechanisms can be introduced to keep an eye on political party financing and auditing, and what Codes of Ethics should be devised for election officials, political parties, observers, the media and other entities performing a role in the electoral process and how could they be enforced.

Court cases in which the Electoral Commission was and is currently still involved have indicated a number of shortcomings in the electoral process. The Report addresses these problem areas and how they could best be addressed. An institutional issue of importance is the attachment of the Electoral Commission to the Office of the Speaker. The Speaker can submit the annual report of the EC to the National Assembly, but cannot manage issues such as introducing and handling amendments to the Electoral Act. A better option could be to attach the EC to the Ministry of Finance for financial matters and the Ministry of Justice for legal matters.

The separation in responsibility and task performance between the EC and the Directorate of Elections (as is the case in most SADC countries) is discussed in

depth. The activation of the EC committee system is highly recommended. Due to the increased responsibilities of the Chairperson of the EC, such a position should be filled permanently.

It is important to assign to the public a greater say in the operation of the electoral process. Issues that came to the fore during the consultative process were the abolishment of the tendered vote, the introduction of the ward system at local level, and the amalgamation of the Delimitation Commission with the Electoral Commission.

Of particular concern is how best to address the gender issue on different levels and for different purposes. A further specific aim is to ascertain how the electorate could take full 'ownership' of the electoral process, thus internalizing it and seeing elections as an important signpost in Namibia's still young democracy.

Next to many other issues that were identified through the public consultative processes with stakeholders are limiting the voting process to one day; improving the quality and efficiency of electoral officials; and doing away with the registration of voters via sworn statements. Special attention is also paid to overseas voting.

Apart from the institutional aspects and the electoral processes, the Report addresses in depth how democracy in Namibia can be enhanced through quality elections. As far as making elections in Namibia more technically proficient and more qualitative, and thereby more meaningful, relevant, trustworthy and credible, there is definitely room for improvement. It is easy to criticize and condemn, but improving is the more constructive option.

Namibia wants to deliver the best. That is what the Report intends.

Part 1

Introduction of the Topic

The concepts 'revision' and 'reform'

1. Electoral **revision** implies to re-examine the *Electoral Act*, especially in order to discover, rectify and amend errors and shortcomings.
2. The concept electoral **reform** relates to revision. In the context of the *Electoral Act* it means to improve such legislation by removing faults and weaknesses and to strengthen good qualities contained in the act.
3. The concepts 'revision' and 'reform' are interrelated. Both are applied as operational concepts in the Report. Reform is, however, the core objective.
4. Joram Rukambe, a former Director of Elections in Namibia, and his co- authors pay special attention to electoral reform in a book titled "Electoral Management Design: The International IDEA Handbook" (Wall & others, 2006: 295-303). According to the authors, electoral reform is a broad term that covers, among others, improving the responsiveness of electoral processes to public desires and expectations.
5. That desire has inspired the Namibian Law Reform and Development Commission, in cooperation with the Namibia Institute for Democracy, to conduct public hearings in all thirteen regions of Namibia on the revision/reform of the *Electoral Act*. *Vox populi* is important. Its response to improve the electoral process was informative and helpful.
6. According to Wall and co-authors (2006: 295-296) there are three distinct areas of electoral reform which, in an adapted form, are as follows:
 - (i) Legal – involving the amendment of the Constitution, the electoral law, and/or related regulations and rules to enhance the integrity, relevance and adequacy of the legal framework within which the Electoral Management Body (EMB) delivers its services. This can include institutional reform of the EMB itself.
 - (ii) Administrative – the introduction within an EMB of new strategies, structures, policies, processes, procedures and technical innovations that enable it to implement its legal responsibilities and deliver its services most efficiently.
 - (iii) Political – changes which take place in the political environment within which an EMB operates, such as giving it more autonomy and authority, or creating a more effective and transparent framework for its functioning and accountability.

7. Revision and reform often have their origin in the failure of EMBs to deliver the expected products and services. A number of possible causes are identified by Wall (2006: 297) and co-authors, amongst them:
 - lack of stakeholder confidence in the EMB;
 - government and/or political influence on EMB decisions;
 - a partisan approach by the EMB or its members;
 - a lack of EMB professionalism;
 - EMB incompetence or financial impropriety.
8. Whatever shortcomings the Namibian EMB and, as such, the Electoral Law are *per se* suffering from; any reform/revision of the Namibian Electoral Law has to rely heavily on the EMB's cooperation and on other stakeholders such as the government, the legislature, the political parties and, most importantly, the electorate.
9. On 14 February 2011 the Namibian High Court expressed its dissatisfaction with the present state of the Namibian Electoral Law. High Court judges J.P. Damaseb and Dr. J. Parker, amongst others stated that the Electoral Law "*...is very scattered. We had ourselves to wade through a myriad of amendments to ascertain what the applicable provisions are. That is an unsatisfactory state of affairs and something must be done as a matter of urgency and before the next round of elections, to consolidate the electoral law of Namibia*". (Second ruling of the High Court in the matter *Rally for Democracy and Progress & Others versus Electoral Commission of Namibia & 5 Others*. Case No: A 01/2010 (No. 2) paragraphs 325 and 326, p. 160.)
10. Reform and revision should not be a once-off undertaking. The EMB should constantly be engaged in a process of review concerning its administrative strategies, policies, procedures and practices. If it does not comply with such expectations, its effectiveness and credibility will suffer, if not diminish.
11. Whatever electoral revision/reform is envisaged in Namibia, it must be based on the democratic norms and practices that the Namibian State has committed itself to, as reflected in the Namibian Constitution.

Elections and Democracy

12. Namibia complies with the African Union's *Declaration on Elections, Democracy and Governance* (Section 1, articles 1.1 - 1.3) which states that "the peoples of Africa have a right to democracy and it is the obligation of their Governments and the people themselves to actively promote and defend it". The Declaration emphasizes that "Democracy is essential for the stable, social, political, cultural, and economic development of the peoples of Africa"

and that “Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework of constitutional order.”

13. Article 1.4 of the same Declaration states that “Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, a pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.”
14. Elections cannot be separated from the observance of fundamental human rights and freedoms as documented in the AU Declaration. They are also enshrined in the Namibian Constitution, and are the promotion of equality, mutual security, and respect for human dignity.
15. Elections are fundamental to any competitive democracy and remain an important exercise in pluralism and, as such, an essential element and integral part in the democratic process. An electoral process is central to democracy. Elections must demonstrate democracy in action. They are about people, voting and expressing an opinion. Namibia has constitutionally committed itself to a multiparty democracy and free, fair, transparent, credible and responsible elections, which guarantee each eligible voter an independent choice.
16. Credible elections are internationally regarded “as a key venue for citizens to exercise their democratic right on how and who should rule over them” (J.K. Rukambe, 2011:1). An electoral process is central to democracy. It forms an integral part of democracy culminating in the holding of elections. They are a mandate for voters to exercise their influence over the orderly and responsible running of the state. Elections determine who is to take control of government. The freely elected government is expected to represent the will of the people in the way in which public power is distributed in the common interest. Elections are critical to the survival of the state and democracy.
17. In terms of the doctrine of the sovereignty of people, government remains answerable to the people and, during elections, to the electorate. Elections held at regular intervals are intended to provide a principal link between the rulers and the ruled. For democracy to succeed there needs to be a contest.
18. An electoral process in a democratic environment cannot be separated from capacitating and empowering voters: It is only successful, credible and meaningful when people have taken ownership of it and have internalized it. It is a self-identification process with a democratic political system, its

structures, institutions and processes. It is important that the electorate must perceive the electoral process as credible and legitimate.

19. The building of democracy includes not only the pursuance of political values and political attitudes that uphold democracy, but must also attend to fundamental questions such as how best to organize democratic elections, the best and most efficient voting system, the conduct of comprehensive and technically sound voter registration, as well as effective and conflict-free electoral campaigns as an integral part of the electoral process.
20. It is the duty of the electoral bodies concerned to ensure that the electoral process is people-friendly. No voter should feel marginalized – and this includes persons with disabilities, voters in old age homes, hospitals, prisons, and at sea, or citizens that find themselves outside the country at election time. Democracy presupposes that each citizen has equal value, that there is a committed and affirmative state, and that a freely elected and people-based government exists.
21. The electoral process involves the whole society. In Namibia, with its suppressive colonial past, the building of properly functioning democratic institutions has taken root but still needs constant attention. Despite having achieved independence twenty-two years ago, independent Namibia is still relatively young. Its democracy is still flexing and must be constantly tested. This can be executed through free, credible, transparent, responsible and fair elections at all levels of governance.
22. In Namibia, the dominance of a political party can be observed. According to Ronald Dworking (2006:131) there are two paradigms to democracy. One he refers to as the majoritarian paradigm, while the other is known as the partnership paradigm.
23. The majoritarian paradigm is that “democracy is a government by majority, that is, in accordance with the will of the greatest number of people, expressed in elections with universal or near universal suffrage. There is no guarantee that a majority will decide fairly; its decisions may be unfair to minorities whose interests the majority systematically ignores. If so, the democracy is unjust, but no less democratic for that reason”.
24. In the partnership paradigm “democracy means that the people govern themselves, each as a full partner in a collective political enterprise so that a majority’s decisions are democratic only when certain further conditions are met that protect the status and interests of each citizen as a full (and equal) partner in that enterprise. On the partnership view, a community that steadily ignores the interest of some minority and other group is just for that reason

not democratic even though it elects officials by impeccably majoritarian means”.

25. In the Namibian context the partnership paradigm is the preferable option.
26. A working democracy is related to quality governance. Quality governance, often referred to as good governance, refers to the manner in which government exercises its power and is related to institutions, structures and processes exercising power. It also refers to the relationship between the government and the public and the participation of the governed in a political system. In addition, quality governance refers to a political system that provides for a stable transfer of power through regular elections, that has a strong, independent and stable public sector, that has accountable public institutions, that has effective public sector management, that has an enabling economic framework, and that adheres to the rule of law (See: Likoti, 2010:7- 8). Quality governance empowers citizens and fosters co-operative and legitimizes participatory democracy.
27. If quality governance is the goal and the reason for voting, then elections must be processes towards the attainment of this goal (unknown author, n.d.:2). In this process, values and principles are translated into an operational framework for free, fair, honest and credible elections to serve as instruments for achieving quality governance. The vote is an instrument to confer power and legitimize rulers to act in the name and on behalf of those who voted them into power.
28. Civil society cannot be prevented from being active participants in the democratization process, with one of its constituent parts being the electoral process. There was a time when the majority of Namibians were excluded from exercising their democratic rights, when co-operative and participative democracy was non-existent; at the time top-down and autocratic governance prevailed. Today, Namibia is a dominant-party state, which may be tempted to follow the trajectory of democratic centralism and autocratic modernization. For this reason alone the control function of the electorate remains relevant. The strengthening of democracy is the task of both the government and the electorate. To keep a functional and vibrant democracy in place, proper checks and balances are needed. A healthy democratic electoral process, free of intervention and marked by transparency, could perform such function.
29. An electoral process can only be meaningful, functional and of value if voters understand the essence and consequence of democracy as being related to elections. Voter education and information within the process of civic education for democracy is meant to make the electoral process better known and comprehensive for everyone who lives or wishes to live in a democratic environment. Voters need to be taught the relevance of regular and periodic

elections in a democracy and what an electoral process entails. The preconditions for free and fair democratic elections are demanding and must constantly be exposed to scrutiny.

30. It cannot be denied that a conceptual linkage exists between socio-economic rights, cultural rights and democracy as well as between development, human rights and democracy. They all aim to foster and strengthen stability, prosperity, security, and peace in society. It is not only the government that is obliged to foster such rights, but also the civil society through community based agencies and organizations, including political parties, educational institutions, religious entities, traditional communities, labour unions, the private sector, peer groups, gender equality advocacy agencies, those representing persons with disabilities, and other non-governmental and community-based organizations.
31. Rukambe (op.cit.:1) talks about competitive elections as critical for promoting socio-economic policies which are responsive to people's needs and aspirations, and which aim at eradicating poverty and expanding the choices that all people have in their lives. It is about the fulfillment of expectations and electoral promises that have been made. The credibility of elections depends on such fulfillment.
32. It is claimed that democracy would be better understood if people could 'eat it'; in other words, if it could deliver tangible benefits such as employment, the eradication of poverty, adequate social care, a healthy society, sufficient food and housing, quality education and training, and other benefits.
33. Threats to democratic and free elections are corruption, bribery, intolerance and intimidation. There is also the danger that media controlled by political parties or in the hands of the private sector but overwhelmingly supportive of a particular party, will by all means try to shape public opinion and undermine the freedom of choice.
34. To summarize: Free, fair, credible and transparent elections are pre- conditions and a requirement for quality governance. It is the dialectical relationship between the process of such elections and its product of quality governance. Law reform agencies, such as the Law Reform and Development Commission in Namibia, must nurture, protect and strengthen quality governance. This can be facilitated by means of law- and institutional reform initiatives that will deepen the roots and processes of democracy, such as electoral processes.

The Right to Vote

35. The democratic right of all eligible voters to express their political will through voting is one of the most fundamental of all human rights and civil liberties. Choosing who should rule over them is not a privilege but rather a basic human right. Voting is the political participation of people in the governance of the country; it is co-governance.
36. The right to vote, without discrimination, is set out in the *Universal Declaration of Human Rights* (Article 21), the *International Covenant on Civil and Political Rights* (Article 25) and the *International Covenant on the Elimination of Racial Discrimination* (Article 5(c)) and many other international human rights documents. Article 25(b) of the *International Covenant on Civil and Political Rights* explicitly states: “to vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”

The Normative Approach: Electoral Justice

37. An international Electoral Integrity Group has developed the so-called *Accra Guiding Principles* for elections. On 15 September 2011 the group issued a document on the principles of electoral justice. Such principles are of particular value and relevance to an electoral process. They are directive, normative and based on experience.
38. Electoral justice - which is considered as a broader concept than the holding of a technically correct poll – fulfils, according to the *Accra Guiding Principles*, “the human rights belonging to all people as individuals and as citizens as outlined in the *Universal Declaration of Human Rights of 1948* (UDHR) and guaranteed by the *International Covenant on Civil and Political Rights and on Economic, Cultural and Social Rights* (collectively known as the *International Bill of Human Rights*)”.
39. In the first instance, electoral justice refers to an operative legal framework within the context of the Constitution in each democratic country. A just and functional electoral law is a critical factor for the orderly and responsible running of an election. Such a law must be applied in all humility. It must apply justice. Law is about justice, but also about electoral justice, and must capacitate the functioning of it in a political atmosphere.
40. The intention of electoral justice is to go beyond the letter of the law and to address the integrity of the total electoral process. Electoral justice does not only protect basic political rights, such as the right to vote, to stand for election, the equal rights of men and women, freedom of association and

affiliation, the right of security of the individual, and the right to actively take part in the conduct of public affairs, but also the civil rights connected to these rights, such as freedom of speech, the right of peaceful assembly, the right to information, and the right to petition for redress. These are all important and principal objectives in elections.

41. Any election needs a set of rules to determine the running and administration of it. It is about finding the most appropriate mechanisms for the achievement of free, fair, transparent, credible, legitimate and trustworthy elections.

Principles

42. A number of guiding principles for electoral justice are spelt out in the Accra document. Such principles will be applied throughout this Report as testing criteria for the credibility and functionality of Namibia's electoral process, and also when elaborating on Namibia's electoral institutions and the electoral law.
43. Some of the principles identified by the International Electoral Integrity Group are already pursued in Namibia and successfully applied; others are not or only selectively applied. The principles proposed by the learned group will guide the deliberations on the Revision of the Namibian *Electoral Act*.
44. The first essential principle deals with “**integrity**”. It is considered a vital element that contributes to the legality and legitimacy of the electoral process and is also a key element of such process. The EMB is the primary guarantor of the integrity and purity of the electoral process (Wall and others, 2006:24).
45. Related to integrity are honesty and accountability on the part of all individuals involved in any aspect of the electoral process. These essential qualities are considered an imperative requirement to uphold electoral justice.
46. These qualities are applied and tested on electoral leaders as role models; how they comply with the code of conduct devised for them; and how they behave ethically in their task performance that is, not being selective in their application of the laws and rules.
47. “**Participation**” is referred to as a second principle for successful electoral justice. The argument is that the voice of the people must be heard, respected, and represented in the context of a free, fair and genuine election contest. All voters must have a fair and equal opportunity to participate in the electoral process. Several examples are cited:
 - Registration centres and polling stations must be readily accessible to voters;
 - Women should be involved in all aspects of an electoral process;

- Mobile polling stations must be provided for remote areas;
 - Special arrangements must be made to assist voters with disabilities, such as the visually impaired (by providing Braille facilities);
 - Voter education should be conducted throughout the year, particularly for those who will reach the age of voting.
48. A third principle is “**lawfulness (Rule of Law)**”. An election can only be legal and legitimate when it is conducted in accordance with the rules clearly established within the legal framework of a community. Laws guarantee the political and civil rights of citizens. They must comply with accepted and relevant international norms (e.g. in the Namibian context the OAU/AU declaration on elections and the SADC principles and guidelines on elections) and their application. Such laws must reflect the principles of electoral justice. Appropriate sanctions must be applied if the laws are violated and not adhered to. No aspect of the electoral process should be left unregulated. Any election related legislation changes (e.g. amendments, proclamations, regulations) must have been promulgated and put into effect not later than six months prior to the election date. There must also be a clear understanding regarding which authority (e.g. Electoral Tribunal/Court) is responsible for the resolution of electoral disputes and related matters.
49. The fourth principle or value is “**impartiality and fairness**”. Both must guarantee the equal treatment of voters and contestants by not only leveling the playing field, but also guaranteeing the equal application of the rules to all parties involved. Impartiality and fairness is not only expected on the part of election management bodies such as the Electoral Commission, the Directorate of Elections and its staff, but also of the security authorities (e.g. police), voters, candidates, political parties, party agents, observers, the media, civil society and other stakeholders.
50. Every EMB is expected to manage elections impartially. As Wall and others (op.cit:23) put it: “Without impartiality of electoral management and independence of action, the integrity of the election is likely to fail, and it can be difficult to instill widespread belief in the credibility of electoral processes, especially among the losers.”
51. Impartiality, fairness and neutrality must reign when electoral authorities and officials are permanently or temporarily appointed. No outside interference should be allowed. The media must allocate fair coverage to the contesting parties. Public funding for election purposes, such as party funding, must be allocated in a fair and rational manner. Auditing how these funds are spent is obligatory.
52. The fifth principle is “**professionalism**”. This quality is essential in the management and oversight of all stages of the electoral process, and must be

demonstrated in the planning, operation and the conclusion of elections. This must also be the case in the pre-electoral, electoral and post-electoral periods. Both the Electoral Management Body and the Electoral Tribunal/Court must be professionally competent. Key indicators of professionalism include experience, expertise, objectivity, neutrality, efficiency, competence, honesty, accuracy, commitment and effectiveness.

53. To apply professionalism requires regular and comprehensive briefings and hands-on training of election officials at all stages of the election process, as well as the establishment of clear guidelines. According to Wall and his co-authors (2006:25), the meticulous and accurate implementation of electoral procedures, as well as suitably skilled staff, are both key elements for the delivery of credible elections. This demands skills development and the setting of high professional standards. The authors correctly believe that personal commitment by each individual in an electoral management body to equity, accuracy, diligence and service in all it does, as well as self-improvement, is necessary to maintain professionalism in electoral management.
54. All electoral officials, permanent and temporary, must have the necessary professional qualifications and experience when appointed. They must be exposed to a written ability and aptitude test. Regular training of electoral personnel and regular updating of the electoral process is obligatory. This also applies to the judicial adjudicators.
55. The Electoral Management Body should offer training facilities related to the electoral process to party officials. The training of registration officials should be ongoing. A particular training task rests on the Electoral Management Body when electronic voting is introduced and any other modern technology is applied in the electoral process.
56. Finally, according to Wall and co-authors (2006:25), visible professionalism in an electoral management body gives political parties, civil society, voters, donors, the media and other stakeholders the confidence that electoral managers are capable of undertaking their tasks effectively.
57. The sixth and probably most demanded principle is “**independence**”. Nearly all submissions made to the Namibia Institute for Democracy, the Law Reform and Development Commission and to the public hearings refer to “independence”. Independence is one of the most hotly debated issues in election administration.
58. Independence embraces two different concepts – that of structural independence from the government, and “fearless” independence expected of all EMBs in that they “do not bend to governmental, political or other partisan

influences on their decisions. Both concepts are separate issues, one being formal and the other normative” (Allan Wall and others, 2006:22), but they are interlinked.

59. Independence is demanded for all those authorities and institutions that are legitimately engaged in the electoral process, ranging from the Electoral Commission to the Directorate of Elections. The dominant reason for such a demand is that there should be no interference by any outside authority and interest. Political appointments in any position of the EMB should be prohibited.
60. There should be no seconding of staff from the public service. Staff members of the electoral bodies are civil servants, but they are appointed by the EMB. They enjoy the protection of the Public Service Commission.
61. The seventh principle is “**transparency**”. It is a core element that involves openness at all stages of the election process. It must foster confidence, trust and credibility in the system in the minds of all stakeholders. It is only superseded by the secrecy of the ballot.
62. Transparency is applicable to all electoral operations. Hearings of election petitions must be open to public observation. This also applies to the process of drafting or amending the legal framework related to elections. The public should at all times be given the opportunity to comment and to make inputs.
63. This equally applies to transparency in operational and financial management. It must be possible for the public to scrutinize the decisions and reasons behind EMB decisions. Wall and others (2006:24) are of the opinion that transparency can assist an EMB to combat perceptions of and identify actual financial or electoral fraud, lack of competence or favoritism towards particular political tendencies, and can enhance the EMB’s credibility. They further opine that the absence of transparency in electoral processes invariably leads to the suspicion that fraudulent activities are taking place.
64. Transparency also applies to political candidates. When they are nominated for any election they should provide detailed information about their educational qualifications, make asset and liabilities declarations, and disclose any criminal convictions.
65. Observation of elections should not have a hidden agenda. Observing elections, which is a SADC requirement, must be performed in a transparent and open way.
66. “**Timeliness**” is the eighth principle. It applies to the timetable for the entire electoral programme, which must be consistent and comply with statutory prescriptions. It also implies adherence to the timely publication of the voter

register, the speedy announcement of election results, and that the Election Tribunal/Court adheres to a time-bound concept.

67. The ninth principle involves “**non-violence**” (freedom from threats and violence). It emphasizes that all stages of the electoral process must be conducted without intimidation, coercion, corruption, or other conduct that can interfere with the free holding of elections in accordance with the values of electoral justice.
68. Non-violence is related to codes of conduct which promote peace and tranquility during the electoral process. Separate codes of conduct are applicable to electoral officials, political parties, observers, candidates, the police and party agents at polling and counting stations. Such codes of conduct contain various issues that deal with potential conflict, violence, intimidation, harassment, coercion, undue intervention in the electoral process and the prevention of unruly behavior. Codes of conduct also deal with enforceable prosecution and punishment for those who break the rules.
69. The penultimate principle is “**regularity**”, which deals with periodic elections at prescribed regular intervals and as such are legalized either in the Constitution and/or in respective laws.
70. The final principle in the Accra document refers to the concept “**acceptance**”. It relates to the acceptance of the outcome of an election. A culture of electoral defeat has not yet taken root in Africa. An overriding principle of electoral justice is that everyone must abide by the outcome of elections. The acknowledgement of legitimacy of the result of an election by the international community, as well as by domestic and international election observers, would contribute to the acceptance of the outcome of elections.
71. “**Efficiency**” can be added to the principles identified by the Ghana Group, and it refers to service delivery and progressive technical know-how. An efficient EMB must set standards for electoral and financial management and administration. Success demands efficiency.
72. Efficiency again relates to “**service-mindedness**”. That is what the EMB’s clientele, the voters, expect. Service performance influences public judgments on the integrity, the credibility, honesty and the effectiveness of electoral bodies.

Elections in Namibia within an African context

73. In an African context, Namibia complies with article 21 of the *Universal Declaration of Human Rights* (1948), which states that everyone has the right

to take part in the government of his/her country, directly or through freely chosen representatives. The *International Covenant on Civil and Political Rights* holds as a norm that the will of the people shall be expressed in periodic and genuine elections held by secret vote and by applying free voting procedures, emphasizing (article 25) that elections will reflect the free expression of the will of the electors.

74. In addition, Article 13 of the *African Charter on Democracy, Election and Governance*, provides that:

“Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provision of the law”.

75. Elections in Namibia take place in addition to international norms, within the context of *SADC Principles and Guidelines Governing Democratic Elections* (2004) and the *OAU/African Union’s Declaration on Elections, Democracy and Governance in Africa* (2003). Namibia subscribes to both of them.

76. The *SADC Principles and Guidelines Governing Democratic Elections*, which are normative for Namibia, contain the following obligations:

- Full participation of the citizens in the political process;
- Freedom of association;
- Political tolerance;
- Regular intervals of elections as provided for by the respective national Constitutions;
- Equal opportunity to exercise the right to vote and to be voted for;
- Independence of the Judiciary and impartiality of the electoral institutions;
- Voter education;
- Challenge of the election results as provided for in the law of the land;
- Acceptance and respect of the election results by political parties proclaimed to have been free and fair by the competent National Electoral Authorities in accordance with the law of the land.

77. The Conference on Elections, Democracy and Governance in Africa, held in South Africa from 7 – 11 April 2003, affirmed that the “true test for the freeness, fairness and credibility is the acceptance of the election by the electorate”. It also recognizes the interconnectedness of the process of democratization and the pursuit of the right to sustainable development in Africa. The Conference further resolved that it is “cognizant of the challenges facing Africa on democratization and good governance and recognizes that free, fair and credible elections are central to the achievement of democracy, good governance and progressive constitutionalism”. It is further cognizant of the initiatives undertaken by African leaders through the African Union and

NEPAD to consolidate peace, security, stability, growth and development in Africa and recognizing that these initiatives “have positioned elections, democracy, good governance and constitutionalism as cornerstones for the success of these ideals”.

78. On 10 May 2007, Namibia signed the *African Charter on Democracy, Elections and Governance in Africa*. One of the stated objectives of this Charter is to “promote best practices in the management of elections for purposes of political stability and good governance” (Chapter 2, Article 2(13)). Article 17(1) states, that “[...] State parties shall: Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections”. Furthermore, reference is made of regular, transparent, free and fair elections (Chapter 3, article 3(4) and article 32(7)).
79. For Namibia the *SADC Principles and Guidelines Governing Democratic Elections* are binding, politically, legally and morally. Namibia has committed itself to conducting elections within a democratic framework. In the SADC document reference is made to the impartiality of the electoral institutions. Article 7.3 refers to the commitment by SADC members to “establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections”.
80. Both the *African Charter on Democracy, Elections and Governance in Africa* and the *SADC Principles and Guidelines Governing Democratic Elections* stress the impartiality of electoral bodies in the conduct of elections.
81. Several regional organizations in Southern Africa deal specifically with electoral issues. Among them are the Electoral Institute of Southern Africa (EISA), the Electoral Commission Forum of SADC countries, and the Election Advisory Committee to the SADC Council of Ministers. The SADC Parliamentary Forum has established its own election norms and standards. At international level the UNDP is also involved in electoral matters in Southern Africa.

Elections in Namibia within a national context

82. Namibia gained its independence on 21 March 1990. This was preceded by the first democratic elections to the Constituent Assembly as supervised by the United Nations Transition Assistance Group (UNTAG). At Independence, the Constituent Assembly converted into the National Assembly. Local

authority and regional council elections took place in 1992 and the first National Assembly and Presidency elections in 1994.

83. Since independence, elections have become an exercise in political pluralism, freedom of association and political activity, and strengthening of democracy. Namibia is committed to free, fair, responsible, impartial, transparent, competent, accountable, trusted and honest elections, guided by the norms and principles as contained in the Namibian Constitution and the *Electoral Act*, which are based on international norms.

84. The Namibian Constitution is very explicit on a number of issues relating to elections. In the Preamble to the Constitution, reference is made to “freely elected representatives of the people”. In addition, Article 17 (1) states that:

“[a]ll citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of Government. All citizens shall have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of political affairs, whether directly or through freely chosen representatives.”

85. The latter should be done via free, fair, credible and transparent elections.

86. Equally important is Article 17 (2), which states that:

“[e]very citizen who has reached the age of eighteen (18) years shall have the right vote and who has reached the age of twenty-one (21) years shall have the right to be elected to public office, unless otherwise provided herein.”

87. The implication of Article 17 (2) is that the state is compelled through its agency, the Electoral Commission, to ensure that all persons 18 years old and older are given the opportunity to register as a voter and to vote. The Electoral Commission is by law tasked to perform such an enabling task. Enabling in this context means to capacitate all eligible voters to exercise their democratic and constitutionally secured right to vote within the parameters of a multi-party democracy.

88. The Constitution refers to elections at different levels of governance. No reference is, however, made to the Electoral Commission as the institutional body to supervise elections. Pertaining to the conduct of elections (national assembly, presidential, regional councils, local authority), only the Electoral Law (Act No 24 of 1992) makes reference to the Electoral Commission (EC) as the sole body entrusted with the performance of particular tasks on behalf of the government. The Electoral Commission and its executive body, the Directorate of Elections, are the legal bodies entrusted to conduct elections and perform all

matters related thereto. Together they form the Electoral Management Body (EMB).

89. The National Assembly, the Presidency and the Local Authority elections are conducted according to the proportional representation (list) electoral system, and the Regional Council elections according to the constituency-based 'winner-takes-all' (first-past-the-post) electoral system. The proportional representation electoral system allows for a proliferation of smaller parties and consequently their representation in the National Assembly and at local authority level. Such a system is very democratic, but produces a trend of the formation of splinter parties, often with an ethnic/tribal basis. It would probably benefit Namibian politics better if splinter parties form alliances and stand as such during elections. Alliances have a better chance to make an impact in the National Assembly and in local authority councils than single representatives of splinter parties who are forced to be a 'jack of all trades'.
90. Elections for the National Assembly and the Presidency take place simultaneously every five years. A year later the combined regional council and local authority elections take place, with candidates also elected for five years.
91. The Electoral Commission and its executive agency, the Directorate of Elections, are provided for in sections 3 to 12 of Part II of the *Electoral Act* and its subsequent amendments. The *Electoral Act*, as amended, provides the primary legislative framework for all elections at national, regional and local level. In cooperation with one another, the Electoral Commission and the Directorate of Elections are entrusted with the conduct of elections.
92. Elections are a learning process. Mistakes have been made and shortcomings have been identified. The *Electoral Act* (Act no. 24 of 1992) has been amended nine times. The whole *Electoral Act* is in dire need of revision, reform, restructuring and consolidation. Some political parties have found it hard to stick to some of the prescribed rules and regulations in the *Electoral Act* and Proclamations. Open distrust has been expressed towards the Electoral Commission and the Directorate of Elections by organizations and individuals, particularly regarding the handling of the electoral process.
93. The Electoral Commission has repeatedly been accused of having transgressed certain rules and regulations. Repeatedly the Electoral Commission has been taken to court since the first elections after independence in 1992. It has been accused of not complying with all the rules of the *Electoral Act*. References in this regard are the following court cases:

- *President of the Republic of Namibia and Others versus Garoeb and Others*, 1992 NR 342 (HC);
- *Congress of Democrats and Others versus Electoral Commission*, 2005 NR 44 (HC);
- *Electoral Commission of Namibia and Others versus Rally for Democracy and Progress and Others*, 2009 (2) Nr 793 (HC);
- *Electoral Commission of Namibia and Others versus Republican Party of Namibia and Others*, 2010 (1) NR 73 (HC)
- *Electoral Commission of Namibia and Others versus Rally for Democracy and Progress and Others*, 2010 (2) NR 487 (HC).

94. Distrust and a loss of confidence in the electoral institutions were also strongly evident during the consultative process in all thirteen regions in February/March 2012. The Electoral Commission is considered by some members of the public and political parties as an agent/body of government/state and not as an autonomous, free and independent body. “It should not be married to the government”, it was stated. Concern is expressed pertaining to the independence, efficiency, competence, transparency, capacity and impartiality of the EC to handle elections professionally, properly and adequately. Statements have been made during the consultative process along the lines of that the present EC is “a political body constituted of SWAPO members”. Instead it should be “a people’s body” and not a “party political body”. “It must be independent as much as a referee”.

95. There is definite room for improvement on a number of electoral issues and aspects. There is dissatisfaction with the accuracy of the voters roll, and the time management associated with making the voters roll available publicly and timeously before the election date. Furthermore, compliance with the *Electoral Act*, such as making the results publicly known at each counting station, is also problematic. Other issues that need to be looked at include electoral efficiency; the literacy and competence of electoral officials; the tendered vote system; the way of voting; the role of party agents and observers; the length of the voting period; the lack of mediating and conflict resolution facilities; the necessity of an Electoral Court; and the verification process. There are further questions about the transparency of the whole electoral process and its management capacity.

96. Suggestions were made during the consultative process recommending that voters older than a certain age – 75 years was the age mentioned – should not be allowed to vote any longer. This, however, contradicts Article 17(2) of the Constitution.

97. After considering all the issues mentioned as well as others that have become apparent, it has become evident that the present *Electoral Act* has severe shortcomings; it is imperfect. It is important to be pro-active in the reform and revision of the *Electoral Act*. One cannot ignore trends in a number of African states where democracy is only used as an instrument to lend credibility and legitimacy to elections. In many instances the independence of African states has put democracy under siege – this is often still the case. Elections are often used for personal gain.
98. Rukambe (op.cit.2) correctly refers to the fact that elections in most African states take place in a high-stakes environment, “that is, an environment in which winning an election is tantamount to capturing the state and monopolizing access to its resources (jobs, tenders, etc.)”. According to Rukambe, this is a zero-sum game in which the “winner takes all and the loser loses all, meaning the latter will have to contend with five long years of drought without access to the means of survival which can only be dispersed by the state”. Consequently, “winning elections gives the winner unfettered access to state resources, which are in turn used to entrench and perpetuate one’s rule”.
99. The few reasons cited are justification enough for undertaking to democratize Namibia’s electoral legislation even more and to strengthen the electorate’s role in safeguarding and exercising democracy. Namibia as a dominant party-state is running short of checks-and-balances to impact the monopoly of state power. Elections, therefore, are a means of gaining control of state power and advancing personal ambitions.

Electoral Legislation

100. The basic Act on elections and related issues was promulgated in 1992. It is known as the *Electoral Act 1992* (Act No. 24 of 1992). Since its inception it has been repeatedly amended and is in need of consolidation. The following amendments have been instituted since 1992:

- *Electoral Amendment Act 1994* (Act No. 23 of 1994) (on procedures and information removal/deletion and repeal and/or revision)
- *Local Authorities Amendment Act 1997* (Act No. 3 of 1997) (on definition of terms and establishment and constitution of EC organs)
- *Electoral Act 1998* (Act No. 30 of 1998) (on transitional provisions and incidental matters)
- *Electoral Amendment Act 1999* (Act No. 11 of 1999) (on transitional provisions relating to the Commission and the Director)
- *Electoral Amendment Act 1999* (Act No. 19 of 1999) (on suspension of voter registration)

- *Electoral Amendment Act 2002* (Act No. 20 of 2002) (on provision of extra voter registration time)
- *Electoral Amendment Act 2003* (Act No. 7 of 2003) (on definitions, establishment of temporary registration points, and remunerations of some officials, etc.)
- *Electoral Amendment Act 2006* (Act No. 4 of 2006) (on empowerment of Local Authority area returning officer)
- *Electoral Amendment Act 2009* (Act No. 7 of 2009) (on provision of additional rules and regulations and empowerment of certain electoral officers)
- *Electoral Amendment Act 2010* (Act No. 11 of 2010) (as amended by section 2 of *Electoral Amendment Act* (No. 11 of 1999) (on Electoral Commission members' term of office).

Part 2

Electoral Commission

Establishment of the Electoral Commission

101. Part II of the *Electoral Act* (Act 24 of 1992) commences with the duties and functions of the Electoral Commission (EC), which is the exclusive authority to direct, supervise and control elections under this Act, to be executed in a fair and impartial manner. It is subjected to the provisions of the Act, the Namibian Constitution and any other related law so decided upon. It is answerable to Parliament. The management and administration of elections rests in the hands of the Directorate of Elections.
102. The EC's particular task is to control and supervise the election of the President, National Assembly members, regional councils and local authorities. It is tasked to supervise voter registration, to compile voter registers, as well as supervise and control political parties, and to direct and control the conduct of elections. Other functions can, if necessary or expedient for the purposes of achieving the objects of the *Electoral Act*, be conferred upon the EC under the provision of the *Electoral Act* or any other law. The EC is directly responsible for supervising all the identified tasks. It can issue regulations that it considers necessary or convenient for carrying out its functions.

Recommendation 1

As stated in the “White Paper” (2011:10), “it is important that the powers of the EC must be clearly defined; it should be mandated to create its own organizational structure, thereby allowing its leadership to take full control of all its operation in order to strengthen areas where operational effectiveness is lacking”.

Appraisal of the Electoral Commission

103. Since the first elections in 1992 (Regional Council and Local Authority Elections), the Electoral Commission has from time to time received severe criticism relating to its decisions and activities. Complaints have been made on its selection, composition, independence, its proficiency and professionalism, and its handling of elections and matters related thereto. During public hearings the EC has been accused of being incompetent, of not being impartial, and only serving the ruling party. It is further claimed that there is not sufficient coordination and communication between the EC and the electorate, and between political parties and the EC. Unfounded statements have been made that the EC is rigging elections, or alternatively manipulating elections.

Recommendation 2

As will be explained in detail, a complete overhaul of the Electoral Commission in its selection, composition, appointment, responsibility and working and other matters has become a matter of urgency, principle, independence, efficiency and legitimacy. The necessity and relevance of such an overhaul will be reflected in pieces of legislation dealing with the Electoral Commission and the conduct of elections. Confidence in the Electoral Commission must be restored.

Independence of the Electoral Commission

104. Although no specific reference is made to the independence of the Electoral Commission in the *Electoral Act*, independence can be considered as normative, obligatory and crucial for its credibility.

105. The Namibian Electoral Commission is independent, subject only to the Constitution of Namibia and other legal provisions. It is a separate legal entity with its own legal personality. With regard to accountability and reporting, the

Commission is presently accountable to the President and the National Assembly through the Office of the Speaker to which it sends its annual report. The Speaker's only task is to table the annual report and the annual budget of the Commission in the National Assembly.

106. No person or organ of state may interfere with the functioning and task performance of the Commission, or may harm its independence.
107. The Electoral Commission practices the so-called independent model, which is applicable in those countries that organize and manage elections through an electoral management body independent from the legislative and executive power of government. It has its own budget and enjoys a degree of autonomy.
108. There are three types of independence which must be guaranteed to an EC: Institutional, administrative and financial independence. Institutional independence refers to the statutory independence, administrative independence implies having unhindered access to human and material resources when performing its mandate, while financial independence implies having access to sufficient funds to perform its obliged tasks as reflected in the *Electoral Act*.
109. How is the independence of an EC defined and protected in the SADC? The situation in the Republic of South Africa (see the *Electoral Commissions Act 51 of 1996*) is similar to that of Namibia, emphasizing the independence, impartiality, dignity and effectiveness of the EC and that it is only subject to the Constitution of South Africa and other related laws. No person or organ of state may interfere with the functioning of the EC. The EC is only accountable to the National Assembly and reports on its activities and the performance of their functions to the National Assembly once a year.
110. Article 61 (5) of the Zimbabwe Constitution as amended on 30th October 2007 states that the EC shall not, in the exercise of its function, be subject to the direction or control of any person or authority. In the Kingdom of Swaziland, not having an EC, the Chief Electoral Officer in terms of section 5(5) of the Electoral Office Order is tasked to act independently and may not be subjected to the control of any person or authority although appointed by the King. The Constitution (Section 65A) of Mozambique determines that the Electoral Management Body is an independent and impartial body. It does not yet have its own legal personality and is as such not an independent legal entity. It functions more as a government department.
111. In Zanzibar the legal provisions of the Constitution of the United Republic of Tanzania (Cap 2) of 1977 are applicable. The *Election Act* guarantees the independence of the Zanzibar EC. Article 119(12) provides that in the performance of its duties, whether in Tanzania or in Zanzibar, the EC is not

bound to obey any order or to follow directions of any person or any department of the Government or the advice of a political party. Article 74(11) of the Tanzanian Constitution applies. The Tanzanian EC is, as it also is in Zanzibar, an autonomous department of the government (Art. 74(7)). The independence of the EC can be deduced from the provision in Article 74(12) of the Tanzanian Constitution that “no court shall have the power to inquire into anything done by the Electoral Commission in the discharge of its functions in accordance with the provisions of the Constitution”.

112. Under Article 76 (1) the Zambian Constitution makes provision for the establishment of an independent and autonomous EC and spells out the constitutional functions of the EC. The Zambian EC is governed by the *Electoral Commission Act No. 24 of 1996*. Its *Electoral Act (Cap 13)* provides that “in the exercise of its function under the Constitution, the Commission shall not be subject to the direction or control of any other person or authority”.

113. In Malawi, the Constitution (Section 76(4)) and the *Electoral Commission Act* (Section 6(i)) guarantee the independence of the Malawian EC. Chapter VII, Section 76(4) of the Malawi Constitution states that “the Electoral Commission shall exercise its powers, functions and duties under this section independent of any direction or interference by any other authority or any person”. There is, however, the proviso that for the purpose of accountability “the Commission shall be answerable, and report directly to the President on the overall fulfillment of the functions and powers of the Commission”. Such a stipulation can be perceived as compromising the independence of the Commission.

114. In the Kingdom of Lesotho the EC is considered independent as stated in Section 66 of its Constitution. In the Democratic Republic of Congo the Electoral Commission is a neutral body and has administrative autonomy. According to the Congolese Public Law, it is endowed with a legal personality. The *National Assembly Election (Amendment) Act of 1997* refers to the impartiality and independence of the Commission. The Constitution of Botswana states in Article 65A that there shall be an independent Electoral Commission.

Recommendation 3

In-depth attention must be given and reflected in the *Electoral Act* pertaining to the independence of the EC, what it entails and how it must best be practiced. During the consultative process, the importance of the independence of the EC and assurances that there can be no interference by government in the activities of the EC, were concerns that were repeatedly raised. Independence is strongly related to the credibility of the EC.

Time schedule for the appointment of the Electoral Commission:

115. During the consultative process, and also by means of submissions to the discussion, concerns were raised relating to the prolonged period that it takes to appoint electoral commissioners. It has been requested that a definite time period be established.

Recommendation 4

The following time schedule is proposed: Fourteen (14) calendar days for the advertisement of vacancies. Three calendar days set aside for interviews, which should be open to the public for observation. Within three (3) calendar days, the nominations are submitted to Parliament. Parliament approval should be executed within seven (7) calendar days. Provision should be made for summoning of Parliament should it be required.

Within fourteen (14) calendar days of receipt by the President of Parliament's approved candidates, the President shall appoint the members of the Electoral Commission, and thereafter announce the appointments in the Gazette.

The same length of time should be applied when vacancies in the Electoral Commission occur. Advertisements should be placed for a vacancy within seven (7) calendar days after the vacancy has been announced in the Gazette. The Director of Elections performs such tasks.

Composition of the Electoral Commission:

116. The present EC is constituted of five (5) members, this can be considered as sufficient. Four (4) to eight (8) electoral commissioners is the usual practice in SADC countries.

117. The suggestions made during the consultative process varied between five (5) to seven (7) members. The general trend was that Namibia should continue with five (5) commissioners, selected from eight (8) candidates. One submission recommended that the President should appoint at least two (2) from his party or ruling party and the other three (3) from opposition parties, or alternatively appoint all five (5) commissioners from the ruling party. Such proposals would contradict the representativeness of the Electoral Commission and would exclude a democratic selection process.

118. In terms of numbers, the practice in SADC countries is: South Africa: five (5) members, one of them a judge. Zanzibar: seven (7) members. Zambia: five (5)

members. Chairperson must hold high judicial office. Malawi: nine (9) members. Chairperson: a High Court judge. Democratic Republic of Congo: twenty-one (21) members. Botswana: seven (7) members. Chairperson: a High Court judge. Mozambique: Nineteen (19) members. Swaziland: Five (5) members. Zimbabwe: Five (5) members, of which at least two (2) must be women. Chairperson must be a person qualified to be a High or Supreme Court Judge. Tanzania: Seven (7) members. Chairperson and Vice Chairman must be judges of the High Court or the Court of Appeals, or advocates with at least 15 years experience. One member must come from the Tanganyika Law Society, and the President proposes the four (4) other members. No commissioners are allowed to be members of a political party.

Recommendation 5

Five (5) candidates out of the submitted eight (8) nominated candidates to Parliament are approved by Parliament and appointed by the President. Not less than two (2) of the appointees must be female. In the event that Parliament cannot approve two (2) female candidates, then in respect of not sufficient number of female candidates, the position is re-advertised. Gender and quality are concepts that should go together.

The candidates' qualifications, criteria of appointment and positioning are dealt with separately.

Term of Office:

119. The present term of office for electoral commissioners in Namibia is five (5) years. Commissioners can serve a second term of office.

120. The practice in SADC countries is as follows: South Africa: seven (7) years. Malawi: four (4) years. Tanzania: four (4) years. Zambia: not more than seven (7) years. Zimbabwe: five (5) years. Botswana: a period of two successive lives of Parliament.

Recommendation 6

The commissioners should be appointed for five years to guarantee continuity. Sitting members can apply for a second term of office but no term thereafter. They must go through the same application and selection processes as applicable to all other candidates.

In order to ensure best practice and continuity of expertise, it is recommended that when the next Electoral Commissioners in Namibia are appointed, the following should be considered: Two (2) Commissioners are appointed for two-and-a-half years (2½), and three (3) Commissioners for five (5) years, including the Chairperson. After two-and-a-half (2½) years, two Commissioners are appointed for five (5) years. The three other Commissioners continue to serve the remaining two-and-a-half (2 ½) years of their term of office. Then, three (3) Commissioners, including the Chairperson, are appointed for five (5) years. Such an arrangement secures not only continuity, but ensures that whenever elections take place, at least a portion of experienced Commissioners are in place.

For the sake of absolute neutrality, it should be avoided that the EC is composed of party political representatives.

For the sake of the proper working and performance of the EC, it is proposed that only the Chairperson of the Electoral Commission should be appointed in a full-time position. The ever-increasing workload and responsibilities demand that the position of the Chairperson of the Electoral Commission should be full-time. This is practiced in a number of SADC countries. In addition, the Electoral Commission should play a decisive role in the functioning of the Directorate of Elections. It should also enhance its own role performance. A full-time position for the Chairman of the Electoral Commission is therefore recommended. If appointed in a full-time position, there should be security of tenure.

The expiry of the term of office of the Commissioners should be changed as per recommendation above in order to ensure that their retirement does not fall in election years, and that all commissioners have at least two years experience before every election.

It is not only expected from Electoral Commissioners to take on particular responsibilities in the proposed Electoral Commission committees (refer to recommendation 11), but also that they regularly visit all regions, constituencies and local registration and polling entities, as well as gain experience during elections in SADC countries and elsewhere.

Selection Committee:

121. The following examples reflect the practices applied in SADC countries:
122. In Namibia the selection committee is established by the Committee of Privileges of the National Assembly and is made up of one staff member of the High or Supreme Court (chairperson) nominated by the Chief Justice, one legal

practitioner nominated by the Law Society, and one person from the staff of the Ombudsman nominated by the Ombudsman.

123. In South Africa the selection panel consists of the President of the Constitutional Court who acts as chairperson, a representative of the Human Rights Commission, a representative of the Commission of Gender equality, and the public protector. In Zanzibar the selection committee is composed of two (2) members from the ruling party and two (2) from the opposition party. In Malawi and in Swaziland the Judicial Service Commission forms the selection body. In Zimbabwe it is the Parliamentary Committee on Standing Rules and Orders and Judicial Service Commission.

124. All are bodies of high integrity and standing in society.

Recommendation 7

The Director of Elections informs the Secretary of Parliament to initiate the appointment of the Electoral Commissioners.

The composition of the selection committee for the members of the Electoral Commission should be constituted of the Registrar of the High Court (Chair), the President of the Law Society and the Chairperson of the Public Service Commission.

The selection committee's impartiality must be guaranteed. It must adhere to the principles of transparency and openness. The Chairperson is the holder of the records.

The Secretary of Parliament is the convener of the Selection Committee. The Director of Elections acts as the secretary of the Selection Committee.

Non-governmental organizations shall be invited to be observers to the selection committee meetings by means of advertisements in two daily papers.

Criteria for Appointment as Commissioners:

125. During the consultative process and in several submissions, special emphasis was put on the quality and expertise of electoral commissioners, and it was stated that such criteria must be made public.

Recommendation 8

The criteria for becoming a Commissioner (namely what the necessary qualifications and experience are) need to be examined and elaborated on. They then also duly need to be reflected in the *Electoral Act*.

Electoral Commissioners must be Namibian citizens and registered voters. They should have prominent standing in society, possess at least a grade 12 qualification, be above the age of 21, should have sound legal knowledge, a high standard of professionalism, sufficient management capacity, sound capability, have a clean criminal record, integrity, political impartiality and mediation capacity. Commissioners may not be political party office bearers or active politicians. They must be known to be promoters of democratic values and principles.

Former political office bearers, who have not been politically active for five years and not currently holding any party political position, may be considered for appointment as commissioners. It has been proposed that political parties can nominate candidates for the position of Commissioners; however, it would seem that the independence and impartiality of Electoral Commissioners would be enhanced if political parties did not nominate Commissioners.

The names and qualifications and other criteria (e.g. age, gender) of applicants should be made public in the Government Gazette and in the local media. The media and the public should be allowed to attend the interviews.

To reiterate the seriousness of their tasks, stipulations should be made in the Act emphasizing the obligatory attendance of EC meetings by the Commissioners and under which circumstances, other than the natural ending of his/her term of office, a Commissioner's appointment can be terminated. Not attending two successive EC meetings without being excused for a valid reason by the Chairperson of the Electoral Commission should be grounds to terminate the Commissioner's membership of the EC. It will immediately cause a vacancy. (For the procedures to be followed in such instances see recommendation 4).

Presently no deadline is stipulated regulating when vacancies in the EC must be advertised, hence the time lapse between the vacancy opening up and the filling of said vacancy. This applies for both casual vacancies and the end of term of the Electoral Commission. The appointment process should commence in good time and long before the term of office of the existing EC expires and when vacancies have to be filled. The time period between advertisement on the selection of candidates and the appointment of Commissioners should be clearly stipulated in the Act, and should not extend beyond the period of one month. (For reference see recommendation 4.)

During the selection process it must be made clear to candidates that should they be appointed as Commissioners, they must have sufficient time at their disposal to attend to all the tasks expected of them. If the practice of part-time Commissioners - except for the Chairperson - is continued, then they should be paid a monthly allowance (not salary as this would make them public officials) and a sitting allowance when the proposed committees meet.

The Chairperson of the EC must be a suitable and competent person with proper legal qualifications and with a proven legal background and experience. Knowledge on electoral matters is a *sine qua non*.

This person could be a retired judge, a senior legal personality (e.g. advocate) with a minimum of fifteen years' legal experience and high standing in the legal fraternity, or an academic with legal qualifications. The Chairperson should have mediation and management capabilities.

It is not recommended that the Chairperson should be a present judge of the High Court or the Supreme Court, as it would compromise him/her when the EC is involved in court proceedings. No objection has been made in submissions and during the consultative process hearings against the appointment of a retired judge of the High or Supreme Court.

Appointing Authority of the Electoral Commission

126. The members of the EC are presently appointed by the President by Proclamation in the Gazette. The present procedure of appointment is transparent. Appointment has to go through the prescribed procedures of applying for such a position.
127. The overriding opinion during the public hearings and deliberations with other stakeholders was that in the appointment of the five (5) Commissioners, absolute transparency and impartiality should prevail. The final selection of five (5) Commissioners out of eight (8) candidates submitted by the Selection Committee should rest with Parliament, which shall also identify the Chairperson of the EC. The list of the five (5) selected Commissioners will then be submitted to the President for official confirmation. The President is considered by many stakeholders, and particularly by the political parties, as a political appointee and should therefore not be involved in the final selection of the Commissioners, but only sign and institute the appointment. The urge is to de-politicise the process of appointment of the Electoral Commissioners by not making the President the selecting and appointing authority.
128. Repeatedly it was stated during the consultative process that the population should have more say in the selection and appointment of the Electoral

Commissioners. It is considered as insufficient that the public is only allowed to attend the public hearings of candidates applying for the position of Commissioners.

129. It has been proposed that the candidates who have applied for the position of Commissioners should be made public and listed in the media before the selection process commences.
130. The criteria for selecting the prospective candidates should be made publicly known. Registered voters should be allowed to object to any application in writing. Presently they can be called to the selection committee meetings to verify their objections before they are interviewed.
131. The overwhelming opinion expressed by stakeholders is that the political parties represented in the National Assembly should have the final say in the selection of the five (5) candidates out of the submitted eight (8). A proposal was put forward that the Commissioners themselves should elect the Chairperson from their ranks, but this proposal received little support.
132. A certain proposal was made, representing a minority opinion, that the EC and the Director of Elections should be appointed by an international organization such as the UNO, and that the chairperson of the EC and the Director of Elections should originate from such an organisation and be run by the same. Such a proposal could be considered as undermining the sovereignty and independence of the Namibian State.
133. During the consultative process a further proposal was made that the President should appoint two (2) Commissioners and the National Assembly three (3). It was, however, not indicated who should appoint the Chairperson and whether the President should have the first option to choose two (2) out of the submitted eight (8) candidates, and thereafter the National Assembly appoints three (3) of the remaining six (6) candidates.
134. Another proposal added that only the Chairperson, selected from the proposed eight (8) candidates to serve on the Electoral Commission, be appointed by the President and the remaining four (4) commissioners by the National Assembly.
135. Considering all the inputs made during the course of the consultative process and also through the submissions, the issue of who should appoint the Commissioners and who elects the Chairperson of the EC it remains a contentious one. The principal issue is whether the President should in the final instance appoint the five (5) members of the Electoral Commission (five out of eight recommended candidates), or whether the National Assembly should do so. It could be argued that the President, as the person to approve the appointees, is of higher status than the National Assembly. The counter

argument is that the National Assembly represents all the parties, while the President represents one particular party only.

136. The following is an overview of who is responsible for appointing the electoral commissioners in SADC countries: In Zambia, the National Assembly. In South Africa, a committee of the National Assembly, proportionally composed of members of all political parties represented in that assembly, from a list of recommended candidates submitted to the committee by an independent panel. In Zambia, the chairperson and all other members are appointed by the President subject to the ratification by the National Assembly. In Zanzibar, by the President of Zanzibar. In Malawi, by the President in consultation with political parties represented in the National Assembly. In Zimbabwe, the President in consultation with Judicial Service Commission. In Swaziland, by the King. In Lesotho, the King who is advised by the Council of State. In the Democratic Republic of Congo, by the President and ratified by the National Assembly. In Botswana, by the Judicial Service Commission. In Mozambique, by Parliament. The Chairperson is elected by Commissioners. In Tanzania, by the President. In Zambia, by the President subject to ratification by the National Assembly.

Recommendation 9

The National Assembly should recommend for appointment four (4) Electoral Commissioners, and separately recommend the Chairperson of the EC. The names and the positions of the appointees (Chairperson and four Commissioners) shall thereafter be submitted to the President for appointment and publication in the Gazette. This proposal commands overwhelming support.

Reporting Authority

137. Presently, the Office of the Speaker in the National Assembly is the reporting authority responsible for handling the EMB's annual budget and defending it. The Speaker is also tasked with tabling the Electoral Commission's Annual Report.

138. It is an extra-ordinary task performed by the Speaker, who has no direct contact with the EMB and is not properly acquainted and involved with the daily running of the EMB.

139. The reasoning behind replacing the Office of the Prime Minister as the overseeing authority over the EMB initially and substituting it with the Office of

the Speaker was due to the accusation, particularly by political parties and the media, that the former arrangement politicized the EMB and put its independence in question. The Office of the Speaker was considered a more neutral institution.

140. One of the shortcomings of this new arrangement is that the Office of the Speaker is not entitled to introduce a bill or an amendment to an existing act, such as the *Electoral Act*. At Cabinet level it was then decided to task the Ministry of Regional and Local Government, Housing and Rural Development with the legislative task. The neutrality of this ministry is being questioned as it has particular interests in regional and local authority matters. Such interests could be reflected in ministerial decisions on regional and local governance, and related to electoral matters at these levels of governance.

Recommendation 10

It would be advisable to task the Ministry of Justice with the representation of particular interests of the Commission and its executing agency, the Directorate of Elections, in the National Assembly. It should perform actions such as submitting amendments to the *Electoral Act*, as well as answer any questions on electoral matters in the National Assembly. The Ministry of Finance should table the annual budget of the Electoral Commission and defend it. This ministry should also be available for consultation on all financial matters that the EC — by means of the Directorate of Elections — has to deal with.

In more detail, the Electoral Commission should report to and seek the cooperation of two ministries:

On financial matters it could cooperate and link with the Ministry of Finance. This includes drafting the budget of the Electoral Commission and the Directorate of Elections (combined budget) and introducing and defending it in the National Assembly. Should there be additional expenditure, it will also be motivated and attended to through the prescribed channels by the Ministry of Finance. The Ministry of Finance will also task the Auditor General's Office with auditing the annual income and expenditure of the Electoral Management Body (EMB), which comprises the Electoral Commission and the Directorate of Elections.

The Ministry of Finance should also be tasked with allocating a certain amount of financial resources to registered political parties participating in an election, in addition to the present practice of annually allocating money proportionally according to party strength in the National Assembly. The Ministry can,

however, delegate the task of administering the allocated money to the EMB for distribution and control.

On legal matters it could cooperate with the Ministry of Justice, which will not only submit the annual report of the EMB to the National Assembly, but will also be responsible for introducing amendments to the *Electoral Act* in the National Assembly. Any amendments to the Local Authorities Act and the Regional Councils Act which deal with electoral matters will remain the responsibility of the Ministry of Regional, Local Government and Housing and Rural Development.

Any electoral matters dealing with the election of regional councillors and local authority councilors should be referred to the *Electoral Act*.

Task Performance

141. The Electoral Commission is the supervisory body that deals with all matters related to the electoral process. It shall be responsible for the appointment of the Director of Elections and for the approval of the appointment of the EMB personnel in cooperation with the Director of Elections.
142. Although the EC must at all times protect its status of neutrality, impartiality and independence, it is not in a position of financial independence. It cannot generate its own financial resources and remains dependent on public funding. Furthermore, any amendments to the *Electoral Act* or any other Act related to electoral matters must go via the National Assembly. It can, however, issue proclamations and regulations.
143. The Chairperson of the EC remains responsible for the announcement of the results of the Presidential elections and all other tasks as identified in the *Electoral Act* and possibly in future in a separate EC act.

Recommendation 11

The quorum for Commission meetings should be defined in the Act; that is, that a two-thirds majority is required when decisions are sanctioned. A quorum consists of three (3) votes (three out of five Commissioners).

Section 7 of the *Electoral Act* provides for the establishment of committees of the EC. Serious attention should be given to the forming of such committees, each with clearly assigned tasks. The Chairperson of a committee must be a Commissioner. No Commissioner can be Chairperson of more than one committee. A committee should not be comprised of more than three (3)

persons, including the respective member of the EC assigned. The additional committee members are appointed by the EC. Such positions should be duly advertised for public nominations. The EC shall act as the selection committee.

If the committees were to be constituted of three (3) persons, then the quorum would be two (2) persons. Recommendations of a committee to the EC should have at least the support of two (2) of its members. Committee members shall receive a sitting allowance to be determined by the EC.

The composition and tasks of the committees could be as follows:

The Chairperson of the EC is to be the overarching authority overseeing the operation and activities of the four (4) committees of the EC. He/she can attend without voting rights any meeting of these committees.

General Service and Human Resources Committee:

A member of the EC to be the Chairperson of the committee dealing with the composition and professional standard of appointed officials (permanent and temporary) of the EMB, and with finance (e.g. control of expenditure by the Directorate of Elections, budget proposals, tenders).

Outreach Committee:

A member of the EC to be the Chairperson of the committee dealing with civic and voter education, liaison with political parties, and all matters related to political parties (e.g. financing, applications and observing the Code of Conduct, access and allocating time to political parties on radio and television).

This committee will also be dealing with public relations, the collection of information related to electoral matters, the publication and distribution of information material, liaising with the media and public in general, dealing with electoral observers, and doing EC workshops and research.

Electoral Operation and Referendum Committee:

A member of the EC to be the Chairperson of the committee dealing with electoral operation and referendum matters.

Governance Committee:

A member of the EC to be the Chairperson of the committee dealing with legal and logistical matters (e.g. amendment of the *Electoral Act* and any other act related to elections, review of legislation to that effect, submission to government to institute amendments to Acts (e.g. *Electoral Act*, *Regional Council Act*, *Local Authority Act* and the *Constitution*), institute rules and

regulations, issue proclamations, mediate and resolve conflicts, and when needed refer matters to that effect to the Electoral Court/Tribunal.

Overarching matters related to the electoral process should be dealt with by a full EC in session.

The institution of EC committees (in some SADC countries called commissions) does not imply interference with the activities of the Directorate of Elections. It exercises compliance with and control over activities by the Directorate of Elections, reflecting a stronger linkage between the EC and Directorate and to support the latter in its task performance. Policy making on electoral matters can only rest in the hands of the EC. The four committees' task is to exercise control over the activities and role performance of the Directorate and enhance the efficiency of the same.

Committees of the EC are not policy making bodies. Their task is to put to the full EC recommendations taken by the respective committees for a final decision by the EC. Only the full EC can take final decisions. Chairpersons of the committees remain in constant contact with the Director of Elections in a cooperative spirit. Such relationships should be marked by common interests and by adhering to the principle of partnership.

The committees should meet once a month in the period between elections, but more regularly during election periods.

Furthermore, the EC needs a link with a ministry for contact and advice on electoral issues that are outside the authority of the EC. These could be technical issues, such as the availability of public transport during the registration and electoral process, as well as tenders and other material issues.

The EC is responsible for the devising and application of the Codes of Conduct for political parties, electoral officials, the police, the observers, party agents and others related to elections. In South Africa a separate Code of Conduct has been established for 'Staff and Commissioners'. It has also established an 'Independent Electoral Commission Parliamentary Monitoring Group'.

Additional task assignments to the Electoral Commission:

Time allocation to political parties, associations, organizations on radio and television with regards to election related matters and the role of the media during the election campaign

144. Time allocation to political parties, associations and organizations, as well as independent candidates on radio and television, has become a contentious issue and requires serious attention and legal enactment.
145. Access to state-owned media — especially the electronic media (radio and television) — is a controversial matter in many countries. The problem manifests itself in terms of the quality, quantity and timing of coverage. According to Kadima and Booyesen (2009:13-14), problems are often evident when there is excessive coverage of the governing party and a failure in covering the activities of the opposition, coverage of the governing parties is at prime times while the opposition is given coverage at odd hours, and there is negative coverage of the opposition. The authors further state that the failure of the state-owned media to cover the contesting political parties and candidates equitably has contributed to making the playing field more favorable to the governing party. This has also deprived voters of the possibility of hearing a variety of views from the contesting candidates and parties in order for them to make informed choices. Angola, the DRC, Botswana, Mauritius, Namibia, Malawi and South Africa are cited by the authors as examples.
146. At public hearings in the South, accusations were leveled against the NBC of it neglecting the South at the expense of the North, and that the South is disadvantaged when it comes to time allocation on the radio and television, which particularly affects the political opposition parties in the South. It was furthermore alleged that the ruling party is advantageously treated on radio and television at the expense of opposition parties.

Recommendation 12

In the *Principles for Election Management, Monitoring and Observation in the SADC Region*, it is recommended that the *Electoral Act* should make *inter alia* provision for equal access to the public media for political parties and candidates, as well as facilitate the establishment of an independent media authority for regulating and monitoring the media not only during an election period, but on a continuous basis.

Time allocation should be dealt with by the EC in consultation with the public broadcaster and the participants in an electoral process. Should disputes arise on any matter dealing with time allocation as well as on the content of broadcast programmes compiled by the political parties, organisations and associations, the matter should then be referred to the Electoral Court/Tribunal for a decision.

When time allocation is attended to then consideration should be given to the political diversity prevailing in Namibia. The principle of fair time allocation on

public and private radio and TV stations should be applied to all political parties, associations and organisations taking part in an election. This ethical principle should also apply to political parties taking part in an election for the first time. It is upon the EC to monitor and regulate the fairness of the time slots allocated upon public broadcasters.

The Namibian Broadcasting Corporation (NBC) is a public institution and financed by the government. It is therefore owned by the public, more specifically by the Namibian taxpayer, and should therefore be answerable to the public. The NBC should ensure equitable and fair coverage on parties participating in an election on news and current affairs programmes. Free airtime should be allocated to all registered political parties, organizations and associations. Should registered political parties participating in an election buy extra time the NBC should determine the rates to be paid? Political organizations (parties, organizations, associations) should not be permitted to buy time on foreign broadcasting stations for election purposes or establish an own broadcasting station outside the country for such purpose.

In cooperation with the NBC, the EC should take a decision whether equal time should be allocated to all political parties, organizations and associations taking part in an election, or whether it should be according to their representativeness in the National Assembly, in regional and local authority councils, and how often coverage is then given.

Another principle that needs to be agreed upon must be the length of time and how often in a week a political party, organization or association should be allowed to make use of broadcasting time. Only after the last day of nominations for political parties, organizations and associations, that is, with the commencement of the electoral campaign, should the public broadcaster allow the participating political parties, organizations and associations to commence with their election programs according to the agreed upon rules.

To foster a healthy relationship between the public and private broadcasting and television entities, a Code of Ethics should be developed that should not only relate to party political time allocated, but also to news broadcasts dealing with election related matters.

During the consultative process a proposal was made recommending that during the election period, five minutes be allocated daily in a feature slot during prime time to three different parties which are featured in alphabetical order.

There should be no time restriction on paid political campaign advertising. The broadcast programs by political parties, organizations and associations must

conform to standards laid down in the Code of Conduct for political parties, organizations and associations.

Objections to the publication of political party advertisements and allocated programs, as well as those of organizations and associations partaking in an election, should be submitted in writing to the Electoral Commission for determination with appeal to the Electoral Court/Tribunal. Any materials deemed likely to incite unlawful, illegal, unethical or criminal actions or condone such actions should be prohibited. This applies to both free and paid broadcasting by political parties, organizations and associations.

As the printed media also plays an important role during an election campaign, it should commit itself to factual reporting. The Electoral Commission should, in cooperation with the Namibian Media Council, develop a Code of Conduct for public broadcasts (radio and television) and the printed media. Such a Code of Conduct should be made applicable during the election process, from the registration of voters till the announcement of the official results. Should there be any complaints and disputes that cannot be resolved by the election authorities, such matters should then be submitted for arbitration and resolution to the Electoral Tribunal/Court.

Annual Report by the Electoral Commission

147. If the responsibility of the Office of the Speaker is shifted to a ministry or ministries (e.g. Justice/Finance), then such a ministry or ministries could be tasked with special assignments which need the support of the National Assembly. For example, the EC's Annual Report is sent directly to the Ministry of Justice for tabling and defending in the National Assembly. The report is thus directly submitted to the Ministry of Justice, and no longer to the President for submission to Parliament.

Recommendation 13

It is recommended is that the EC's Annual Report no longer be tabled in the National Assembly by the Speaker, but instead by the Minister of Justice. It is therefore no longer submitted to the President first. After approval in the National Assembly, the Report is then sent to the Office of the President for noting. It is furthermore recommended that any amendments to the *Electoral Act* should in future be handled by the Ministry of Justice, as well as all matters related to law.

Part 3

Electoral Commission Act

148. It has become evident that a heavy onus rests on the Electoral Commission to perform its varied tasks efficiently, adequately and conscientiously. The Electoral Commission is not an occasional body that convenes from time to time; it is a permanent body. As is the case in South Africa, there should be a separate piece of legislation on the Electoral Commission in Namibia.
149. There is strong support in society, as indicated during the consultative process, for a separate Act on the Electoral Commission. This is the practice in a multitude of SADC countries. In most SADC countries the Electoral Commission and its expected task performance, as well as other related aspects, are reflected in the Constitution of such countries. Such practice should also be applied in Namibia and as such reflected in the Namibian Constitution.
150. A separate Electoral Commission Act, which will underscore the specific tasks of the Electoral Commission separate to those of its executing agency, namely the Directorate of Elections, will grant the Electoral Commission the necessary independent status and positioning in the electoral process. It is felt, as has been reflected during the consultative process as well as in submissions, that there should be a separate piece of legislation on the Electoral Commission that will guarantee its independence and autonomy as a separate body. It should also reflect that the Electoral Commission should have more decisive and executive power than the Directorate of Elections.
151. The Electoral Commission is an independent and autonomous body. It is not a government institution but a government agency similar to the Law Reform and Development Commission of Namibia. During the consultative process it was emphasized that it should not be a political body, but an independent body serving and accessible to the public.
152. A separate Electoral Commission Act would imply a division of tasks between the Electoral Commission and the Directorate of Elections. Together they form the Electoral Management Body and thus cooperate intensively with each other, but with each one commanding its own domain. There should be a clear Electoral Commission-Directorate of Elections separation of roles. Clear lines of individual responsibility should be established for service delivery among both commissioners and staff.
153. The term 'electoral management body' refers to the body or bodies responsible for electoral management. In Namibia the Electoral Commission is the supervisory and policy-making body, and the Directorate of Elections the

executive body. The inter-linkage between the two bodies and their tasks and role division must be clearly defined legally.

Recommendation 14

The tasks assigned to the EC must be determined in detail and legally condoned. The EC is the exclusive authority to administer the conduct of elections. In future it shall in all probability also administer referenda. The Namibian Constitution should be improved to contain a chapter on the Electoral Commission, which determines the independence and autonomy of the EC. The EC needs constitutional standing and protection. This is the practice in most SADC countries.

No member of the executive and legislative authority or any other person shall interfere with the EC. It shall only be subject to the Namibian Constitution and any law.

In addition, as is the practice in many SADC countries (e.g. Zambia, Tanzania, South Africa and Zimbabwe), a separate act on the Electoral Commission should be drafted. It should deal *inter alia* with the Electoral Commission's independence, its composition, the appointment of the EC, its function, task performance and other related matters.

Consideration should also be given as to how the EC could broaden and improve its work performance.

The Electoral Commission Act should deal with the structural independence (e.g. autonomy, legality, composition) of the EC, its functional independence (e.g. transparent working, integrity, impartiality), operational independence (e.g. assigned tasks such as voter registration, conduct of elections, registration of political parties, voter education), its obligations and expected performance (application of a performance assessment), and financial independence (e.g. annual budget, accountability).

An Electoral Commission Act should contain:

- Legal position of Commission (e.g. status, functions, objectives);**
- Independence, impartiality and professionalism of Commission;**
- Establishment and composition of Commission;**
- Qualifications of candidates for the position of commissioners;**
- Disclosure of interests;**
- Selection of commissioners;**
- Appointment of commissioners;**
- Tenure of office;**

Filling of vacancies;
Terms and condition of office (e.g. remuneration and allowances);
Meetings of Commission;
Removal of commissioners from office;
The right to institute disciplinary actions against the Director of Elections and staff;
Committees of Commission.

The Electoral Commission Act must also deal with the supervision and control of electoral processes (e.g. registration of voters and political parties, nomination of candidates and parties, voting, results of elections)

Other tasks to be performed by the Electoral Commission as should be contained in the Electoral Commission Act:

Liaison with political parties, the media and public;
Promotion of civic and voter education;
Development of electoral expertise and technology;
Institution and application of Codes of Conduct;
Control over disclosure and dissemination of information;
Control over and administration of electoral observers;
Regulatory and executive power of the Commission (e.g. functions, objectives);
Conflict resolution/mediation;
Amendments to the *Electoral Act* and issuing Proclamations and Notices in the Gazette;
Establishment of and control over Directorate of Elections;
Appointment of Director of Elections as well as of permanent and temporary staff;
Securing the representation of the diverse social and cultural groups and seeking their cooperation;
Relationship with the Public Service Commission (e.g. pertaining to the establishment and appointment of staff, grading);
Funds and finances of the Commission;
Financial year (time frame);
Accounts/estimates of revenue and expenditure;
Auditing;
Ex-government financial contribution;
Annual reports of the EC's activities;
Exemption from liability;
Legal proceedings against the Commission.

Part 4

Directorate of Elections

The body and its leadership

154. The *Electoral Act* refers in Article 11 to the establishment of the Directorate of Elections and the appointment of the Director of Elections. Section 5 of the *Electoral Amendment Act* (Act 30 of 1998) refers to the Director as the accounting and chief executive officer of the EC. He/she is the operational head of the Directorate of Elections, which is the executive agency of the EC. The Director also acts as the ex-officio secretary to the EC and subject committees without voting rights. He reports directly to the EC. The tasks to be performed by the Director are clearly reflected in the *Electoral Act*.
155. The secretarial tasks to be performed by the Director as ex-officio secretary of the subject committees can be delegated to the four (4) deputy directors, each one seconded to one of the subject committees.
156. Currently, the Secretary to the National Assembly initiates the procedure whereby the Director is appointed. The Director is contractually appointed for a period of five (5) years. The criteria for selection and appointment are stated in the *Electoral Act*. With the Secretary of the National Assembly acting as Secretary to the Selection body, which consists of all members of the EC, eventually two (2) suitable candidates are submitted to the President, who makes the final choice and appoints the chosen candidate.
157. How to form a firm relationship and how to share responsibility between the EC and the directorate has already been indicated when the forming of specific EC subject committees was discussed. Such inter-linkage is an important process that can ultimately determine the success of the EMB. It can result in improved understanding between the EC and the Directorate regarding their specific roles and task performances.

Recommendation 15:

A different procedure for the appointment of the Director of Elections than hitherto should be followed. The EC should initiate the appointment process of the Director of Elections. The process of filling the position of the Director should commence at least six (6) months before the present term of office of the present incumbent expires, and the incoming Director should be appointed

not later than one month before the term of office of his/her predecessor expires, even though the incoming Director will only take office after the term of office of the incumbent Director has expired.

The position of the Director should be made more independent. The Director should not be exposed and receptive to pressure from politicians or undue influence, and must adhere constantly to democratic principles and processes as stated in the Constitution.

The principles of democratic choice, neutrality, transparency and professionalism should be reflected in the appointment of the director. The names and particulars of applicants shortlisted to fill the position of Director should be released to the media.

It shall be the responsibility of the EC to advertise the post of Director in the media. It is also the responsibility of the EC to appoint the Director of Elections. The decision shall be decided by a majority of votes.

It is recommended that the selection of applicants for the post Director of Elections be performed by the EC subject committee General Services and Finance. It should conduct the process of short-listing, interviewing, selecting and recommending to the Electoral Commission the suitable applicants.

The public should be given an observer role during the interviewing of the applicants. It should be left to the discretion of the EC whether in the appointment of the Director all registered political parties and representatives of the public (e.g. NGOs) should be consulted.

The Director is appointed by the EC for a contractual period of five (5) years and can be re-appointed but must follow the same application process when he/she was appointed for the first time.

The EC shall notify the President and the National Assembly of its decision who has been appointed as Director of Elections. Such an arrangement confirms the autonomy and independence of the EC on any matter related to free, fair, transparent, responsible, impartial and credible elections.

Once the Director of Elections is appointed, the name of the incumbent of this position shall be published in the Gazette.

The General Services and Finance Committee is also responsible for the selection process of the four deputy directors, each one assigned to one of the subject committees. The deputy directors will be appointed by the Electoral Commission. The same committee could also be involved in the selection and appointment of the secretary to the Electoral Commission, of the secretary to the four (4) selection committees, of the secretary to the Director of Elections and of the secretary to the Delimitation and Referendum entity.

The Directorate of Elections as integral part of the Electoral Management Body (EMB)

158. It is the task of the EMB, thus both the EC and the directorate, to promote confidence and trust in electoral processes and prove to be a credible and trustworthy institution. Nearly all SADC countries have opted for independent EMBs. EMB independence could mean to be both structurally (organizational) and behaviorally (processes determined by values and morals) independent.
159. The former Director of Elections, Joram Rukambe, is correct when he states that there is a correlation between the level of public trust in elections and democracy at large and the nature of the EMB a country opts for.
160. According to Rukambe (2006:8) EMBs may be categorized in three ways: Executive power (to call and conduct elections, certify and nullify elections, etc.); judicial power (to investigate and resolve disputes which could also be separately dealt with by an Electoral Court/Tribunal); and legislative power (proposing laws and law amendments, making regulations, instituting directives that are binding on the electoral processes).
161. It is also upon the EMB to be involved in the appointment, training and capacity building of temporary and permanent staff. It should be a knowledgeable staff familiar with administration and the responsible delegation of tasks, and conversant with election related legislation and proclamations. The staff should also know how to conduct human relations, be willing to learn and be committed to its tasks, as well as show understanding and concern, and be able to mediate and contribute to conflict resolution.

Recommendation 16

There should be no interference allowed with the independence of the Directorate of Elections by outside forces such as politicians, public administrators and the public at large. The independence and neutrality of the Directorate of Elections must be legally safeguarded. The EC is accountable for its activities to the National Assembly. Despite its financial dependency on government resources for the operation of the directorate, it cannot be used to interfere with its independence. It cannot be subjected to the control of any authority other than the EC. There should, however be a review of the Directorate of Elections' tasks and role performance during elections and the periods in between elections. The time frame of such review, on which needs to be decided upon, should be reflected in the draft bill of the revised Electoral Act.

The Directorate of Elections should structure a process that allows for public scrutiny of all its processes and ensure accountability to the broader body politic. It rests upon the EC to appoint permanent and temporary staff members in line with Public Service laws, rules and regulations. Appointees should not necessarily originate from the public sector, but also from the private sector. The task is to appoint the best-qualified and most suitable personnel. Fair gender representation and quality of appointment should be secured.

The Director reports on all managerial and administrative matters and decisions taken to the EC. He/she should be tasked to apply performance management and evaluation processes across the board. He should also undertake a thorough management system review to be on par with practices and methods in the private sector.

The overall aim of the Directorate of Elections should be quality management and administration, transparency, trustworthiness and accountability towards the government and the public. The government is expected to contribute to an enabling environment that guarantees an unhindered electoral process.

Financing of the EMB

162. As has already been indicated, the Electoral Management Body (EMB) comprises the Electoral Commission and the Directorate of Elections. Both entities are part of the same budget. The costs for the functions performed by the EMB as determined by the *Electoral Act* are defrayed from money appropriated by the National Assembly on an annual basis. The EMB should be empowered to engage in fundraising activities to boost its finances. External forms of income must, however, be duly declared to the Ministry of Finance as an income source.
163. The financial dependency on state resources by the EMB to finance its functions and operations must not affect or interfere with its independence and autonomy. It is not foreseeable that the EMB can finance its operations from sources other than those granted by the executive. The financial autonomy of the EMB must, however, be secured. This must be reflected in EMB procurement policies and practices.
164. In SADC countries the needed financial resources are either derived directly from the Ministry of Finance with an own budget and included as a separate item in the Ministry's annual budget, or are derived from the Consolidated (Revenue) Fund (e.g. Zanzibar, Zimbabwe, Tanzania, Lesotho).

165. Resources should be made available on an annual basis as a lump sum and not by way of installments. Some SADC countries make provision for a separate act on election finance, but most integrate it into the *Electoral Act*. It is up to the Namibian Government whether Namibia should have its own Election Finance Act, or whether financial matters pertaining to the EMB should remain integrated into the *Electoral Act*.
166. When the Directorate of Elections was established in 1992 it was responsible towards the Office of the Prime Minister for financial matters (e.g. budget, additional expenses). Presently the Office of the Speaker is responsible for tabling the annual budget in the National Assembly. The reason for such an arrangement was to emphasize the impartiality of the Commission and its Directorate of Elections, but — as already indicated — it has functional and procedural disadvantages.
167. The tasks of the EMB can only be executed efficiently and effectively if adequate funds are secured on an annual basis.
168. The EMB has at all times the right to decide on its financial policies and practices, but this does not exclude consulting with the Ministry of Finance without abandoning the electoral bodies' independence. Financial autonomy is important and should be reflected in procurement policies and practices.
169. Should the Ministry of Finance become the Ministry responsible for tabling the annual budget of the EC in the National Assembly, an important linkage is established. The EMB will indicate to the Finance Ministry the amount of financial resources needed for the proper running of the EMB and all the assigned tasks. The Ministry again will indicate to the EMB the financial sources available. It is a negotiating situation that eventually satisfies both bodies and enables the Ministry of Finance to present the EMB's budget to the National Assembly for approval. As the Ministry of Finance will have thoroughly scrutinized the budget of the EMB before tabling and defending it in the National Assembly, undue delays can be avoided. The budget, and consequently the annual financial report, should not only reflect transparency, but also the correctness of financial activities. Ultimately, the EMB should be accountable to the public for its activities.
170. Section 128 of the Namibian *Electoral Act* is not sufficiently clear and elaborative on payment and expenditure and where the funds for the running of the EMB and its activities should come from. It only states in article 128 (1) "any payment and any expenditure to be, or which may be, made or incurred under this Act, shall be defrayed out of funds appropriated by law for that purpose".
171. Nothing is said in the Act on auditing the EMB's income and expenditure. The financial records of the EMB must be audited annually by the Office of the

Auditor General, and the subsequent report submitted to the National Assembly for approval.

172. Clear indications must also be given in the Act as to whether the EMB must at all times strictly follow the central tender board rules. Exemptions should be indicated with the approval of the Ministry of Finance. Situations often arise during an electoral process that demand swift decision making, and at these times there is often not sufficient time for going through all the normal tender procedures and requisition processes. The Act should thus indicate exemptions and state under which circumstances they would be made.

Recommendation 17

As has already been indicated, the Ministry of Finance should present and defend the annual budget in the National Assembly.

The Ministry of Finance is not entitled to interfere with the activities of the electoral bodies, but is obliged to respect their independence and neutrality despite being tasked with financial matters on behalf of the Commission and the Directorate.

It is necessary to clearly define in the *Electoral Act* all matters relating to the financial resources of the EC, such as annual budget allocation, additional fundraising, cooperation with the Ministry of Finance, responsibility towards the National Assembly, and auditing of financial expenditure.

It should be determined to what extent the EC should be subjected to the tender rules, treasury instructions and other central government rules and regulations.

Another question that needs to be addressed is whether there should be a special budget vote for the EMB, thus independent of the budget vote of the Ministry of Finance, or whether a Special Fund should be established out of which the running costs of the electoral body are financed and is provided for under Article 125(3) in the Namibian Constitution and Section 9 of the *State Finance Act* (1991).

Tender prescriptions and obliged procedures should be examined, especially instances where exemptions might apply. An example would be a crisis situation where immediate decisions have to be made, and the normal procedures cannot be followed.

Decentralization of EMB activities

173. Considering Namibia's vastness, the formal decentralization of the EMB's activities has become a *sine qua non*. In each region a permanently appointed full-time regional director of elections is needed to act as a link between the region and the EMB.

Recommendation 18

Decentralisation of EMB tasks (to be defined) to regions (permanent) and constituencies (temporary). The overriding opinion during the consultative process was that the EMB should institute permanent regional offices headed by a regional coordinator appointed by the EC.

Permanent regional directors of elections located at regional offices of the EC should establish links with governors, regional and local authority councilors. In rural areas the regional directors of elections should build linkages with the traditional leaders and authorities. Regional directors of elections should be well acquainted with all electoral and related legislation (e.g. *Regional Council Act, Local Authority Act, Traditional Authorities Act, Traditional Leaders Act*).

Decentralized EC structures can assure continuity in the EC's work, especially where the EC has responsibility for recurring tasks such as continuous voter registration, voter education and information, tasks that the regional directors of elections should be trusted with. Decentralization by way of regional directors of elections as office holders can enhance inclusiveness and transparency in electoral management. It should also strengthen the links with the population and particularly the electorate.

Decentralization of electoral tasks must enhance responsibility at sub-national level, improve the coordination of task performance, exercise better control and ensure efficiency. Regional directors of elections can substantially assist in the recruitment and training of electoral officials.

The EC shall be entitled to regulate the relationships between the Director of Elections and the regional directors of elections on matters such as staffing, operations and administration at regional level. The regional director of elections is responsible for distributing all election material to the constituencies and polling stations.

Part 5

ELECTORAL PROCESS AS REFLECTED IN THE ELECTORAL ACT

Introduction

174. As laid-down in the *Electoral Act*, elections must be held at regular intervals within pre-determined timeframes. Elections should be conducted in a well structured manner that allows the leveling of the playing field without giving any contestant an unfair advantage.

175. Each election is conducted within the framework of an electoral cycle. It is comprised of different phases and must comply with prescribed requirements:

- Legal framework (Constitution, *Electoral Act*, Legislation, electoral bodies), and identification of the environment in which elections are conducted;
- The planning and implementation phase;
- Training of electoral officials and voter information;
- Voter registration; registration of political parties; nomination of candidates
- Electoral campaign;
- Operations on polling day (logistics and actions);
- Verification of election results (tabulation of results, complaints, appeals, official results).

176. The consultative process revealed a high level of mistrust and little confidence in the electoral process. This is an alarming situation endangering the status of elections as a democratic undertaking. Trust, tolerance and efficiency must mark the electoral process.

The Electoral Process

177. In accordance to the above, the Electoral Management Body's responsibilities are as follows:

- Registration of voters and compilation of voter lists;
- Registration of political parties;
- Nomination by parties and of candidates;
- Supervision of electoral campaigns;
- Recruitment and training of electoral personnel;
- Electoral planning;

- The electoral campaign;
- Polling;
- Civic/Voter education;
- Liaison with political parties, the media and other stakeholders;
- Drafting and application of Codes of Conduct;
- Accreditation of observers;
- Vote counting;
- Announcement/declaration of results;
- The tabulation of results;
- Mediation and conflict/dispute resolution;
- Reporting;
- The design and drafting of legislation;
- The drafting and publication of rules and regulations;
- Auditing;
- Archiving.

Electoral System

178. Article 28 of the Namibian Constitution provides for the direct election of the executive President. The President is elected by absolute majority for a period of five (5) years and can be re-elected for another term of five (5) years. The members of the National Assembly are elected according to the proportional representation (PR) electoral system and a list system is applied. The same system is applied at local authority level. Members of the Regional Councils are elected on a constituency basis by way of the first-past-the-post (that is, winner takes all) electoral system, also known as the plurality-majority electoral system.

Recommendation 19

Time is opportune to consider whether a mixed electoral system should be introduced at national level to add to the present composition of the National Assembly directly elected representatives.

It is furthermore recommended that a minimum percentage cut-off system for political parties to be represented in the National Assembly should be applied. A political party represented in the National Assembly should at least gain three (3) per cent of the votes cast at a general national election.

Voter Registration

179. Voter registration determines the ability of eligible voters to participate in an election and referendum, and is a key ingredient in the fairness of an election. A revision/reform of the *Electoral Act* should pay particular attention to increasing

the efficiency, quality and integrity of voter registration processes and procedures. Key components in a registration process are inclusiveness, fairness, accuracy and transparency. A registration process cannot be considered successful if it does not enjoy the trust of the electorate.

180. According to the *Electoral Act*, Section 15, a general registration of voters must take place not later than every ten (10) years. Section 15 (1A) of the *Electoral Act* states the second general registration of voters was determined for the period 1 July 2003 to 31 August 2003. Section 28 (A) of the *Electoral Act* provides for the continuous registration of voters. Voter registration is a voluntary process and no eligible voter is compelled to register.
181. Complaints were made and concerns expressed during the consultative process that the registration of voters has notable shortcomings, particularly in rural areas. An attitude prevails that the onus does not rest on the prospective voter to register as a voter, but that the authorities should approach him/her to register as a voter. This way of thinking needs to be changed.
182. During the consultative process it was suggested that next to the ID card which identifies the owner of such document as a Namibian citizen, an official document with a photo similar to the Namibian driver's license should be accepted for voter registration. A passport contains the ID number of an applicant and also a photo. Official and diplomatic passports are, however, not acceptable for registration. Application for an ID card is not sufficient proof for registering as a voter. Birth certificates should be permissible as a document of identification. **If only an ID card is accepted for voter registration, then the alternatives, which do not guarantee the identity of a person, would fall away. According to the Ministry of Home Affairs, 98% of the Namibian population above the age of 16 (qualifying age) are already in possession of an ID document.** The voter register should contain a photo of the registered voter and his/her fingerprint.
183. During the public hearings a proposal was made that an individual should have been resident in a regional constituency for at least twelve months before he/she is entitled to register as a voter there.
184. The *Electoral Act* refers to the permanent registration of voters which had its ups and downs in Namibia, but needs to be revived. The result would be a permanent national voters list, as is the case in South Africa. The permanent registration of voters should only be suspended upon the proclamation of elections at any level of governance.
185. Supplementary voter registration takes place when a vacancy occurs in a constituency at regional council level, or when the incumbent president dies or vacates his/her seat. The Minister of Regional and Local Government, Housing

and Rural Development has the right to dissolve a local authority council and institute a new election of local authority councilors. In this case a supplementary registration process is obligatory.

186. The stipulation in Section 15 of the *Electoral Act* that voters can be registered by statement under oath — that is, sworn statements — by two other persons claiming to know the applicant, remains contentious. This stipulation was necessary at a time when many prospective voters were not in possession of an ID card or birth certificate. However, the sworn statement stipulation can be misused and lends itself to abuse. Indications are that it has been misused in the past. It was rejected by most political parties and was strongly criticized during the consultative process and also in submissions. It should be done away with.
187. In the “White Paper” (Electoral Commission, 2011:11) a number of difficulties are referred to when a prospective voter intends to register without an ID document. Presently a prospective voter is still entitled to register via a sworn statement or by way of affirmation while not being in possession of a proper identity document. Guidelines are missing regulating the extent to which a deponent can be involved in supporting applicants for registration as voters. It is not clear how many persons a deponent is allowed to represent, a practice that has been misused. It is also not explained how well a deponent should know the person he/she is vouching for in order to register as a voter.
188. The general feeling is that Namibia has been independent for twenty-two years and there has been sufficient time and opportunity to obtain an ID document. Namibian citizens aged sixteen (16) and older are eligible to apply for ID documents. There are still more than two years to go before the next election phase, therefore there is sufficient time to obtain an ID card.
189. South Africa can be cited as an example. The South African *Electoral Act No. 73 of 1998* stipulates that a South African citizen wanting to register as a voter must present an official South African identity document (ID). The identity document has to include a unique bar code for which the Namibian ID makes provision.
190. It is worthwhile considering the South African method of voter registration. All applications for voter registration are computer matched and checked against the National Population Register (civil registry), which should be available in Namibia once the results of the 2011 national census are available, to establish eligibility to register. If the person is positively identified, she/he is added to the voter list; if not, the voter is contacted and informed. A voter can change his/her residential address information simply by referring to the ID number.

191. For the 2009 South African elections voter registration data was collected in the field using battery-powered portable 'zip-zip' barcode reading machines. These machines read the barcode on the ID document, and the data was sent by a wide-area network to the electoral headquarters, where it was matched to the National Population Register to verify identities and be compiled into a voter roll for each voting district (in Namibia it would be for each constituency and local authority). Thus, when a voter applies for registration, the barcode in his/her ID book is scanned using the 'zip-zip' barcode machine and the voter's residential address is recorded on a form. The 'zip-zip' machine produces a label confirming the application for registration and this label is stuck into the voter's ID book.
192. The barcode-based technology has been chosen by South Africa due to its compatibility with the ID documents, as well as its relative simplicity and accuracy, its ability to process large volumes of data quickly and its integrity controls. It was a great success.
193. The 'zip-zip' machines can hold the whole national voter roll and were used during the 2009 South African elections to screen voters at voting stations on voting day. They are uploaded with the national voter roll and are used to scan the barcode stickers in voter ID documents before voters enter the polling station.
194. Duplicates can be avoided and transfers (in Namibia moving from constituency or local authority area to another) matched as each unique national ID number can only have one active entry on the voter roll.
195. In the Namibian context voter rolls would then be permanently on display at each constituency office and local authority for verification, new registrations and amendments to registrations. Any person may lodge an objection at the electoral headquarters to any voter's inclusion on the voter roll for a voting entity (constituency, local authority).
196. Data from the National Population Register is also used to remove deceased voters from the voter roll in a constituency or local authority area.
197. To assist voters, the South African Independent Electoral Commission (IEC) installed a toll-free telephone number and set up a website whereby voters could check if and where they were registered.
198. The voter registration system used in South Africa has proven to be reliable and effective.

Recommendation 20

Given that it is nearly two-and-a-half years before the next election in November/December 2014, there is sufficient time to apply for an ID card. During this period of time prospective voters should obtain their ID card as the only proof of citizenship when registering as a voter.

A new general national voter registration (2013) should only be conducted after a Delimitation Commission (alternatively, if in place the delimitation section of the Electoral Commission) has completed its task of reviewing present borderlines of regions and constituencies, and revising and establishing new ones. It is highly recommended that the South African method and technique of voter registration be introduced.

Registration points and polling stations should not be located in traditional homesteads but at neutral registration points. Where electoral officials are denied entrance to privately owned land such as farms, strong legal actions must be taken against the owners of such land.

The replacement of voter cards and re-registration should be possible regionally and administered by the regional director of elections.

It is highly recommended that the national voter register be linked to the National Population Register. It should be permanently available to the public and the political parties. It should close three months before the election date. Any changes thereafter, such as removing the names of deceased registered voters, should be conveyed to all registered political parties.

If a prospective voter is refused registration (e.g. if doubt exists as to whether the person is a Namibian citizen or has reached the age of 18) and the applicant is not satisfied with such a decision, he/she should on the same day direct his/her appeal to the EC for immediate attention. Persons with mental disabilities and certified as such, shall not be allowed to register.

Voter registration by sworn statements should be seriously reconsidered. The objective should be to eventually do away with such procedure and that the national ID card should be the only legal document used when registering as a voter. This was the overwhelming recommendation during the consultative process.

Attention must be paid to a situation where the Ministry of Home Affairs has for a particular reason refused to issue an ID document to a prospective voter. A decision has to be taken that if the Ministry of Home Affairs refuses an ID document whether this suffices to be refused to register as a voter, thus making the position of an ID document an absolute precondition for being registered as a voter.

The Ministry of Home Affairs should, in cooperation with the proposed permanent regional coordinators of the EMB, decentralize its activities pertaining to the issuing of ID cards.

In the case of registration for local authority elections, the ID card should be used plus evidence that the voter has resided in the local authority area for at least one year, and that the local address is their permanent place of residence. Only when local authority elections take place for the first time (e.g. Oranjemund and Otjinene) and no proof is available that the person registering has lived in the particular local authority area for at least twelve months, should the sworn statement be allowed as proof for registration.

During the consultative process it was also recommended that the proof of having lived permanently in a local authority area for twelve months could be substituted by doing house-by-house voter registration, which then would give proof of residence. The provision in the *Electoral Act* that a voter can attest to his/her staying in a local authority area for twelve months before registering as a voter by providing as proof water, electricity and phone bills, is a restricted one. Many prospective voters in local authority areas buy pre-paid water, electricity and phone time and not on account with the local authority. The EC can institute new regulations with requirements in addition to the ID that can be used to prove residence of more than twelve months in a local authority area.

Local authority elections are covered by both the *Local Authorities Act* (No.23 of 1992) and the *Electoral Act*. The Local Authority Act makes provision for the number of councillors to be elected in the different local authorities (municipalities, towns, villages) and to guarantee fair gender representation at local authority level.

Renewed attention must be paid to the residence question of local authority voters. If a voter claims to reside permanently in two or more local authority areas, which one should be identified as the permanent residence for the purpose of voting? The Act allows only one permanent residence. What prevents a prospective voter from voting in two local authority areas claiming that he/she lives equally long in each local authority area? Many voters are migrant workers who are domiciled in a local authority area in the north and are at least temporarily domiciled in a local authority area elsewhere in the country (e.g. Walvis Bay, Oranjemund). The final decision regarding the permanent domicile in only one locality should rest with the prospective voter.

The present voter's card should be reviewed to ascertain whether it contains all the information needed and complies with the newest technology (e.g. computer chip, protection against fraud). A proposal was made suggesting the compiling of only one voter register which is equally valid during national,

presidential, regional and local authority elections – this seems to be a complicated issue and not possible as long as the tendered vote system is continued. The latter requires constituency based registration of voters.

When one takes into consideration Namibia’s vastness and the sparseness of the population in rural areas, it is impossible to do away with mobile registration points. It is recommended that organized farmer unions, labor unions, churches and other civil organizations active and represented in rural areas are consulted about functioning as registration points for mobile teams.

The registration of voters should be entrusted to the regional director of elections in each region and temporary registration officials at constituency and local authority level. Any person who qualifies for registration as a voter is entitled to register any time at registration points decided upon by the EC save for a period when registration has been suspended due to elections.

Notifying the Directorate of Elections of a change of address (e.g. when taking residence in another constituency, or moving to other local authority areas) and reapplying for lost voter cards should be part of the registration process. The deletion of names from the voter register of persons who are deceased should also be clearly defined. In the latter case it should be stipulated in the *Electoral Act* that the Ministry of Home Affairs should provide the Directorate of Elections with a monthly list informing them of persons above the age of 18 who are deceased.

It would be helpful if local authorities could keep records of all residents domiciled in the respective local authority areas and when these residents settled in that particular local authority area.

Voter Register

199. Much doubt was expressed during the consultative process and also in submissions on the correctness of voter registers. Complaints were also made about the availability of voter lists for verification well in advance of elections, the duplication of registration of voters, the timely removal of names from the voter lists of voters who are deceased and fraudulent registrations.

200. Currently the *Electoral Act* does not provide for a complete voter list/roll/register to be available and used at each polling station.

Recommendation 21

The establishment of a voter register must be a transparent undertaking. A national voter register should be reviewed every five (5) years.

It is argued whether persons should be allowed to vote if their names do not appear on the voter register, even if this arises as result of a *bona fide* mistake by those who compiled the voter register, it will compromise the system of a provisional and finally certified voters register as, *inter alia*, dealt with by Sections 22 – 27 of the *Electoral Act*. The problem that arises is that potential voters are deprived of the opportunity to object to such person being a registered voter if his/her name does not appear on the voter register. If such a person is nevertheless allowed to vote because he/she is in possession of a voter's card, someone is then effectively allowed to vote despite the fact that members of the public have, at least nationally, been deprived of the opportunity to object to that person being a voter.

Should on the day of elections the name of a voter not appear on the voters' register, but is in possession of a valid voters registration card he/she should be allowed to vote. The voters registration card is the most convincing proof of having registered. Most probably an administrative oversight is the reason for not being on the voters' register. The presiding officer should document such event and identify his/her reason for having allowed such voter to cast his/her vote.

The South African practice of linking the national voter register to the national population register is recommended. This would imply the integration of the present voter register for National Assembly, Presidency and Regional Council elections and the voter register for local authority elections into one unit. When compiling only one national voter register, serious consideration should be given to applying the South African 'zip-zip' method of voter registration.

National voter lists must be available at the EC headquarters, at the respective regional office of the EC, at constituency offices and at magistrate offices. Local authority voter lists must be available at local authority offices.

In the case of by-elections in constituencies and outside the general elections at local authority level, a provisional voter list should be ready for inspection two (2) months before the election date and a final version one (1) month before the election date.

Registration of voters preceding a general national election, regional council and local authority elections should culminate in a provisional voter register ready for inspection three months (3) before Election Day and a final one four (4) weeks before Election Day. It should be made available and accessible at

the offices of the EC. A period of two (2) months in between a provisional and a final voters list allows sufficient time for correcting the voter list.

One (1) month before election date and two (2) months after the publication of the provisional voter register and two (2) weeks after the election date, no registration of voters shall take place. Only those applicants who have received the permission by the Director of Elections shall be considered for registration after the set date. Such consideration should, for example, be granted to persons who turn 18 only two days before the election date. Any such permission given by the Director of Elections should be made public and communicated to registered political parties participating in the election to follow.

The compilation of a separate voter list for Namibian eligible voters in foreign countries should be considered. The provisional voter register of the persons who registered overseas should be made available two (2) months before election date and the final one a month before the election date. Regulations are needed for the registration and voting in foreign countries. All polling stations outside the country together form a constituency.

After the publication of the provisional voter register any person or political party has the right to lodge a complaint during a given period but not later than thirty-seven (37) days after the publication of the provisional voter register. Such complaints on the validity of the voters register may detail wrong spelling of names, incorrectness of other data and double registration. The timetable and procedural process of the provisional and final voter register shall be summarized as follows:

Ninety (90) calendar days before the election date the provisional voter register shall be published. This also applies to voters registered overseas. A separate voter register should be compiled for registered voters overseas.

The provisional voter register shall be available for public scrutiny, possible objections and complaints for thirty (30) calendar days.

Until seven (7) calendar days after the thirty (30) calendar days' period, thus together thirty-seven (37) calendar days after the provisional voter register has been made public, the Electoral Commission shall deal with objections and complaints.

Appeals can be lodged against the decisions by the Electoral Commission with the Electoral Court/Tribunal within a time period of seven (7) calendar days after the verdict of the Electoral Commission.

The Electoral Court/Tribunal will deal with appeals within seven (7) calendar days after the appeal has been lodged. Its verdict is final.

The Electoral Commission shall thereafter and within a time period of nine (9) calendar days compile the final voter register which will then be ready thirty (30) calendar days before the election date.

The whole process from the day of publication of the provisional voter list till the final voter list thus lasts sixty (60) days.

The thirty (30) calendar days left before election date shall be used by the EC for the preparation of the voting process.

Appeals regarding the decision of the Electoral Commission about complaints and/or objections lodged with the Electoral Court/Tribunal after the publication of the final voter register should not be entertained. Rules and regulations need to be drafted to attenuate normal court rules.

Electronic copies of the voter register shall be made available, free of charge, to identified stakeholders (e.g. contestants: political parties, organizations, associations, independent candidates, general public, the media, accredited observers). Hard copies shall upon application be made available. Should the political parties, organizations and associations participating in elections not collect them, a fine should be imposed. Easy access to voter registers in print and electronic formats should be made possible not only at the electoral headquarters, but also at regional, constituency and local authority offices. No challenge concerning the inclusion or exclusion of any person on the voter register shall be allowed after the election results have been announced.

Voting Date

201. During the consultation process, dissatisfaction was expressed in having the voting date in November or December. Several reasons were cited: Amongst them was that this was the rainy season and also the hottest time of the year, as well as the non-availability of schools as polling stations and of teachers as electoral officials at that time of year. The idea of holding elections on a Sunday was only supported by a minority.
202. Of particular concern when deciding on an election date, are by-elections. The Regional Council Act, Section 10 (3) prescribes a period of ninety (90) days within which a by-election should be held in a constituency at regional level. The Act does, however, not prescribe within what timeframe the notice of vacancy must be gazetted, thereby leaving room for different interpretations. Should the three (3) months period be counted from the date the member of the Regional Council vacated his/her office, or must the ninety (90) day period be counted from the date the vacancy is proclaimed in the Gazette?

Recommendation 22

It is for the Regional Council Act to prescribe when the period of filling a vacancy in a constituency commences and when it ends. Is it on the day when the vacancy occurred or when it was published in the Gazette? The Act should also indicate the timeframe the Regional Council is granted with regards to advertising a vacancy – it should not be longer than fourteen (14) days after the vacancy occurred.

In the event of a vacancy at regional council level, thus in a constituency, the time frame for the voter register needs to be in compliance with section 10(3) of the Regional Council Act. It would be ideal if the provisional voter register for the particular constituency is published within twenty-one (21) calendar days of the vacancy occurring. Objections can be launched within seven (7) days thereafter. The final voter register will then be published one (1) month before the election date.

The election date should be announced at least three (3) months in advance. The President is tasked with announcing the date of an election keeping in mind that a conducive environment exists to hold elections.

All elections, with exception of by-elections should be held during the winter school holidays on a specific day, such as the third Wednesday in August. Another proposal during the consultative process was that elections should take place in October as all fishing vessels are then docked in the harbour – this suggestion did not garner much support, and neither did the suggestion of holding elections on a Sunday.

It has been proposed and generally supported, that all elections and specifically national elections, should be conducted only on one day, preferably midweek. Such a day should be declared a public holiday, and all shebeens, cuca-shops and similar places of alcohol consumption should be closed on the day of election.

Should the proposal of the third Wednesday in August as election date find approval, serious consideration must be given by Parliament as to whether the swearing-in of the new members of the National Assembly should be given a new date. Currently the swearing-in coincides with Independence Day on 21 March.

There should be sufficient time set aside for any petitions to the Electoral Court/Tribunal after the elections. This needs probably be taken into consideration before the members of the National Assembly are sworn in. The suggested time for any electoral challenge should not be more than three months post election results.

Selection and nomination of candidates

203. All eligible voters have the right and opportunity according to laid-down laws to stand as candidates for presidential, national assembly, regional and local authority elections. The only specification of Article 28 of the Constitution in Article 28 prescribes that presidential candidates have a minimum age of 35 years. For all the other elections, in Article 17 (2) a minimum age of 18 years is prescribed. There must be a free choice of candidates and no form of discrimination should be applied.
204. Although no other qualifications are prescribed, general concern prevails about the quality of candidates and how it could be improved. A low quality of candidates is particularly experienced at local authority council level. Favoritism seemingly plays a more decisive role than the quality of prospective councilors. This matter cannot be addressed by the EC, but needs to be attended to by the Ministry of Regional and Local Government, Housing and Rural Development and political parties, organizations and associations.
205. Another complaint during the consultative process was that often candidates who are nominated are totally unknown to the public, and have no track record for being involved in community matters. Loyalty, nepotism and favoritism are the dominating criteria, it was claimed.
206. It was emphasized that voters should have confidence not only in the political party they are supporting, but even more so in the candidates that are nominated for election. It has been proposed that candidates must originate from the constituency where they are nominated and have been resident there for at least twelve months, or have been born in the particular constituency. The reason for this recommendation was that a candidate must be well acquainted with the area and known to the people living in that constituency.
207. A question was raised whether a presidential candidate should simultaneously be a nominated candidate on the party list during the combined national assembly and presidential elections; the Constitution does not prevent it.

Recommendation 23

During the consultative process, distrust was expressed in nominated candidates and elected representatives. It was claimed that voters are not consulted in the nomination of candidates, either on the list (National Assembly and Local Authority elections) or in constituencies.

The following suggestions were made:

A regional council candidate should have at least 500 signatures in the constituency contested to his/her name before making him/herself available for standing as candidate; The regional council candidate should have resided in the constituency where he/she stands for election for at least twelve (12) months.

One aspect that needs to be considered is the nomination process. One possibility could be that only five (5) nomination days are determined and that the time of nomination on those days is from 8:00 till 17:00. The chosen five (5) days should be 45 days before the election date to allow sufficient time for the printing of ballot papers and the conducting of election campaigns. The last nomination day should be legally proclaimed as the commencement of the election campaign which ends at 12:00 o'clock midnight before the day of elections.

Regarding the nomination of candidates for local authority councils: Presently the law allows political parties, organizations and associations to nominate and gazette candidates up to the last day before the elections. In practice this is impossible, as the names of candidates must be gazette; this cannot be performed a day before elections. It is recommended that the cut-off deadline should be fourteen (14) calendar days before the day of elections.

The Local Authority Act allows political parties to substitute candidates but only if they are considered incompetent. This particular possibility should be revisited.

Pertaining to qualification of local authority councilors: Illiterate individuals should be prevented from standing as prospective councilors. It is expected that councilors be able to read the minutes, agendas and related documents of local authority councils and should not be less qualified than the lowest officials in service of a local authority council. Illiteracy among local authority councilors is often exploited by the officials of a local authority council, and affects the quality of these councils.

Although the Local Authority Act determines the ratio between male and female candidates, nothing is said about the ranking of candidates. The new *Electoral Act* should legalize the 'zebra' method, which determines that when the first candidate is a man, the second one should be a women and vice versa.

In case of the National Assembly elections it could be considered that the same principle of gender-based selection should apply. For example, that all the lists of participating parties in a National Assembly election should eventually reflect a 50 per cent female representation with the 'zebra' method

of nomination applied to comply with the *SADC Protocol on Gender and Development*.

Preparation of Elections

208. It is imperative that due care must be taken at the electoral headquarters during all the preparatory stages of an election, and that they are identified step- by-step. There must be clarity on the distribution of responsibility, as well as who reports to whom. Of particular importance is election material, and how it is transported to the polling venues.

Recommendation 24

Before leaving the electoral headquarters, ballot boxes must be sealed. In addition to the EC seals, political parties should be entitled to add their own seals and record the number of the seals. The seal numbers must be provided to the regional director of elections to be distributed to the representatives of the political parties in the region and to the presiding officer at polling stations in the region. Should political parties not attend or be unable to place seals upon the ballot boxes, then such political parties shall be precluded from questioning the integrity of the ballot boxes by dint of their seals not being on the ballot boxes.

Voter Education and Voter Information

209. Voter education and the dissemination of information were legalized as the responsibility of the EC in 2009. It is a very important task that can substantially contribute to democratic elections. Voter education and information should pursue the objective to make the meaning and purpose of elections well understood by the electorate. Voter education and information is indispensable for democratic consolidation, and for making an informed choice on the day of voting.

210. In a paper dealing with the role of the media in promoting voter education, the Directorate of Elections elaborates on its endeavors to foster the voter interest in the electoral process. In its efforts to promote voter education and the spread of information it has formed a cooperative relationship with both the printed and spoken media. Both should identify how to reach the voter most constructively and effectively. It could be in the form of talk shows, news covering election related issues, contributions to voter education, and other forms of programs.

211. Not voting seems to be a trend among young people as they claim that promises made during the election campaigns, such as the eradication of poverty and creation of job opportunities, have not materialized. So why vote? This way of thinking was repeatedly expressed during the consultative process. Both the media and the Directorate of Elections must be aware and factor in that there are critical social, cultural and economic factors that must be taken into account when enlightening the electorate on electoral matters. Cognizance must be made of the ethnic composition of the country's population, the different indigenous languages spoken, as well as cultures, values, beliefs and norms in the different population groups. It has also to consider the level of education in society when compiling and distributing voter material and when attending to voter education.

212. The program presently performed by the ECN attends to the following key areas:

- Creating public awareness on elections, democracy building and political tolerance;
- Developing, revising and updating voter education materials on a continuous basis;
- Establishing regional advisory committees and voter education offices to decentralize the distribution of voter education materials and to increase local participation;
- Designing a multi-media campaign strategy that identifies information channels;
- Establishing partnerships with civic organizations, media, and political parties to support the EC voter education program;
- Monitoring and conducting formative evaluation research to determine the impact of the voter education program;
- Produce a quarterly EC Newsletter to promote and report on the conducted activities and challenges.

213. Many children turn eighteen while still at school and thus qualify to become registered as voters. The school system at secondary level can inform the upcoming eligible voters and assist them to exercise their right to register as voters and to exercise their democratic right to vote.

Recommendation 25

The Directorate of Elections should institute a permanent division of voter education and information in the directorate and enhance the activities of such body. Electoral education and information officers are permanently appointed

by the EC in each region and shall be located in the office of the regional director of elections in each region.

Personnel involved in voter education and voter information must duly be trained for such tasks. They should be competent enough to not only conduct voter education, but also to spread voter education and information to the grass-roots level. The regional director of elections should play a supportive and supervising role in their task performances.

Voter education and information should be an intensive process and should particularly address the young population which forms the majority of the electorate.

Voter education and information should not be the monopoly of the EC. When others are involved, the EC should exercise strict control over who should be involved, what the content of voter education programs must be, and how voter education should be performed. The EC must prescribe the norms of voter education and information. Shareholders and partners in voter education and information can be political parties, non-governmental organizations and education authorities. The section dealing with voter education and information in the Directorate of Elections should be obliged to share their expertise and knowledge with other interested bodies.

It would be beneficial to cooperate with other relevant ministries (e.g. Education and Information) on voter information and education. In the case of the Ministry of Education, it would be advantageous if voter education forms part of civic education whether it is taught as a subject or as part of Social Studies or any related teaching subject. Civic education *per se* is not the task of the Electoral Commission. Officials of the Directorate of Elections could be of assistance when the Ministry of Education compiles a syllabus which includes voter education. The Ministry of Information can be involved in voter information. Combined efforts could be undertaken to that effect.

Domestic voter education and information dissemination not undertaken by the Directorate of Elections and voter education undertaken by foreign organizations can only be allowed if sanctioned and controlled by the Electoral Commission. Outside agencies can only be involved in voter education and information dissemination if accredited with the EC. Any offered material assistance and contribution to voter education and information by external sources must be evaluated by the Electoral Commission before permission is granted. It must be subjected to laid-down rules. External voter educators/informers must be in constant communication with the Electoral Commission and report back to it.

Adequate financial resources for voter education and information dissemination should be made available and should form an integral part of the EC's annual budget.

The EC in cooperation with the Delimitation Commission should make available constituency and local authority maps, which would be helpful during the voter education and information dissemination process.

There were requests from blind voters who attended the public hearings that voter information material should also be printed in Braille.

Supervision of Electoral Campaign

214. All contestants in elections and referenda must have equal opportunity to conduct their electoral campaigns and convey their message without restriction. They have at all times to comply with laid-down democratic rules such as the Code of Conduct for political parties, organizations and associations.

Recommendation 26

There must be legally defined rules either in the *Electoral Act* or at least in a Proclamation on what is understood by an electoral campaign, what it can contain, and what the rules related to it are. It should also be legally determined what penalties parties/candidates can expect when these rules are transgressed. Provision must be made for the definite application of penalties.

Electoral campaigns must be fair, transparent, credible and free. No discrimination of any kind and on grounds of race, ethnicity, color, gender, language, religion and different political opinions is permissible.

The EC is the supervisory body of electoral campaigns and operates in conjunction with the Directorate of Elections in performing its tasks. The EC is assisted in its supervision task by the Police Force, which is responsible for the protection and transport of election material, the correct storing of election material, for accompanying election material — including ballot boxes and ballot papers — to polling stations and eventually back to the electoral headquarters. Another supervisory task performed by the Police is their presence at polling and counting stations.

Should there be matters that cannot be resolved by the ECN (e.g. conflicts, disputes), then they should be referred to the Electoral Court/Tribunal or, if applicable, to the Anti-Corruption Commission.

The Police and party agents must be present when ballot boxes are sealed at the electoral headquarters before being dispatched to the polling stations.

Similar restrictions should apply in respect of complaints relating to seals (see recommendation 24). During the Public hearings it was also recommended that the police should be present at public meetings during the election campaign.

Recruitment and training of electoral officials

215. The recruitment process is often criticized. Various accusations were made during the consultative process: One of them is that favoritism is practiced when electoral officials are being recruited. It was further alleged that ethnic/tribal preference is applied and that members of the ruling party are favored. The application forms make no reference to which ethnic/tribal group the applicant belongs.
216. Every election experiences the problem of insufficiently trained electoral officials, particularly those that have only been appointed temporarily. This matter needs urgent attention. Duly laid-down rules and procedures will result in definite improvements.
217. Disappointment has been expressed about the temporary employment of unemployed people, particularly young people, during elections. Many of them are seen to be incompetent, possessing insufficient knowledge and having no sense of responsibility. Some don't have any work experience and their only interest is in the remuneration, and not in what is expected of them.

Recommendation 27

The recruitment of temporary electoral officials should at all times be a public and transparent process. Currently they are sourced by way of advertisements in the daily newspapers. Applicants must be registered voters.

Recruitment should best take place on a regional basis with the assistance of the permanently appointed regional coordinator of the EMB. All applications in a region should be sent to him/her. The selection process per region should be done in cooperation with the Directorate of Elections, and in a transparent and impartial way. No applicant must indicate in his/her application his/her party affiliation or party preference. A precondition for appointment should be a grade 12 certificate and the attainment of the age of twenty-one (21).

Currently, a ratio of 70:30 in favor of currently unemployed people versus currently employed people is used when filling electoral official posts. This should be reconsidered, particularly as quality and efficiency should be the

most important criteria to guarantee free, fair, transparent and credible elections. Quality should supersede quantity.

It is therefore recommended that the whole recruitment and training process be reviewed. The temporarily appointed election officials fill posts as registrations officials, returning officers, presiding officers and assisting personnel at registration points and polling and counting stations. There should be separate training processes for returning and presiding officials, and the rest of the electoral officials.

Renewed attention should be given to the training programs and training manuals for electoral officials. Besides dealing with the practical and administrative matters that are a part of every electoral official's remit, their training should also extensively cover the social, economic and political environment in which elections take place. This should include an overview of the character of a multi-party democracy, the rule of law, the respect for and application of fundamental human rights and freedoms, the electoral right, and the history of elections in Namibia.

Appointees must be 21 years of age and have a sound command of the official language. They must also be acquainted with the local vernacular spoken at the polling stations where they are appointed. All the Elect Forms which are compiled in English must be clearly understood by the election officials. (Elect Forms are those forms that are prescribed by law to be completed during the registration of political parties, nomination of candidates and which are documenting the whole administrative process of elections).

Attention must also be given to the ability of electoral officials, at least one at each polling station, to command knowledge of the sign language (e.g. for people with hearing disabilities). Gender balance must prevail when electoral officials are recruited and appointed.

Returning and presiding officers should initially be trained on a regional basis and thereafter at the electoral headquarters for a final training session. The first training period of at least one week should be conducted on regional level six months before an election. The last session should take place one month before the date of elections. Only capable trainers should be involved in the training process. The first round of training must end with writing a written examination and having passed a practical exercise (e.g. a mock election). Prospective presiding and returning officers must pass the tests before being considered for appointment. Certificates of having successfully passed examinations shall be issued but require renewal every five years.

A training program is also applicable to personnel heading up the registration process. Only officials conversant with the dominant local language where

registration takes place should head the registration process (general and supplementary) in the different regions. The same should apply to returning and presiding officers at polling and counting stations. Communication that is understood, is of particular relevance when explaining rules and regulations and assisting prospective voters.

Professional training manuals complete with all the Elect Forms should be constantly reviewed. It should be available not only to each trainee, but also to political parties, organizations and associations and to election observers. They must be familiar with the content thereof.

The Directorate of Elections should constantly review Elect Forms and evaluate whether they are in agreement with the regulations.

In the interest of impartial elections, members of the Police Force, the Defense Force and the National Intelligence Agency must not be appointed as members of temporary appointed staff during the voting process. Public servants, *per se*, if permitted to take special (not ordinary) leave during that time, must not be excluded from being appointed as temporary electoral officials, particularly in the positions of presiding and returning officers. If elections take place during school holidays, then teachers should be considered as temporary appointed electoral officials. An agreement should be concluded with the teacher unions to employ teaching staff as electoral staff, particularly as presiding and returning officers.

Permanent liaison between the EC and political parties, organizations, associations, independent candidates, the media and the public

218. A permanent linkage between the EC and political parties, organisations, associations and independent candidates is a necessity, and a precondition for a good and productive relationship. This also applies to the relationship with the media and the public during the voter registration process, the elections and the period in between elections. The aim is to establish and maintain trust in all facets of the electoral process.

219. During the consultative process concern was expressed that some political parties only show occasional interest in the political parties' liaison committee. Interest has been expressed by civil society organizations to also be involved in a liaison committee and also as observers in the political parties' liaison committee.

Recommendation 28

In the interests of a successful and productive relationship between political parties, organizations and associations and the EC, it has become obligatory to form an institutionalized political parties' liaison committee. Its permanent existence and the terms of reference should be reflected in the *Electoral Act*. Each party is entitled to two members on such liaison committee. There should be ongoing dialogue between political parties and the EC in order to foster good relations and trust between all stakeholders.

It has been suggested that political parties should not receive information and any form of assistance if not participating in the activities of the political parties' liaison committee.

In addition to the institutionalized political parties' liaison committee a separate liaison committee, an Outreach Committee, between the EC and the public at large should be established. It should equally be legalized. Dialogue applicable to both committees should enhance the credibility, transparency, legality, openness, trustworthiness, legitimacy and honesty of the electoral process and all related matters.

Liaison committees should be sub-committees of the Directorate of Elections and should cooperate closely with the committee tasked by the Electoral Commission to deal with the public relationship. The Director of Election shall be tasked to establish different stakeholder committees and encourage political parties to practice inter- and intra-party democracy.

During the election campaign period, the EC liaison committee should hold weekly meetings with the media and every two (2) weeks with NGOs, who would represent the public. A commissioner of the Electoral Commission should chair each of the two (2) liaison committees.

Both liaison committees could be useful when determining the location of polling stations.

An open line (e.g. telephone, electronic) at the Directorate of Elections is essential to deal with any enquiries pertaining to electoral matters. Such communication lines should not only be available during election periods, but also during the voter registration period and any time thereafter between elections. Additional open lines should be available during registration and election periods. The persons in charge of the open lines should be well trained and well informed.

Codes of Conduct

220. There should be a code of conduct that is binding on all stakeholders and role players directly or indirectly involved in the electoral process.

221. Extensive consideration must be given to the enforcement of the Codes of Conduct.

Recommendation 29

There should be a revision of the existing Codes of Conduct in order to devise new ones when needed. It should be clearly stipulated in the Codes of Conduct what is understood by prohibited conduct. There should be separate Codes of Conduct for Political Parties, Organizations and Associations; for Domestic and External Observers; for Election Officials; for the Media; for Electoral Officials; and for Party Agents.

During the consultative process it was recommended that the Code of Conduct for political parties, in addition to what it already contains, should also specify that damaging property belonging to political parties is not acceptable; that intimidation, so-called 'no-go areas', violence, psychological and physical aggression such as rock throwing, hate speech, insults, defamation and name calling are all not allowed. Codes of Conduct should also contain a clause stating that the consumption of alcohol by election personnel, party agents and observers during the voting and while the counting process is underway, is forbidden, and that flouting this rule should immediately disqualify such persons from continuing with their task performance.

Voluntary adherence to the Codes of Conduct has hitherto not been successful. Particular attention should therefore be paid to the adherence and legal enforcement of the Codes of Conduct. Also, who is responsible for the enforcement (e.g. Electoral Court/Tribunal?) of laid-down rules of behavior such as contained in the Codes of Conduct?

Anyone is entitled to raise non-compliance with the Codes of Conduct. Rules and regulations will specify under which conditions complainants are entitled to raise non-compliance with the Codes of Conduct.

Codes of Conduct should form an integral part of the *Electoral Act*. Provision should be made for severe punishment, in some cases without the choice of a fine, when the Codes of Conduct are violated. In serious cases infringements should be referred to the Electoral Court/Tribunal for adjudication.

Observers/Monitors

222. Namibia complies with the *African Union Guidelines for African Union Electoral Observation and Monitoring Missions*. A Code of Conduct for SADC Electoral Observer Missions is contained in the *SADC Principles and Guidelines Governing Democratic Elections*.
223. The *OAU/AU Declaration on the Principles governing democratic Elections* states in Section V(3) that “member states should ensure that invitations to OAU to participate in election observation or monitoring are sent at least two months before elections”.
224. The *African Charter on Democracy, Elections and Governance* states in Article 19 that “each party shall inform the Commission of scheduled elections and invite to send an electoral observer mission”.
225. The rationale of election monitoring and observation is to:
- Safeguard the integrity of the electoral process;
 - Promote openness and transparency;
 - Enhance public confidence;
 - Ease tension and increase security;
 - Deter improper practices and attempts at fraud;
 - Increase political credibility;
 - Support honesty and trust;
 - Increase acceptability of the electoral process and result;
 - Disseminate and strengthen basic standards of election administration.
226. There is an ongoing debate as to whether both observers and monitors should be allowed to observe the electoral process, and to what extent monitoring and observation should be permitted. The African Union uses both concepts.
227. **Monitors** refer to individuals or organized groups (e.g. NGOs) mandated to monitor, investigate, report on and frequently pronounce judgment on the actions of parties to a dispute in terms of commonly accepted or normally endorsed behavior. A monitor’s mandate is to observe the electoral process (as observers also do) and they can intervene (observers cannot) if the laws are being violated. The monitors may come from the international community and/or could be nationals of Namibia. In both cases they are expected to be non- partisan.
228. The mandate of election monitors is to ensure that elections are free and fair. They perform the function of watchdogs and deterrents. Not only do they observe events related to the electoral process, but they may want to exercise a particular influence on actions related to the electoral process, thus to a certain extent exercise the right to intervene in the electoral process. They consider

themselves as being in a position to offer a credible, independent opinion on the validity of conflicting claims by participating parties and other entities (e.g. associations, organizations, independent candidates) during the electoral process. Monitors play a more activist and interventionist role than election observers. They have a much greater authority than observers. They are, however, not empowered to interrupt the election process, but only to ensure that the election process and laws are not manipulated.

229. **Observation** means the purposeful gathering of information regarding an electoral process, and the making of informed judgment on the conduct of such a process on the basis of information gathered, by persons who are not inherently authorized to intervene in the process, and whose involvement in mediation or technical assistance activities should not be such so as to jeopardize their main observation responsibilities.

230. Election observers are tasked with the following responsibilities:

- To be impartial, non-partisan and balanced;
- To observe all phases of the electoral process;
- To accurately report the problems encountered to the relevant electoral authorities;
- To document all phases of the electoral process;
- To adhere to the Code of Conduct for observers;
- Not to engage in any conduct which undermines neither the electoral process nor their mission;
- Not to interfere with the voting and counting process.

231. Observers are in most cases representatives of domestic and international organizations authorized to observe the preparation for and conduct of an election. They can also be present during a general voter registration process. The intention is to assist in ensuring that the integrity of the electoral process is respected and to report any misgivings.

232. The EC of Namibia should offer training for domestic and external observers/monitors. It has compiled a Handbook for Election Observers in Namibia to that effect.

233. An essential principle that the electoral process must cover is that the civil society should be given the opportunity to be involved in such a process. To act as observers during elections is one opportunity. It is expected that civil society is more likely to be objective, since its ranks are filled with supporters of different parties. During the public hearings, however, it was claimed that one couldn't rely on the impartiality of domestic observers, as each is a supporter of a particular political party. For that reason they could be biased and therefore their reports could be doubted.

234. There should be a prescribed deadline for the registration of observers/monitors with the EC. Whether observers or monitors, they should not be allowed to interfere with the autonomy and independence of the Namibian state. Monitors and observers must comply with predetermined criteria set out by the Electoral Commission, and must observe rules determined by the Electoral Commission.

235. It is good practice for an EMB to accredit internal and international observers and/or monitors and guarantee their right of observation, as well as provide them with comprehensive briefing materials, training and specific responsibilities.

Recommendation 30

As Namibia has already conducted a number of elections since independence, and has thereby built up an electoral culture and proven its autonomy and independence, the need for election monitors as opposed to observers may have become superfluous.

The EC should be acquainted with the obligation to inform and invite the African Union Observer Mission and to determine whether or not to invite SADC election observer teams. Reference in this context is made to the ‘SADC Principles and Guidelines Governing Democratic Elections’, the ‘African Charter on Democracy, Elections and Governance in Africa’ and the African Union’s ‘Declaration on Elections, Democracy and Governance’ (see pages 13, 14 and 25 of this document).

Observing, however, should be an on-going practice. According to a SADC resolution on elections in SADC countries, elections can be observed by member states. Both domestic and foreign observers can be involved in an electoral process. For domestic observers, observing is an experience in applied democracy as part of the political process. Foreign observers are important for an outside opinion (e.g. third opinion), which is expected to be impartial. This is not always the case with domestic observers, as some may pursue their own (political) agendas.

During the consultative process a proposal was made that observers from foreign countries should be allowed in Namibia, and that their countries would then reciprocally allow Namibians to observe their elections.

In its recommendations the “White Paper” (2011:23) refers to a number of expected behavior rules for international observers, which are slightly adapted in this report.

Amongst them are:

- **Abiding by the Constitution and laws of the host country;**
- **Respecting the cultures and traditions of the host country;**
- **Declaring any conflict of interest prior to taking part in the mission;**
- **Remaining strictly impartial and unbiased;**
- **Refraining from actions that could lead to the perception of sympathy for a particular candidate or political party;**
- **Refraining from wearing any party symbols or colors;**
- **Contributing to the legitimization of the electoral process and its outcome;**
- **Supporting the enhancement of and respecting the basic social, political, legal and other human rights in the host country;**
- **Increasing public confidence in the electoral process;**
- **Offering support and understanding to those directly involved in the electoral process;**
- **Revealing any observed irregularities and malpractices in the electoral process for redress by the relevant institutions;**
- **Exercising sound judgment at the highest level and personal discretion at all times;**
- **Refraining from making public statements till after the elections.**

It should be obligatory for observers/monitors to sign a Code of Conduct.

Independent observation, by both domestic and international observers, must be free of control and interference by the EC as long they adhere to the laid-down rules as stated in the Code of Conduct. Partiality, the endangering of voter safety, being unauthorized and disrupting the electoral process would be examples of transgressions of the Code of Conduct for electoral observers.

The observers should be offered the opportunity, if so wished, to observe all stages of the electoral process, such as the preparations of the elections (e.g. training of electoral officials) and not only the voting, counting, variation of election results, and announcement of election results.

Political party agents perform the role of observers, but could also be assigned monitoring tasks. They are encouraged to observe the printing of the ballot papers whether inside or outside the country. They are allowed to ascertain the number of ballot papers printed and received. Party agents are allowed to accompany the election material to the polling stations, to observe

the opening and sealing of ballot boxes, and to accompany mobile polling teams to their destinations.

The Electoral Commission should solely be responsible with accrediting observers/monitors. The Electoral Commission should thoroughly inform observers/monitors of what is expected of them before the election, train domestic observers, and have both foreign and domestic observers sign the Code of Conduct for Monitors and/or Observers.

Observers/Monitors are obliged to compile observation reports at the end of the elections after the results have been officially sanctioned. A period of a month should be given to the monitors/observers to submit their reports to the chairperson of the Electoral Commission.

The Electoral Commission is to study the reports by the Monitors/Observers and discuss them with the Directorate of Elections in detail. Critical remarks and suggestions of improvement should be thoroughly considered.

Party agents at registration points and at polling and counting stations

236. During elections representatives of participating political parties are allowed to be present at registration points, at polling stations and at counting stations. The same applies during local authority elections to the agents of participating organizations and associations. During regional council elections an independent candidate can also appoint a representative at the polling stations in the given constituency.

237. It is the party, organization and association agents' task to observe that correct procedures are followed during the voting and counting process. They must also take part in the sealing process of any election material, and accompany the ballot boxes when moved from the polling station to the verification centre and on their return to the electoral headquarters. The agents must report any irregularities observed to the presiding and/or the returning officer. Party agents are, however, not allowed to intervene with the election process or bring it to a halt.

Recommendation 31

The agents appointed by the participating parties, organizations and associations in the elections should not number more than one per polling or counting station. Party agents should be allowed to be replaced by another approved agent of the same party, organization or association during the course of the electoral process. The EC shall provide a meal for one person per political party acting as party agent.

As voting lasts for at least fourteen hours, agents of political parties/independent candidates/organizations and associations should be allowed to nominate an alternative agent before the counting process commences. It is worth considering making it an obligation.

Ideally, political parties participating in an election should find common ground on the role, function and representation of their agents at polling and counting stations, and voluntarily decide on rules which must be adhered to by the agents, possibly in addition to what the *Electoral Act* prescribes.

Instead of providing the names of the agents to the returning officer, it could be considered to provide the names to the regional director of elections. He/she then will distribute the names to the presiding officer at the polling stations via the returning officers. The names of agents should be made public by the Directorate of Elections at least two weeks ahead of the election date.

The Directorate of Elections should be willing to offer training of election agents at regional (in the case of presidential, national assembly and regional council elections) and at local level (in the case of local authority elections). Party agents must be able to communicate in the official language.

Party agents must sign a Code of Conduct designed for party, organization and association agents. Such documents must be signed at each polling and counting station in the presence of the returning or presiding officer.

Agents of parties, organizations and associations should not leave the polling station till all votes are counted and they have signed the result sheet before they are publicly made known. Should such agents abandon the polling/counting station before the voting and counting processes have been completed, they are not entitled to lodge any objection pertaining to the election results in the particular polling station to which they have been assigned. This applies also when political parties have not appointed an agent at polling and counting station. Such parties should not be allowed to challenge the results at such polling and counting stations.

It is also recommended to keep an Occurrence Register at each regional election office, polling station (presiding officer) and at the verification centre (returning officer), which could be used as evidence in the event of disputes and court cases.

Party agents who have not undergone the official training by the Directorate of Elections shall not qualify to act as party agents and shall be excluded from the polling and counting process. The above applies also to alternate agents. The names of trained party agents must be submitted to the presiding officer at a polling station not later than 24 hours before the election commences.

It was suggested during the consultative process that party agents should be remunerated by the State when observing the voting and counting process. Such an arrangement would, however, infringe upon the independence of the electoral process.

After the election process has come to its end, the Director of Elections should be obliged to write a report on the performance of party agents as supplied by the individual presiding and returning officers as supplied by the individual presiding and returning officers to the regional directors of elections.

The Voting Process

238. When compared with a number of other African states, the voting process in Namibia is marked by relatively few flaws. A concern is the printing of ballot papers. Other issues of concern are voting at sea and outside of the country. Of serious concern is also the system of tendered voting, special votes and electronic voting. All these issues were repeatedly mentioned during the public hearings.

239. Returning officers are mandated to supervise the nomination, voting and counting processes in each constituency and local authority area. They are also responsible for the announcement of election results. Presiding officers head the polling stations, assisted by six (6) further electoral officials. Mobile teams are usually composed of five (5) electoral officials, including the presiding officer.

240. The secrecy of voting is well protected during polls. It is guaranteed by Section 75(1) of the *Electoral Act*.

Recommendation 32

The presently applied voting process and its sequences should remain as they are. There is, however, one recommendation. To speed up the voting process, at each polling station the voter list should be subdivided into three packets for checking. The first one could deal with names beginning with the letters A

to H, the second covers the names beginning with I to P, and the third one covering names beginning with letters Q to Z.

Illiterate voters should be allowed to vote per thumb or any other finger should the thumb of a voter's hand have been amputated. He/she will not need assistance during the voting process if he/she is able to mark the ballot paper with the remaining fingers.

Illiterate voters should seek the assistance of a relative or friend who must be a registered voter. In the absence thereof the presiding officer should assist when the voter enters polling booth and casting his/her vote. It should be within a presiding officer's competence and authority to deny a drunken voter to cast his/her vote. If needed, the presiding officer should seek the assistance of the present police officer at a polling station to determine the inability of a drunken voter to cast his/her vote.

Voters with mental disabilities and certified as such, shall not be allowed to vote. They are vulnerable to exploitation by political parties, and this must be avoided.

Voting Day: During the twenty-two years since independence, Namibia has developed a voting culture that makes it possible to recommend voting for only one day on any weekday except Saturday, Sunday and Monday. A midweek day would be preferable. Opening hours should remain from 07:00 till 21:00. Every voter still in the queue at closing time shall be entitled to vote.

The Chairperson of the Electoral Commission, in consultation with the President, should announce the election date three (3) months before the election commences.

Voters in hospitals and old age homes, and incapacitated voters at their homes, must also be given the opportunity to cast their votes.

Elderly persons, persons with disabilities, as well as expecting mothers, should be fast-tracked for vote at the polling stations, and should not have to queue.

Ballot Papers: The present form is acceptable. In the interest of credibility and transparency, the ballots should not be printed by any Namibian printing company with ties to a political party participating in any given election.

Voting at Sea and in Foreign Countries: Regarding fishermen out at sea on the day of voting, several options could be considered:

a) To enter into negotiations with the fishing factory owners and trade unions, which represent the interests of people employed in the fishing industry, to come to an agreement that all the workers employed in such

industry should be on land on the day of voting. Factory owners could be legally compelled to do so. It was suggested that the *Electoral Act* should amend fishing rights and licenses to the fishing industry to protect the democratic right to vote.

b) That all boats are in harbor on the day of elections and fisherman can vote at a polling station situated inside the harbor. The suggestion of having a polling station inside the harbor was, however, not well supported.

c) That if a postal vote is introduced, fishermen at sea on the date of voting should make use of such a voting system in advance.

The best option would be to encourage the fishing enterprises to have their crews on land on voting day. As has been suggested, the election will take place only on one day.

In South Africa, the Gauteng Provincial Division of the High Court ordered the Electoral Commission to ensure that all categories of citizens absent from the Republic of South Africa who are registered as voters shall be entitled to vote by means of special votes (See: De Vos, 2009:1). The ruling may be interpreted as allowing registered absentee voters outside the country to cast their vote whenever there is an election in South Africa.

Following the South African example and given that voting outside Namibia is already practiced, registered Namibian voters who find themselves outside of the country on polling day, should have the opportunity to vote in countries and at diplomatic stations where Namibia is represented by diplomatic missions (e.g. embassy, consulate). Diplomatic officials should act as electoral officials. Votes cast outside Namibia are presently cast as tendered votes. Should a postal vote be introduced, the tendered vote would fall away.

For administrative purposes, all the foreign polling stations should form one electoral constituency. The votes cast outside the country shall be sent to Windhoek and stored in one ballot box. The enveloped votes shall be opened at the headquarters in Windhoek and counted under the supervision of the Director of Elections after the polling stations have been closed on the day of elections. Such an approach will foster secrecy as the votes are not counted according to polling points in foreign countries, but as a sum total. This is applicable as long the electronic voting system is not introduced.

The right of imprisoned registered voters to vote: Prisoners registered as voters or registered voters detained in police cells should have the right to vote. The proposal made during the Public hearings that convicted prisoners should only be allowed to vote once they are rehabilitated, would be contrary to the stipulation in the Constitution (Article 17 (2)) that all eligible voters

should have the opportunity, once they are registered, to vote. Human dignity should not be violated.

The question of whether prisoners should be allowed to vote has caused in-depth debate in the international community. The majority opinion is that there are overwhelming legal, moral and practical reasons for enfranchising people in prison (See: House of Commons, 2011: Ev w6). As part of their citizenship, registered prisoners and registered voters detained in police cells should be entitled to vote.

In the Republic of South Africa the court case “Minister of Home Affairs v National Institute for Crime Prevention (NICRO)” brought to the attention of the South African Constitutional Court, and through its judgment confirmed the right of prisoners who are registered voters to cast their vote when the opportunity arrives (for detailed information, see Pierre de Vos’ paper *South African prisoner’s right to vote.*).

Namibia should continue to allow registered prisoners and detainees in police cells to vote when the occasion arises.

Special Votes: Should postal voting be introduced, special voting becomes superfluous. Should the latter be continued with, then special voting should not only be restricted to electoral officials at headquarters and the police engaged in the electoral process, but also to electoral officials in the field and to political party agents at polling and counting stations. During the consultative process it was recommended that the number of special votes cast before Election Day should be made public. To date only the turnout of special votes will be made public and not the outcome.

It is recommended that a special voting day for police, prisons, election officials, defense force, party agents and other applying categories of persons should be determined by the EC in consultation with the relevant stake holders. Such special voting must be performed one week prior to the election date.

The names of voters who had the right to cast a special vote should not be made public as it could violate the principle of secrecy of voting.

Electronic register and voting: Electronic voting, like the electronic registration of voters via the ‘zip-zip’ method, is a new undertaking and needs to be experimented in Namibia. It has clear advantages: It is quicker and can eliminate a number of problems that are presently experienced and classified as human errors. The electronic registration via the ‘zip-zip’ method has been successful in South Africa.

Before the national elections in 2014, electronic voting could be tested during by-elections in constituencies. Any flaws should thereafter be attended to and, if necessary, the *Electoral Act* should be amended accordingly. A number of legal issues need to be addressed (e.g. relating to evidence) and even made law before electronic voting can be applied. It needs legal protection.

During the consultative process much trepidation was observed regarding the perception that electric voting would already be applied during the 2014 elections. However, manual voting must still be applied during the 2014 elections. That said, the EMB is already aiming to commence with an information campaign about electronic voting and what it implies.

Marking of fingers: The system of putting inked identification marks on fingers has not been efficient or reliable. Evidence has been presented that these marks can be washed off. Either this method must be improved (e.g. the marks need to be absolutely indelible on the day) or done away with, alternatively replaced with a more effective method. If a different system of an 'identification mark' should be applied, amendments to Section 82 of the *Electoral Act* must be attended to. Alternatively a biometric (finger print) system can be introduced.

Tendered and Postal Votes

241. Remote voting is used in many countries to broaden participation. Remote voting by means of tendered votes or postal votes may take place in person outside the constituency where registered. If ballot papers are to be dispatched by post, thus implementing a postal vote system, then this must be considered when drafting the election time table.

242. Currently postal voting is untried in Africa, although it is used in some European countries, such as Sweden and Germany. Postal voting implies that an absentee voter (in the Namibian case a voter who cannot be in the constituency where registered or is at sea or in a foreign country on the day of voting) can petition the Directorate of Elections for an application form for postal voting, complete it and send it to the electoral headquarters to arrive there at a determined date and time. Such postal votes are opened in the presence of the Director of Elections and counted and finally added to the votes cast during presidential, national, regional and local authority elections in the rest of the country. In the case of regional elections, such votes must be added to the constituencies where the voter was registered. Postal votes are seen to be more secret than tendered votes.

243. Considering the still prevalent migration of people between one national election and the following one, which covers a period of five years, many voters do not reside in the constituency where they registered any longer. Only a few voters adhere to the legal stipulation that they need to inform the Directorate of Elections of any changes of address and be issued with a new voter registration card. The election pattern has shown that more than 20 per cent of all registered voters have up to now made use of the tendered vote.

244. The tendered vote system has its administrative problems. Each tendered vote must be put in a separate envelope with the name of the constituency on it where registered. Cast tendered votes must be placed in a separate ballot box, one for the election of the President and one for the National Assembly. Tendered votes must also be separately counted.

245. For the first time during the last national election the tendered votes were counted at the polling stations where they were cast. Unfortunately, the presiding officers at the counting stations did not indicate from which constituencies the tendered votes originated when announcing the results. The original intention was that all polling stations had to record the constituencies from which the tendered votes originated. Only if such a procedure is followed, will the public at large and particularly the political parties know how many voters voted for their party in every constituency. During the last election the tendered votes were added to the ordinary votes when the results were announced. This caused an incorrect impression of percentage and party allegiance in each constituency. In some constituencies, the adding of tendered votes to ordinary votes indicated that the total votes cast in a constituency reflected more than 100 per cent of the vote in a constituency. This led to accusations of manipulation and corruption, and mistrust.

Recommendation 33

Section 87 (before it was amended by the *Electoral Amendment Act No. 7 of 2009*), required that tendered votes to be counted separately. This was previously specifically stipulated in Section 87(2)(d) and (e) of the Act. The counting process is now governed by Section 85 of the Act. Section 85, in terms of its current wording, does not require such procedures and it appears that this is where the perception arises that all votes — ordinary and tendered votes — be counted together at the polling station where they were cast and that all those votes form part of that polling station. This caused uncertainty among some political parties during the 2009 elections.

The *Electoral Act* should state unambiguously how tendered votes are to be counted and in respect of which constituency those tendered votes should be

taken into account. To add those votes to the constituency where the voter has been registered (in the case of National Assembly and Presidential elections) may conceivably cause a number of logistical problems. On the other hand, it distorts the result of the constituencies and may even give rise to suspicious and unrealistic voter turnouts (such as voter turnouts of more than 100 per cent) if all votes, namely ordinary and tendered votes, form part of the result of a constituency in which they were cast.

If it so decided that the tendered vote should be continued with, then tendered votes should form part of polling station results where those votes were cast:

a) To do it differently will compromise transparency and the system of checks and balances brought about by being able to compare the polling station results with the national result, and to ensure that constituency results correspond with the aggregate of the result of all polling stations in that constituency. Constituency results that change from the total of all polling stations in that constituency (and because of the later addition of tendered votes cast elsewhere), complicates verification of the result by political parties and the public.

b) The 'moving' of tendered votes from the constituency in which they have been cast to another constituency may also open the door for manipulation (or, at least a public perception of the possibility of manipulation).

When the election results are announced, the percentage of votes cast by tendered votes and the support that the different parties obtained in the constituencies where the voter is registered, should be made known.

The alternative to the present system is to totally do away with the tendered vote system as it is practiced now (sealed envelopes with the name of the constituency where registered on it and deposited in a separate ballot box). For the purpose of discarding the tendered vote system the whole country is declared one voting entity. Voters, wherever they are and wherever they are registered, cast their vote at the nearest polling station. A vote cast by a voter who is not registered in the constituency where he/she votes but registered in a different constituency, deposits his/her ballot paper in an ordinary ballot box. His/her ballot paper is no longer put in an envelope which is then gummed closed, as was the practice in the past. It is also no longer deposited in a separate ballot box marked 'tender votes'. Elect 33 shall still be applicable.

The presiding officer in each polling station must, however, identify and record the voters who voted at 'his/her 'polling station who are not registered there. The presiding officer's record should reflect the name of the person, their ID number, their voter registration number, and the name of the constituency

where they are registered. In the end the record will indicate the number of votes cast by voters who are not registered in the presiding officer's constituency, and will reflect where those voters are in fact registered.

Not to continue with the tendered system (vote separately identified and counted) can only be applied during presidential and national assembly elections. It is not applicable during Regional Council elections when the "first-past-the-post" electoral system is practiced.

Voter Assistance

246. As the Electoral Law demonstrates very well, Namibian legislators are concerned about voters who for particular reasons need assistance during voting. Section 83 in the *Electoral Act* makes provision for providing assistance to voters with special needs (blindness or other physical disabilities) and helping them to cast their vote.

Recommendation 34

It is recommended that a physically disabled voter should cast his/her vote in the same manner as a visually impaired voter. That means without assistance from an electoral official, but rather with help from a single relative or friend who is older than 18 years of age and can prove his/her age as well as Namibian citizenship. He/she should also be a registered voter. Only in the absence of a friend or relative should the presiding officer or one of the electoral officials he/she has tasked, assist such a voter.

Political party agents and observers should not be allowed to assist special needs voters to cast their vote. If a party agent were to assist such voter, it would violate the secrecy of the vote. It is also recommended that the ballot books be printed in Braille.

It should be discussed whether or not serving politicians (e.g. members of Parliament, Regional Councils and Local Authorities) and party officials should be allowed to accompany and assist voters to the polling stations.

Polling Stations

247. No definition of the concept 'polling station' is provided for in the *Electoral Act*.

248. Section 73 of the *Electoral Act* pays much attention to the allocation and location (routes) of polling stations and what factors should be considered. One

such factor should be the walking distance a voter is expected to cover to reach the nearest polling station.

249. The establishment of polling stations is determined by a number of considerations, such as the availability of suitable places able to accommodate polling stations; the number of registered voters per constituency and local authority; the accessibility, geography, topography and infrastructure of the area; and the available amenities. Care should be taken to ensure sufficient space in the polling stations to domicile the desks of all electoral officials, the polling booths (secrecy must be secured) and polling boxes.

250. Complaints were made during the consultative process about the working of mobile voting stations, and questions were raised as to how reliable and efficient they are. It has been claimed that mobile polling stations can easily contribute to vote rigging, a concept that is not defined in the *Electoral Act*.

251. Further concern was expressed that the secrecy of vote is not adequately addressed when voting at mobile polling stations. The chance of identifying voters who have voted for a certain party is greater at mobile polling points, particularly when only a few votes are cast at such a voting point.

252. 1,036 fixed voting stations and 549 mobile stations visiting 3,000 places were identified during the 2009 Presidential and National elections.

Recommendation 35

The concepts “polling stations” and “rigging” should be defined in the *Electoral Act*. Rigging could be defined as ‘prearrange fraudulently’ or in the case of elections, to ‘manipulate dishonestly’.

Once polling stations have been identified with the assistance of political parties, the regional governors and councilors, and at local level with the local authority councilors, the identified polling stations should be advertised for public comments. Regarding the identification of fixed polling stations, consideration should be given to whether they should be declared permanent for the elections to come, and as such proclaimed.

Due to the social-economic reasons, settlement patterns and geographic conditions of Namibia, mobile polling stations are indispensable. A voter should not walk more than 5 (five) kilometers to reach a polling station. Any further distance than five kilometers would be unreasonable to elderly people.

The mobile voting system should not be discarded, as it benefits voters who would otherwise find it difficult to cast their vote, particularly in sparsely

populated rural areas and on distant farms. Mobile polling stations also serve voters in prison, hospitals and old age homes in an efficient way.

The Police should be tasked with protecting polling stations and made responsible for making it possible for the elections to take place in a safe environment. The Police can be armed, but their weapons should not be visible. A conciliatory attitude should prevail at polling stations. The Police's task is to maintain law and order, but not to assist a voter to cast his/her vote. It should be a requirement that Police Officers be easily identifiable at polling stations.

Police officials and/or army personnel, well-trained for their task, should be present outside and inside each polling station to attend to security, to enforce orderly queuing, and to handle the access to the polling station. The Police officials and returning and presiding officers should consult and act in unison.

Clarification is needed on the concept "polling station at a convenient place", as stated in the *Electoral Act*. Certain conditions should be specified as to what is considered a convenient place. Also the minimum size of a polling station should be prescribed with access to toilet facilities. Preferably polling stations should have separate entrances and exits.

No photos should be allowed to be taken inside polling stations without permission of the Director of Elections. Only the presiding officer and the returning officer should be permitted to carry and use mobile phones for communication on electoral matters.

Serious attention should be given to whether the number of fixed polling stations can be increased, thereby resulting in less mobile polling teams and stations. If elections were to be conducted on one day only, it would imply an increase need in the number of fixed polling stations, and possibly also more mobile polling teams.

Mobile polling teams are here to stay. Circumstances in Namibia are as such that elections cannot be conducted without them. They serve polling points that cannot be adequately served by fixed polling stations.

During the consultative process repeated requests were made that mobile teams should be accompanied by party agents, that transport should be provided for them by the State, and possibly also that their remuneration be paid by the State. This request undermines the independence of the agents.

Except for party agents, electoral officials, police official on duty and observers, no other person should be allowed to be present during vote counting. Should there be other persons present (e.g. members of the public), it could endanger the secrecy of the vote.

Election Officials

253. Having very well trained electoral officials capacitated with the necessary skills, who are helpful to voters and communicative in their approach, are all preconditions for successful voting. The prospective voter should feel as if he/she is the most important person on Election Day.

Recommendation 36

During the consultative process it was proposed that election officials should not be members of the police force, defense force, and state security. This principle is acceptable.

All election officials should undergo an aptitude test before being appointed. They must be well trained and only appointed if they have passed a written ability test. Ordinary election officials, below the rank of a presiding and returning officer, should be above the age of twenty-one. Only experienced people should fill the positions of presiding and returning officers. They will have demonstrated their knowledge, expertise, management and administrative abilities and skills during previous elections. No electoral official should be a political party office bearer.

As the possibility exists that a number of election officials will not pass their tests, twenty per cent more applicants than needed should undergo training and complete the required tests. Those who cannot be appointed immediately should be put on a reserve list without remuneration.

It is expected that election officials should open the polling stations punctually and must show their capabilities and capacities to handle the voting process smoothly and efficiently. Among others it is the duty of the presiding officer to ensure that the secret mark is affixed on the ballot papers.

Somewhere in the *Electoral Act* it should be mentioned that returning and presiding officers must have proven during their training process that they have communication and mediating skills.

Vote Counting

254. The *Electoral Act* is very clear on this procedure. All votes cast, whether valid or rejected, are considered as votes cast. But only valid votes determine the

outcome of an election. Polling stations are counting stations after the elections have been terminated.

255. Different opinions prevail on the commencement of counting after the voting process has come to an end. Voting officials are exhausted after a day of voting. They have been operative for at least sixteen hours if one takes into consideration the fact that there's one hour of preparation, and that voting lasts anything between fourteen to sixteen hours depending on how many prospective voters were still in the queue when voting officially closed at 21:00 hours. At least another hour is needed to comply with the prescribed administrative tasks.

Recommendation 37

The *Electoral Act* should clearly state that only the voting mark inside the space provided should be valid; any voting mark outside the space provided should be invalid and rejected.

One approach is to commence with the counting when the last votes have been cast and not later than one hour thereafter. A replacement of electoral officials and party agents should, however, be considered, which is not necessary when the electronic voting system is applied. Should the present system be continued with then a new team of electoral officials should take over.

As the officials are exhausted by that time, it would be inhuman and would do the counting process harm (e.g. no concentration; making unnecessary mistakes; officials, observers and agents falling asleep) to immediately commence with vote counting. How will an electoral official be able to work with the same energy, diligence and physical competence after having been involved in the voting process for at least sixteen hours?

Special permission must be gained from the Ministry of Labour to prolong the ordinary working hours from eight to sixteen hours which should be reflected in the remuneration.

Alternatively, counting could commence early the next morning at 07h00 after the day of elections. The same team from the previous day can then continue. This approach is recommended.

In some quarters the decision to commence with counting only the next morning may raise doubts and criticism as the ballot boxes have to be duly protected and guarded during the night till counting commences. For that night the ballot boxes shall remain under the protection of the Police at the

polling stations. Party agents are present when the ballot boxes are sealed, including the seals of parties, and are again present when the seals are broken before counting commences the next day. When sealed, every ballot box should bear the signature of the party agents present who should also sign the result sheet of elections before the results are publically announced. With regards to mobile stations, the same procedure should apply.

A suggestion has been made that video cameras should be installed at ECN logistic facilities such as headquarters, polling and verification centres, where election material such as ballot boxes are stored.

When for specific reasons recounting of votes is necessary then the presiding officer and his/her team will perform such task at the polling station in the presence of the party agents.

Under certain circumstances a returning officer can also request a recount of the ballot papers at the verification/collation centre. Such entity should be clearly defined in the *Electoral Act*.

It is recommended that verification should in the first instance take place at polling stations and not at a verification/collation centre.

Spoilt and rejected ballot papers

256. Some confusion is caused by the terminology of the *Electoral Act* when it refers to “*spoilt*” and “*rejected*” ballot papers. These two terms are used interchangeably (compare, *inter alia*: Sections 85 (2), 85 (3), 85 (4), 85 (7)(f), 85 (9) (c) and also 83 of the *Electoral Act*). During elections it appears to have caused some confusion regarding the manner in which election forms are prepared when a record of “*rejected*” or “*spoilt*” ballot papers is required.

257. It can be argued that “*rejected*” and “*spoilt*” ballot papers consist of two distinctly different categories of ballot papers, namely:

- a) Ballot papers which are spoilt or damaged before they find their way into the ballot box. For instance, ballot papers inadvertently damaged by a voter or an election official before any vote is being cast with that ballot paper. Such ballot papers can then not be used, but should be accounted for in order for the election forms to add up, i.e. to ensure that all ballot papers issued to a particular polling station are being accounted for and that the paper trail shows no discrepancies.
- b) A different category which consists of ballot papers which find their way into the ballot box and were spoilt by the voter.

Recommendation 38:

The *Electoral Act* should clearly distinguish between the two categories of spoilt (and/or for that matter, “rejected”) ballot papers. The *Electoral Act* or Regulations should determine how a record of these two categories should be kept in the election forms. Absolute clarity is needed.

Allocation of seats and the Surplus Vote

258. Schedule 4 of the Constitution deals with the election of members of the National Assembly. The method applied is also applicable during local authority elections.
259. Schedule 4(1) states “for the purpose of filling the 72 seats in the National Assembly pursuant to the provisions of Article 46(1)(a) hereof, the total number of votes cast in a general election for these seats shall be divided by seventy- two (72) and the result shall constitute the quota per seat”.
260. Schedule 4(2) it continues: “The total number of votes cast in favour of a registered political party which offers itself for this purpose shall be divided by the quota of votes per seat and the result shall, subject to paragraph 3, constitute the number of seats to which that political party shall be entitled in the National Assembly.
261. Of particular relevance is Schedule 4, paragraph 3, which deals with the surplus vote. It states: “Where the formula set out in paragraph (2) yields a surplus fraction not absorbed by the number of seats allocated to the political party concerned, such surplus shall compete with other similar surpluses accruing to any other political party or parties participating in the election, and any undistributed seat or seats (in terms of the formula set out in paragraph (2)) shall be awarded to the party or parties concerned in sequence of the highest surplus.”
262. A difference of opinion prevails on which registered participating political party in an election is qualified to obtain a seat when the principle of surplus is applied. One interpretation is that the party that has already obtained a seat or seats in the election should benefit from the highest surplus, and not a party that achieves the highest surplus but has not obtained a seat according to the quota allocation. The other interpretation is that the seat should be allocated to the party with the highest surplus, irrespective of whether that party has obtained a seat according to the quota application or not.

263. During the consultative process an unfounded fear was expressed that surpluses of all the parties are added to the party with the highest surplus. This is not the case.

Recommendation 39

As a difference of opinion prevails on who should benefit from the surplus, a legal opinion is necessary on paragraph three of Schedule 4 of the Namibian Constitution. Such opinion should not only deal with the interpretation of the concept ‘surplus’, also but who is entitled to benefit from such surplus.

It is therefore recommended that said Schedule 4 (particularly paragraph 3) should, according to Article 79 (2) of the Constitution of Namibia, be referred to the Attorney-General and from such office to the Supreme Court for interpretation. Article 79 (2) states that “the Supreme Court shall ... hear and adjudicate ... the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed there-under”. It continues to state that “the Supreme Court shall ... deal with matters referred to it for decision by the Attorney-General under this Constitution”.

The latter legal procedure is recommended, namely to approach the Attorney-General to refer the matter of the surplus vote and the procedures how it should be applied (see Schedule 4, particularly paragraph 3 of Article 79 of the Namibian Constitution) for interpretation to the Supreme Court.

Should the surplus votes be equal in numbers, dicing (‘flipping the coin’) — that is, deciding by lot — should be considered and as such reflected in Namibian Constitution. An alternative could be that the parties with equal votes decide that each one serves an equal term of office. This has been applied in the past when a region had equal representation of councillors belonging to two different parties and the governor had to be elected. The agreement was that if two parties have the same number of councillors, then one party would fill the position of the governor for half the term, and the other party the other half term.

Verification of votes and announcement of election results

264. The *Electoral Act* has certain flaws regarding the ultimate announcement of election results at polling stations. This applies to both ordinary and tendered votes.

265. It follows from an interpretation of Sections 85, 88 and 92 of the *Electoral Act* and their various subsections that the ultimate result announced by the Director of Elections in terms of Section 92 of the Act and in respect of the National Assembly elections, is the total of all the results counted at polling station level and not, for instance, the result of a verification process as envisaged by Section 87 of the *Electoral Act*.

Recommendation 40

Precise clarification is needed on the task performance by the presiding officer at a counting station and the returning officer at a verification centre pertaining to the announcement of election results. Who must take the responsibility?

It is a matter of interpretation which may result in an amendment to the *Electoral Act* to achieve more clarity on the announcement of results. The fact that the ultimate result should be the aggregate of polling stations results is very important. This would agree with SADC-principles. The following is important in this context:

a) Party agents are entitled to be present where the actual counting, which determines the ultimate result on a national level, is being done, namely at the counting stations. It is at counting stations where the *Electoral Act* requires that the results of the counts should be announced. This ensures a transparent election process and enables everyone concerned to verify the ultimate result, i.e. to ensure that the total of all results of the polling stations equals the total result announced for the whole country.

b) It is therefore important that the total of all polling station results translate into the total result announced by the Director of Elections in terms of Section 92 of the *Electoral Act*, and the Act should be worded so as to clearly stress this principle and requirement.

During the consultative process repeated proposals were made that the results announced at polling stations should be the final result, and that no further verification should take place. Discretion should be given to the returning officer, after discussion with the party agents present (see argument for their presence further down), to concur that that results of a polling station as submitted by the presiding officer of the counting centre to the verification centre be final without opening ballot boxes and ballot papers.

It is not clear from Section 87 what ‘verification’ actually means. On the one hand it stands to be argued that this does not entail a recount of the polling station votes by the verification officers, but that the words appearing in

Section 87 (2) (a), namely that the returning officer has the obligation to “*verify the correctness of the return finished by the presiding officer concerned*” (thus, the presiding officer at the polling station), means that the returning officer should establish whether the return has been correctly prepared, i.e. added and calculated, and thus only needs to check it for arithmetical errors, etc. In the latest High Court judgment in the RDP-matter, the Court held that this is the correct interpretation. This interpretation was attacked on appeal, and a judgment of the Supreme Court is awaited.

The concept ‘verification’ is thus subject to different interpretations, one of them being ‘recount’, another ‘collation’. Next to verification no mention is made in the *Electoral Act* of the concept ‘verification centre’.

It can be argued that the correct interpretation of Section 87 (2) (a) is that a recount should take place by the returning officer, since the correctness of the return (i.e. the correctness of the results appearing in that return) cannot be verified without a recount of the votes. It is submitted that it is for that reason that Section 87(2)(a) requires the returning officer to “open” the sealed packets and remove all the ballots therefrom. If it is simply a matter of an arithmetical recalculation of the return of the presiding officer being required, it makes no sense to require the returning officer to open the sealed packets and remove the ballot papers there from.

The *Electoral Act* should be amended to state the obligations of the returning officer during the process of verification in clearer terms.

The *Electoral Act* should state expressly that even should the returning officer find a discrepancy between the votes counted by him/her and the votes counted by the presiding officer of the polling station, that it would still be the result of the polling station count that will prevail. If that were not to be the case, the ability of the public to verify the national result would be compromised, since it is the polling station results which are being publicly announced. In addition, should the verification result be the one that ultimately counts, it opens the door for ballot box stuffing during the transit of ballot boxes from polling stations to verification centres. It could therefore compromise the integrity of the election process (or at least create a public perception of such a compromise) should the verification center results be determinative.

The purpose of the report of the verification process prepared by the returning officer in terms of Section 87(2)(b) is then simply to serve as a record for anyone who may later wish to challenge the election in respect of particular constituencies (and this report would then constitute evidence of a discrepancy found). The purpose of this report should never be to constitute the result for a constituency.

Currently Section 87 of the *Electoral Act* does not allow party agents to be present during the verification process. During such processes party agents are merely entitled to examine the seals of ballot boxes, voting machines and packets before these are opened and afterwards they receive a copy of the report prepared by the verification officer (returning officer). The party agents are not even entitled to be present when the boxes and packets are being opened. For the sake of transparency, it is recommended that it should be stated in the *Electoral Act* that party agents are entitled to be present during the entire verification process.

Pertaining to the verification process and its implications Section 87 of the *Electoral Act* should be revisited.

The announcement of the provisional results — if the *Electoral Act* should be amended it could be the permanent result — is executed at the counting station by the presiding officer. This should be in a handwritten or electronic form providing all the particulars (e.g. percentage vote, valid and spoilt ballots, votes cast for each participating political party or candidate). Such documentation should be affixed to the outside wall of the counting station (e.g. door, window), signed by the presiding officer and party agents who should be provided with a copy of the result sheet. The result sheet should remain affixed for 72 hours. Removal of such result sheet should be declared as a crime and punished accordingly.

Immediately after the announcement of the provisional results they should, as prescribed, be transmitted by the presiding officer at the counting station to the verification/collation station headed by a returning officer. The procedure of verification of ballot papers is reflected in Section 87 (1) of the *Electoral Act*. Verification implies among others that the votes cast must comply with the number of ballot papers issued. The task is thus to collate results. The verification/collation centre is not a centre where a recount of the cast votes automatically takes place. This should only be allowed in clearly defined circumstances.

After verifying the results and informing the Director of Elections accordingly, he/she will publically announce the official result of the elections in a constituency or local authority area. As long as tendered votes are cast throughout the country they must be assigned to the constituency where the voter was registered and then added to the ordinary votes in the particular constituency.

The public, the media and every interested body should be allowed to make copies and/or photograph the published result sheets at polling stations and at the constituency result centre.

The Chairman of the Electoral Commission should remain responsible for the announcement of the outcome of the presidential election. A time frame should be set in the *Electoral Act* for the announcement of election results. It is recommended that election results shall be announced within five days after the elections officially ended.

Assessment of the Electoral Process

266. It should be an important part of the responsibilities of the EMB to assess the performance of conducted elections and how they can be improved against the experience obtained during the electoral process. No process is perfect and each election is a learning experience. For a performance assessment a set of criteria should be developed against which the EMB's performance can be measured. Such an evaluation process could be undertaken by the EMB itself, or be performed by an outside agency.

Recommendation 41

A peer review mechanism should be established to appraise the EMB's capabilities and election managing capacities. Such a peer review mechanism should harmonise with NEPAD's African Peer Review Mechanism. It is also recommended to share Namibia's own experience and judgment with other SADC states. The aim is to achieve the best practices.

Post election reports by the EC should be made publically available and discussed. They should be published within a month of the election results having been officially announced. As recommended in the "White Paper" (2011:24), they should contain five (5) major categories (slightly adapted):

- a) Constitutional and *Electoral Act* provisions;**
- b) Systems and logistics (including infrastructure);**
- c) Training of election officials and their performance;**
- d) Voter education and training;**
- e) Voting process and analysis of results; and,**
- f) Consequently, possible amendments to the *Electoral Act*.**

Part 6

Political Parties and Funding

Registration of political parties, organisations and associations

267. A political party can be defined as a formally organised group of people sharing common policy preferences over a wide range of issues. Their declared purpose is to seek power through representation in legislative bodies at both national and sub-national level. Politics *per se* is the art and science of governing a state. It involves the allocation, distribution and the control of power.
268. Article 17 (1) of the Namibian Constitution states that: “All citizens have the right to participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of public affairs, whether directly or through freely chosen representatives.”
269. Section 39 of the *Electoral Act* determines that if a party wants to be considered for registration it must have as its main objective to be an active participant in elections and also to promote elections. Its aims must not be prejudicial to the safety of the state, to public welfare or to good order. A further demand is that the party membership must be open to all, regardless of gender, race, colour, ethnicity, religion or social or economic status.
270. Political parties play an important role in a political system. They participate in shaping the political will of people, propagate and pursue political ideas and social and economic programmes of a national character. They are expected to perform a vital role in democracies by:
- Recruiting and training future political leaders;
 - Educating the electorate on current issues of public concern;
 - Formulating and presenting the people with alternative policy programmes; and, in the process,
 - Seeking to reconcile conflicting interests within the party and the country.
271. Political parties are expected to promote national unity and reflect democratic nationalism. In Namibia the majority of political parties are founded on an ethnic/tribal basis. This hampers a national approach and undermines reconciliation. Sectarian parties can potentially undermine the stability of the state and foster disunity.

272. Parties should be inclusive and not exclusive in their approach and when pursuing their programme. It is therefore important that the EC plays an important role in monitoring the activities of political parties and constantly assesses whether they comply with the Code of Conduct devised for them.
273. Sections 39 – 47 of the *Electoral Act* prescribe the processes of registration political parties, organisations and associations are obliged to follow. Note must also be made of Government Notice of 2007, Part II which also deals with the registration of political parties, organisations and associations. This Notice contains Elect 3 (application for registration as a political party), Elect 4 (application for registration as an association or organisation), Elect 5 (certificate of registration as a political party), and Elect 6 (certificate of registration as an association or organisation).
274. The registration of a political party can be cancelled if it contravenes Section 46 of the *Electoral Act*, which deals with foreign financing.

Recommendation 42

During the consultative process it was widely recommended that a separate act should be promulgated dealing with the establishment of political parties, their role in an election process and their funding. In terms of finding references for establishing a ‘Political Parties and Funding Act’ in Namibia, it is worth looking at and using existing political parties acts in other SADC countries, such as in Tanzania (*The Political Parties Act*), Kenya (*The Political Parties Act, Act No. 10 of 2007*), Uganda (*Political Parties and Organisations Act, 2005 (Act No. 18 of 2005)*), and Zimbabwe (*The Political Parties (Finance) Act*).

A Political Party and Finance Act should contain a number of salient features, including the provision for the registration, regulation, and funding of political parties. To exclude ethnic and tribal based parties from registration would probably contradict the Constitution which safeguards cultural and tribal identities. At registration, political parties should prove their national character and they must practice internal party democracy. It is also expected of all political parties, already registered or about to register, to practice gender parity. They must prove accountability and trustworthiness, the orderly running of public rallies, and should make provision in their constitution about how to resolve political parties’ disputes. Of importance is also how political parties regulate and control their finances and where their income is derived from. For Namibia, the *Kenyan Political Parties Act, No. 10 of 2007* could in particular serve as a useful example (see: Mwangi, 2010:11-12).

There was general agreement during the consultative process that stricter preconditions and rules should be applied when political parties apply for registration. The present conditions and rules are not considered sufficient. However, the registration conditions for organisations and associations should remain as stated in the *Electoral Act*.

The Kenyan Political Parties Act contains the precondition that a political party cannot be registered if it:

- a) Is founded, or seeks to engage in propaganda, on an ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious basis;
- b) Uses words, slogans, emblems or symbols which could give rise to ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious division;
- c) Has a constitution or operational ethic that provides for discriminatory practices contrary to the provisions of the Constitution or of any written law;
- d) Accepts or advocates the use of force or violence as a means of attaining its political objectives;
- e) Advocates or aims to carry on its political activities exclusively in one part of Kenya, and
- f) Does not allow regular, periodic and open election of its office bearers.

The *Namibian Government Notice of 2007* states in Section 8, that a political party is obliged to pay a N\$5,000 registration fee and an association or organisation N\$500, to be paid into the State Revenue Fund. Some political parties are of the opinion that the N\$5,000 registration fee should be lowered to make it more affordable to register as a party. Most support a higher registration fee of up to N\$50,000 to prevent the registration of parties that have no financial capacity to compete in elections. As political parties only qualify for financial support from the State if they are represented in the National Assembly, it could be argued that there is no sense in allowing financially weak parties to register, as they will not qualify for party funding. Their chance to make it into the National Assembly is zero.

In general, political parties participating in national elections (presidential, national assembly) should prove their countrywide support before being allowed to register as a political party. The support of at least 500 to 1,000 registered voters in each of at least ten regions is a measurement that could be considered. The figure per region could vary: More signatures of registered

voters in densely populated regions and less in regions with smaller numbers of registered voters could be considered. A variation is thus possible.

In the case of local authority elections, participating parties, organisations and associations should have the signatures of at least 200 registered voters in the particular local authority area.

During the consultative process, a number of proposals were made. The majority recommended that to qualify for registration a political party's support should not be based on signatures obtained in a single constituency, region or local authority area; they should command widespread national support. The general feeling is that the present stipulation that a party needs only five hundred signatures for registration, which theoretically could come from one constituency, should be done away with.

The general trend during the consultative process was that strict conditions should apply for the registration of political parties. The mushrooming of parties with little support nationally should be avoided.

The precondition of registering political parties differs in African countries. In Angola the registration of a political party must be requested by at least 7,500 citizens older than 18 years of age, 150 of whom must be residents in each of the country's 18 provinces.

The revised *Electoral Act* for Namibia should contain a provision that the Electoral Commission should be alerted of any changes and amendments to the registered political parties', organisations' and associations' constitutions, particularly when they could harm the exercise of democracy on an intra- and inter-party level. For further control of the justified existence of a political party, the Electoral Commission should have the right to enquire from time to time whether a political party still has a sufficient number of members, at least as many as were prescribed when it was registered.

If the National Assembly should decide that the composition of the party nomination lists of the prospective members of the National Assembly should be gender representative (as is the case with the local authority party lists), then the determined ratio should also be reflected as an obligation.

If needed, it could be stated in the revised *Local Authority Act* that registered parties, organisations and associations are not compelled to take part in an election.

Political parties should be consulted in the design, administration and adjudication of rules for elections by way of a structured and agreeable process. On the other hand, political parties should be allowed to make use of

the services of the EC during intra-party elections and for voter education and information.

The *Political Parties and Funding Act* should be specifically clear on the procedures when registered political parties merge to form a united body such as an alliance (e.g. re-registration). Registered political parties should be free to form (permanent, temporary) alliances, coalitions and fronts. Coalitions are only formed once parties have been elected and are represented in the National Assembly. Coalitions cannot register as a party, but only as an alliance. Both the concepts 'coalition' and 'alliance' should be defined in the *Political Parties and Funding Act*.

The Electoral Commission is at any time entitled to deregister a political party, organisation or association if it does not comply with the provisions of the *Electoral Act*. Reasons for deregistering a party must be legally determined. There must be clear criteria in the Act for deregistering political parties, organisations and associations. A political party, organisation and association should be given sufficient time to attend and contest the intention of the EC to deregister it. It is recommended that if a registered party or alliance does not take part in two successive elections at national or regional or local level or has become dormant, its registration should be declared expired. Rules for deregistration of political parties, organisations, associations and alliances should be laid-down.

Example of a Political Parties and Organisations Act:

The Ugandan *Political Parties and Organisations Act* could serve as a point of departure for a Namibian Political Parties and Funding Act. It is the Ugandan *Political Parties and Organisations Act, 2005 (Act No. 18 of 2005)*, amended by the *Political Parties and Organisations (Amendment) Act No. 4 of 2010* and *Act No. 13 of 2010*.

This Act makes provision for regulating the financing and functioning of political parties and organisations, their formation, registration, membership and organisation under articles 71, 72 and 73 of the Constitution; the prescription of a Code of Conduct for political parties and organisations and the establishment of a national consultative forum for political parties and organisations; to repeal and replace the *Political Parties and Organisations Act, 2002*, and for related matters.

The Ugandan Act contains the following principles, stipulations and requirements, which are reflected in an adapted form and are possibly applicable to a similar act in Namibia:

PART 1 - Preliminary

1. Short title

2. Interpretation

PART II – Registration of Political Parties and Organisations

3. Formation of political parties and organisations

4. Electoral Commission to register political parties and organisations

5. Prohibition of ethnic/tribal or religious organisations (to become involved in party politics)

6. Conditions for the registration of political parties and organisations

7. Method of registration of political parties and organisations

8. Acceptable constitution, symbols (motto) and party colours

PART III – Conduct of Political Parties and Organisations

9. Declaration of assets and liabilities

10. Internal organisation of political parties or organizations

11. Notification of changes and alterations in the constitution of political parties or organisations

12. Records and audit of political parties or organisations

13. Membership: only Namibian citizens

14. Non-Namibians not allowed to hold office in a political party or organisation

15. Control over contributions from the private sector and from foreign sources

16. Use of government and public resources for political party or organisations activities

17. Duty of political parties or organisations to provide information to the Electoral Commission on outside funding

18. Merger of political parties and organisations

19. Alliance and coalitions of political parties and organisations

20. PART IV – General Provisions

21. Code of Conduct for political parties or organisations

22. National consultative forum for political parties and organisations

23. Composition of the national consultative forum

24. Non-compliance with this Act

25. Appeals

26. Expedition of proceedings

27. Gazette notices, etc.

28. Delegation of tasks by the Electoral Commission

29. Regulations

30. Minister's power to amend Schedules

31. Repeal and savings

Party funding

275. Party financing and spending is a contentious and sensitive political issue with no applicable legislation existing in Namibia that regulates the conduct of political parties in relation to private donations and funding. No conditions are attached to the receipt of such contributions. Section 46 of the *Electoral Act* only refers to the disclosure of foreign financing of political parties and article 98 to offences in connection with foreign financing of political parties, and there it ends. No mechanism exists for making funding public. There are also no legal requirements to account for the money received.
276. It has become practice in countries, with South Africa as an example, that the EC simultaneously administers the registration of political parties, the public funding of parties, the disclosure provisions, and also observes as the guardian of a political party, symbols and independent candidates' logos. For these purposes South Africa has promulgated separate legislation dealing with political parties. It is known as the *Public Funding of Represented Political Parties Act No. 103 of 1997* and the *Public Funding of Represented Political Parties Regulations, 1998*. The Namibian *Electoral Act*, although not in any particular detail, makes provision for most of the tasks as disclosed in the South African Act, but no provision is made for funding and related matters, how income is handled, from which sources financial and material assistance is received, how the income is spent, and who is responsible for annual auditing of the accounts of political parties.
277. A number of SADC countries such as Botswana, Zambia, Democratic Republic of Congo, Madagascar, Tanzania and Mauritius do not allocate public money to fund political parties. Other SADC countries, such as Zimbabwe, follow the proportional allocation of seats in Parliament. Others, such as Malawi, have a threshold, funding only political parties that received a certain percentage of votes during the last election. In Lesotho half of the funds allocated by Parliament are divided equally among the parties, and the other half is divided according to the number of seats a party fielded. In Mozambique a third of the allocated funds go to presidential candidates, a third to parties in Parliament in proportion to the seats held, and a third to parties in proportion to the numbers of candidates fielded. Mozambique is the rare exception to provide funding for campaign purposes to parties not represented in Parliament. Madagascar only reimburses expenses incurred by candidates or parties who receive more than ten percent of the vote. Countries neighbouring Namibia, such as South Africa and Angola, provide funding to parties represented in Parliament.

278. In Kenya a Political Parties Fund exists which is administered by the Registrar. The Minister of Finance provides the funds, and the Fund can also receive contributions and donations from other sources. The monies from the Fund are then allocated to political parties for democracy promoting use. The funds must not be used:

- For paying remuneration, fees, rewards, or any other benefit to a member or supporter of the party;
- To finance any matter, cause, event or occasion in contravention of any code of ethics binding on public officers;
- For the purposes of establishing any business or acquiring or maintaining any right of financial interest in any business or in any immovable property, unless it is to be used for ordinary political purposes;
- For any purpose incompatible with the promotion of a multiparty democracy and the electoral processes.

279. The funding of political parties in West Africa is extensively explained in a book edited by Kofi Kumado. Among others it addresses themes such as ‘Multi-party democracy and political party financing’, ‘The case for public funding’, ‘Political funding in young African democracies’, and, ‘The role of financial rules and regulations for the success of multi-party democracy’.

280. The financing of political parties represented in the National Assembly (not considering the representation of political parties at regional and local level annually and not specifically during electoral campaigns) is separately enacted in Namibia. It is state money that is involved which the political parties must account for. The total amount available in a financial year is 0.2 per cent of revenue from the previous financial year. The amount is proportionally divided among the parties and based on the number of seats they have in the National Assembly.

281. In a Government Notice of 2007 on Regulations relating to the Registration of Voters and Political Parties in Section 10, clarification is given on the disclosure of monies received by political parties in Namibia and the disclosure thereof to the public. The Notice reads as follows:

282. “The disclosure of money to the public as contemplated in Section 46(1) of the Act, shall be made by a political party or other body or institution, or member of such party, body or institution, or other person referred to in that Section, within a period of 30 days after it was received, by publishing a notice in two (2) newspapers circulating in Namibia, specifying:

- (a) the amount of money received;
- (b) the source from which such money was received;

- (c) any conditions upon which such money was donated or otherwise received; and
- (d) the manner in which such money is intended to be used.”

283. Particular interest is expressed in who the donors are, whether they originate from the private sector or whether foreign institutions such as political parties and governments are supporting domestic parties.

284. Political parties are hesitant to make their sources of funding public, and this also applies to their financial backers. In addition, ruling parties are accused of misusing public resources (e.g. government buildings, transport, civil servants, money).

285. In 1996 a parliamentary select committee recommended that parties receive a subsidy, while adding that they should submit annual accounts to parliament and declare every donation over N\$500 (Mongudhi, 2008:19). This did not materialise.

286. In December 2011 a member of the National Council (Bernard Sibalatani) tabled a motion calling for separate funding of political parties represented in the National Council. His argument does not hold water as registered political parties are funded and not representatives in the National Assembly, the National Council, the Regional Councils, and Local Authority Councils. It is a collective amount allocated on a pro rata basis to registered political parties as represented in the National Assembly from which all political representatives in the different legislative bodies (e.g. National Assembly and National Council) benefit. It is not the representative of a particular party who benefits but the party to which he/she belongs and which decides how the financial resource received is allocated and for what purpose (e.g. elections).

287. All parties demand transparency and accountability from government in its decisions and in the execution thereof, particularly when it comes to government expenditure, but political parties remain unaccountable when it comes to their own use of public funds.

288. A valid argument could be whether state money should also be spent on organisations and associations at local authority level and also on independent candidates should they be successful in elections, thus making representation at national level not the only norm for subsidising political parties.

Recommendation 43

Definite provision should be made in the proposed Act on Political Parties and Funding on the annual financing of political parties, associations and organisations, relating to both public and occasional private funding.

There should be clear guidelines/rules how political parties can spend allocated funds and how they can best use the financial resources to promote democracy, including intra-party democracy. They must give full account of how they spend private and public funds. Transparency should prevail. Punitive measures should be applied if the political parties do not account on the spending of public and private funds.

South Africa and some other SADC countries (e.g. United Republic of Tanzania, Zimbabwe) have separate legislation (Act) for the Financing of Political Parties in place. It can be considered as an obligation of the state to finance political parties through public funds to ensure equitable participation in elections.

Zimbabwe's *Political Parties (Finance) Act* makes provision among others for:

- a) Financing of political parties;**
- b) Applying for payment of monies to qualifying political parties;**
- c) Money to be paid from the Consolidated Revenue Fund;**
- d) Donations to political parties, members and candidates;**
- e) Foreign funding and the solicitation of donations by foreigners is prohibited.**

In Uganda funds or other public resources are contributed to political parties or organisations represented in Parliament. They are funded in respect of elections and in respect of normal day-to-day activities according to their numerical strength in Parliament. A separate fund can also be created for election campaigning can be equally divided among the political parties and organisations contesting an election.

Some political parties in Namibia adhere to the thought that all registered political parties should, according to a certain formula, be financed when they partake in elections, whether they will be represented after elections in the National Assembly, in regional and local authority councils, or not. The emphasis is on enabling political parties to take part in any form and at any levels of elections.

Another argument is that only political parties represented in the National Assembly, regional councils and local authorities (plus organisations and associations) should receive annual financial support from the government coffers. In this case it is argued that money should be more equally be distributed among all the political parties and not according to the support (e.g. seats, percentage) obtained during elections.

During the consultative process a suggestion was made that a lump sum distributed equally should be paid to all participating political parties in an election. Thereafter day-to-day funding on a proportional basis relating to the representativeness of political parties in the National Assembly, in regional councils and in local authorities, should be made available.

The matter then is whether, in addition to the annual public funding of registered political parties represented in the National Assembly, Regional Councils and Local Authorities, parties should receive additional funding during presidential, national, regional and local authority elections.

The EC should be entitled to be informed on income and expenditure should political parties, organisations and associations, as well as independent candidates, be financially supported by the state and other sources (domestic and foreign). It should also be entitled to have access to the annual audit of the funding of political parties and how the income is spent. This equally applies at local level to associations, organisations and independent candidates (the latter at regional council and presidential level).

According to Booyesen and Masterson (2009:415-416) important ground rules should be laid-down that public political party funding can only be used and accounted for by political parties, organisations and associations, for the following purposes:

- a) The development of the political will of the people;
- b) Bringing the party's influence to bear on the shaping of public opinion;
- c) Inspiring and furthering political education;
- d) Promoting active participation by individual citizens in political life;
- e) Exercising and influencing political trends;
- f) Ensuring continuous, vital links between the people and the organs of state.

Public funds must not be used for personal gain, for undermining the governance of the country and should not be utilised to further party programmes.

Every political party receiving public funds should be obliged to appoint an accounting officer who should be responsible for accounting how such funding is spent and who can be held liable thereto.

The EC should be responsible for the administration of public funds to political parties. Allocated funds by the State should be channeled to the EC

which then is responsible for allocating proportionally, as determined by the State, the assigned funds to the political parties.

The annual auditing of parties' income and expenditure should be performed by the Auditor General's Office. Should a party fail to submit the annual auditing report to the National Assembly, public funding to that party must cease.

Part 7

Alignment of Electoral and Delimitation Commission

289. Alignment is used in the context that the Electoral Commission is correctly positioned relative to the Delimitation Commission.
290. The work and tasks of the Electoral Commission and the Delimitation Commission are interrelated. The Electoral Commission conducts its activities within regions, constituencies and local authority areas. The Delimitation Commission demarcates the boundaries of these entities (regions, constituencies and wards).
291. Article 103 (1) of the Namibian Constitution states that the boundaries of regions that are subdivided into constituencies "shall be determined by a Delimitation Commission". Article 103 (2) elaborates on the tasks to be performed by the Delimitation Commission. It states that "the boundaries of regions may be changed from time to time and new regions may be created from time to time, but only in accordance with the recommendations of the Delimitation Commission".
292. Section 5 (1) (a) and (b) of the *Regional Council Act* (Act No 22 of 1992) determine that the President may at any time with a view to changing the boundaries of any region, or to creating any new region "at intervals of not less than six years and not more than twelve years" beginning with the commencement of the Regional Council Act, "with a view to re-dividing the regions into constituencies", appoint a delimitation commission to consider new regions and constituencies, re-divisions of such entities, and changes to the border lines of regions and constituencies. Section 2 of the same Act states what must be considered when new boundaries, new regions and constituencies are established.

293. Article 104 (2) of the Constitution states that the Commission “shall discharge its duties in accordance with the provisions of an Act of Parliament and this Constitution, and shall report thereon to the President.”
294. Article 104 (1) deals with the composition of the Delimitation Commission. The Delimitation Commission shall consist of a chairperson “who shall be a judge of the Supreme Court or the High Court, and two other persons to be appointed by the President with the approval of Parliament”.
295. Currently any appointed Delimitation Commission must submit a report to the President containing all the recommendations for his/her approval. When satisfied, the President shall by proclamation make known the proposed changes and additions as recommended by the Delimitation Commission. Such a proclamation will become effective before the next Regional Councils elections in 2015.
296. The Delimitation Commission is presently appointed at intervals of six (6) years for a determined period till it has completed its tasks. Since the term of office of Regional Councils has been shortened by one year to five (5) years, the Delimitation Commission should be appointed every five (5) years, thus the latest in 2014.
297. The present arrangement of occasional and temporary appointment of a Delimitation Commission has its shortcomings. Any changes to the border lines of regions and constituencies, any rectification of existing border lines and any establishment of new regions and constituencies can only be performed when a Delimitation Commission is appointed, at the earliest every five (5) years. No amendments or changes can be determined and applied within this period.
298. Should bodies (e.g. Regional Councils, the National Assembly, civic organisations, other bodies) request that any changes to the existing border lines of regions and constituencies, and at a given stage to wards, should be adhered to immediately (e.g. before a by-election in a constituency), they can submit such requests to the President. The President is, however, not in a position to accede to such requests as only a Delimitation Commission can do so. The Delimitation Commission is, however, not a permanent institution and can at the earliest adhere to any requests every five (5) years.
299. During the public hearings and other consultations it has therefore been requested that the Delimitation Commission should form an integral part of the Electoral Commission. This does not imply that it will be permanently operative, but only when the occasion arises. The tasks of the Delimitation Commission are closely linked and interrelated to the activities of the Electoral Commission. This is acknowledged by the majority of SADC countries. In Zimbabwe, Kenya, Lesotho, Zambia, Nigeria, Uganda, Tanzania, Zanzibar, Malawi, and Swaziland

the tasks of a Delimitation Commission are amalgamated with the tasks of the Electoral Commission. Such an arrangement can be considered logical.

300. There are operational and cost-effectiveness advantages when an EMB takes responsibility for the delimitation of regional, constituency and ward boundaries. Delimitation can be a sensitive issue. In the Namibian context political parties have an interest that border lines are demarcated in such a way that they can benefit from it. There has also been dissatisfaction among traditional authorities and leaders. Border lines that have been drawn by the Electoral Commissions have not taken into consideration traditional authority border lines in the communal areas. Drawing boundary lines can thus be a politically divisive issue. Whoever is tasked with drawing the borderlines can expect open attacks by those who perceive the results as not serving their interests.

Recommendation 44

EMBs can play a distinctive role in the delimitation of regions and constituencies. With the knowledge that the EMB is gaining during the registration and election processes, it would be recommended that delimitation becomes a combined effort of the Electoral Commission and the Delimitation Commission. Each one operates separately, but in cooperation with the other.

The Delimitation Commission should still be composed of three knowledgeable persons, appointed by the National Assembly and approved by the President. The same selection committee that is responsible for the identification of candidates for the position of electoral commissioners should act as the selection committee for two of the three members of the Delimitation Commission. The chairperson should be proposed by the Judge President for approval by the National Assembly. The other two positions should be advertised and the candidates selected from the applicants.

The Delimitation Commission becomes an allied part of the Electoral Commission. The Delimitation Commission (alternatively, a unit of the Electoral Commission) should only be operative when the need arises. Whenever it operates it should be supported by subject committees. The secretariat of the EC should be shared with that of the Delimitation Commission, thus one secretariat serving both commissions. The Delimitation Commission (alternatively, the delimitation unit) should be domiciled in the headquarters of the EC.

Pertaining to the operation of the Delimitation Commission, two options could be considered:

a) **The Chairperson of the Electoral Commission also functions as the chairperson of the Delimitation Commission (could be renamed the delimitation unit of the Electoral Commission) together with two separately appointed members when the delimitation body is operative.**

b) **The Chairperson of the Delimitation Commission could be a separate proven legal personality of high professional standing and experience (e.g. judge of the High Court or Supreme Court, senior lawyer), thus a separate person from the chairperson of the Electoral Commission.**

If amalgamated, delimitation is still performed by the Delimitation Commission (unit), but assisted by the Electoral Commission. In South Africa the Delimitation Commission is domiciled in a 'Delimitation and Planning Directorate' attached to the EC.

It is further recommended that the delimitation entity should report any of its decisions and proposals to the National Assembly for sanctioning. Thereafter the recommendations should be submitted to the President for approval. It is then the President's task to proclaim in the Government Gazette any changes to border lines of regions and constituencies, any re-division as well as the establishment of any new constituencies and regions, and the institution of wards at local authority level.

The proposed arrangement would assure that, for example, requests for amendments to the border of regions and constituencies (in future probably also of wards) can at any time be directed to the delimitation entity attached to the Electoral Commission for immediate attention and action. This would guarantee consistency, efficiency and prompt delivery. It would also be a cost-saving arrangement.

Namibia is presently in dire need of evaluating and reconsidering all the border lines of regions and constituencies and establishing new ones. Demographic changes since the first Delimitation Commission was appointed in 1991, as is reflected in the provisional results of the National Census in April 2012, have become a common phenomenon. Large scale migration from rural to urban areas is consistently taking place at inter- and intra-regional and at constituency level. This may necessitate a revision of existing border lines of regions and constituencies, and also a revision of the number of regions and constituencies.

It has therefore become a matter of urgency to appoint a Delimitation Commission. It is recommended to appoint such a Delimitation Commission before a general registration of voters commences. The latter is presently planned for 2012.

Part 8

Institution of an Electoral Court/Tribunal

301. The institution of an Electoral Court/Tribunal is overdue in Namibia. The prolonged court cases after the general elections (e.g. 2009-2012) could possibly have been avoided had Namibia had an electoral court/tribunal. Deadlines must be set for courts to deliver judgment. Namibia is in need of a special legal institutional entity that delivers immediate justice regarding election related issues and complaints. These include conflict monitoring, conflict prevention and management, conflict resolution, mediation and adjudicating disputes and complaints, addressing appeals, applications, petitions and reviews. It has also jurisdiction over decisions taken by the Electoral Management Body.
302. An Electoral Court/Tribunal could address issues brought to its attention with immediate effect and issue a verdict speedily. This could prevent drawn-out court cases. Electoral matters brought before the Electoral Court/Tribunal must be submitted not longer than one (1) month after the official election results have been announced. Such court cases should, however, not prevent the inauguration of the new members of the National Assembly.
303. The EMB should be entitled to submit any matter, such as a dispute, to the Electoral Court/Tribunal for a decision. It can also be tasked with reviewing any decision by the Electoral Commission relating to an electoral matter. In South Africa the Electoral Court, established in terms of the *Electoral Commission Act of 1996*, may hear and determine an appeal against any decision of the Electoral Commission only in so far as such decisions relate to the interpretation of any law or any other matter for which an appeal is provided for by law.
304. The power and authority to be exercised by the Electoral Court/Tribunal shall naturally include judicial power over electoral administration, but it should not be involved in criminal matters. Principles of electoral administration include fairness, justness, credibility, impartiality, competence and courtesy.
305. Electoral justice and electoral adjudication often has to be applied in an atmosphere of hesitance and non-acceptance of election results. Unfortunately, elections raise the temperature of divisions. Local political climates and cultures must be considered when electoral justice is practiced.
306. It is important that electoral disputes must be attended to firmly, honestly and quickly. Verdicts must not drag out over years. If so, “then you have failed” as

the former South African Judge Johan Kriegler proclaimed. In addition, verdicts should not only be based on fundamentalism and legality, but must also address legitimacy.

307. Electoral justice must be both flexible and adjudicative. Electoral disputes must be adjudicated in a pragmatic, consultative, credible and pragmatic way. Credible justice is important.

Recommendation 45

The establishment of an *ad hoc* independent electoral court/tribunal for the purpose of hearing and determining election petitions, complaints, disputes and other matters related to the electoral process as contained in the *Electoral Act* is recommended. The aim is to resolve electoral disputes speedily and within set deadlines.

Such a court is widely supported by the Namibian population as was reflected in the number of submissions by organisations during the consultative process, as well as by submissions made spontaneously by the public.

The government should make a budgetary provision for the installation of an independent Electoral/Tribunal court. It could also consider whether to make funds available for those who would like to submit election challenges but do not possess the financial means. Legal fees should be determined by the Law Society. Payment of security could also be considered, but the amounts of security to be paid should be tabulated.

The Electoral Court/Tribunal should be a temporary *ad hoc* court. It should have the status of a High Court. It could be constituted of three legal practitioners of long standing (e.g. High Court Judges, senior advocates) with a High Court judge as chairperson. The members of the Electoral Court should be appointed by the Chief Justice in cooperation with the Judge President of the High Court and the Judicial Service Commission.

To guarantee the absolute independence of the Electoral Court/Tribunal and to not make it a party-political issue, the National Assembly should not be involved in the appointment of the members of the Electoral Court/Tribunal.

Such a Court/Tribunal should be enabled to deal with all election-related matters. The Electoral Commission is answerable to the Electoral Court/Tribunal on electoral matters brought to its attention. The Electoral Court/Tribunal shall develop its own conflict resolution mechanisms.

The Electoral Court/Tribunal should become operative four (4) months before the electoral process commences (after nomination day) and remain active till

two (2) months after the election results have become official and at any other time should the necessity arise.

The right of complaint and to make submissions to the Electoral Court/Tribunal should not only be granted to political parties, but also to individual voters.

Attention should be given to the issue of whether a voter can lodge an application regarding an electoral matter in the High Court while an Electoral Court/Tribunal is in existence, as both Courts will have equal status.

An Electoral Court/Tribunal in Namibia can be based on South Africa's arrangements and legal provisions. It should pay detailed attention to a number of aspects, such as providing sufficient time for court applications (quicker than action proceedings) and a time limit for the court to make judgments on election issues. Election rules should be on equal level with high court rules. If action proceedings are followed then cross-examination of witnesses should be allowed.

In the *Electoral Court/Tribunal Act* a clear indication should be given what can be challenged. For example, can a whole election be challenged, or only the results of a particular polling station? The Act should also give a clear indication as to who can challenge election outcomes or any other matter related to the electoral process. Can it only be participating parties in an election, or also individuals?

In the Act it should also be stated that if any party or person having brought a matter to the Electoral/Tribunal for a decision is not satisfied with the verdict, they have the right to appeal to the Supreme Court. Others argue that the verdict of an Electoral Court/Tribunal should be final.

The proposed act should carry a clear clause on the access to election material. It is recommended that only the Electoral Court/Tribunal can determine by way of a court order the access to ballot papers and a recount of cast votes. Ballot boxes that have been opened during this process must be sealed again in the presence of stakeholders (e.g. electoral officials, party representatives, Electoral Court/Tribunal representative). Access to other election material should be left to the discretion of the EMB.

It is recommended that the *Electoral Court/Tribunal Act* should not deal with criminal matters. If such a court is restricted in its adjudication then it should be clearly determined in the Act.

The *Electoral Court/Tribunal Act* should also address the issue of who will carry the legal costs of an application. The *Archives Act* should also prescribe how long electoral records need to be kept for before being destroyed.

Any complaints or objections arising prior to and until the announcement of the election results can be handled by the Electoral Commission on an *ad hoc* basis. The electoral court/tribunal court could act as a court of appeal if applicants are not satisfied with the verdict handed down by the EC.

For the effective working of the Electoral Court/Tribunal Act, the decentralisation of its activities could be considered by introducing regional conflict management committees headed by the permanently appointed regional director of the EC, and supervised and advised by the Electoral Court/Tribunal. Members of such regional conflict management committees could among others include police officials, representatives of NGOs and CBOs. Such a conflict management committee could monitor levels of conflict; oversee conflict mediation; decide on the levels and nature of interventions; and which matters should be referred to the Electoral Court/Tribunal. It is a kind of a regional mediation and conflict resolution body.

Any matters related to the interpretations and implementation of the *Electoral Act* shall be dealt with by the Electoral Court/Tribunal. It shall be within the competence of such a court to overturn decisions taken by the EC.

General remark:

Having elaborated on the institution of an *Electoral Commission Act*, an *Electoral Act*, a *Party and Funding Act*, an *Electoral Court/Tribunal Act*, *Political Parties and Funding Act* and a *Delimitation Commission Act*, consideration could be given to combining some of these acts.

The *Electoral Commission Act*, the *Electoral Act*, and the *Electoral Court/Tribunal Act* could be combined as separate chapters in one act, named the *Electoral Commission Act*. Chapters delimitation (*Delimitation Act*) and referendum (*Referendum Act*) could be combined in one act, named the *Delimitation and Referendum Act*.

A separate act could be the *Political Party and Funding Act*.

Part 9

Related Matters

Gender representation

308. The principle of gender equality is enshrined in the Namibian Constitution (Article 10) and also guaranteed in several pieces of legislation. Namibia has ratified all the international instruments guaranteeing the rights of women, including the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW), the *AU Protocol on the Rights of Women in Africa*, and the *SADC Protocol on Gender and Development*. These rights particularly apply to participation of women in politics and decision-making bodies.
309. In the *National Gender Policy (2010-2020)*, compiled by the Ministry of Gender Equality and Child Welfare, it is stated that “Government recognises the need to promote equitable gender representation at all levels of decision making, through measures such as affirmative action, as well as the improvement of women’s social, economic and political status. This Policy supports the SADC Protocol on Gender and Development, which recommends that the minimum target for female representation be raised from 30 per cent to 50 per cent in all SADC member states, by 2015”.
310. The Ministry’s policy statement complies with the *SADC Protocol on Gender and Development*, which states in Article 12:
- a) “State Parties shall endeavour that by 2015, at least fifty percent of decision-making positions in the public and private sectors are held by women, including the use of affirmative action measures as provided for in Article 5”.
 - b) “State parties shall ensure that all legislative and other measures are accompanied by public awareness campaigns, which demonstrate the vital link between the equal representation and participation of women and men in decision-making positions and democracy, good governance and citizen participation”.
311. The government has accordingly set a target of 50 (fifty) per cent at all levels of governance and is considering the enforcement of mechanisms to achieving the set target.
312. The nomination and representation of women candidates at all levels of governance has become a challenging task. The Namibian government has committed itself to improving gender representation of women at national,

regional and local level. Only at local authorities level is fair gender representation guaranteed by law. It is presently 41 (forty one) per cent.

313. A gender conscious non-governmental body has submitted a 50/50 draft bill. It seeks to provide mechanisms for gender balance in the National Assembly, National Council, Regional Councils and Local Authority Councils.

Recommendation 46

In the context of the deliberations on the reform and revision of the *Electoral Act*, gender equity should be pursued in all positions relating to electoral tasks, from the lowest to the highest level, whether a temporary appointment or permanent, whether as commissioners (Electoral Commission, Delimitation Commission), members of a selection committee or as officials or political representatives at local, regional and national level, whether elected or nominated.

The Ministry of Regional and Local Government, Housing and Rural Development should be tasked with considering the proposals of the 50/50 Bill related to Regional Government, National Council and Local Authority representation. Such consideration is outside the scope of the *Electoral Act*. It needs to be noted that the 50/50 Bill was presented against the background that the Constitution of the Republic of Namibia would not be changed, however, if that is an option, changing the Constitution, other options may be available.

The 50/50 Bill commissioned by the Namibian Manifesto Network and compiled by the Legal Assistance Centre should be considered for possible implementation when it relates to particular issues as contained in the *Electoral Act*. The aim of the bill is to provide for gender balance in the National Assembly, National Council, Regional Councils, and Local Authority Councils. Also recommended is that all future local authority elections should continue to be held on a party (organisation, association) list system (proportional electoral system) with provision for gender-balanced lists. Should the proposals be agreed to, fully or partially, such proposals would cause amendments to the *Regional Council Act*, *the Local Authority Act*, *the Electoral Act* and possibly also to the *Constitution*.

The ‘zebra’ method of nomination when candidates are nominated for elections at national and local level should be legalised. If the first candidate on the list is a male person, then the next candidate should be a female person and vice versa.

The general comment during the consultative process was to abide by the *SADC Protocol on Gender and Development*, article 12, which emphasises fair gender representation in all electoral bodies and the goal of achieving a 50/50 per cent representation by the year 2015. There is thus general agreement on fair gender representation, but also at the same time that quality should be the first criterion in the selection of candidates for the National Assembly, Regional Councils and Local Authorities, even should the majority be women.

As long Namibia is a signatory to the international statutes dealing with gender representation and is bound by the terms of those instruments under Article 144 of the Namibian Constitution, political parties are compelled to fair gender representation as an obligation upon Namibia.

Mediation and Conflict Resolution

314. No election is without its hazards and obstacles. Some conflicts are deliberate, some are not. Some can be of the personal kind and are directed against another person, be it a voter or an electoral official. Some are directed against persons who do not share the same opinion. Some can be discriminatory and deliberately insulting. All of them can disturb the ordinary running of an election.
315. Elections should only be held under conditions of peace, tranquility and in a stable democratic environment. If such conditions do not prevail and disorderly behavior marks an election, they can detrimentally contribute to conflict before, during and after an election. To some parties losing an election is a traumatic and unacceptable experience. Africa has not yet developed a losing culture.
316. Election-related conflict and disputes can undermine political stability. The mediation and conflict resolution capability of electoral officials needs more assistance and guidance; it has hitherto not been sufficiently attended to. Special training programmes should be offered to that effect.
317. One incident was brought to the attention of the chairperson of the Legal Reform and Development Commission, Mr. Sacky E. Shangala, during the consultative process. A particular person, an adult man in the Ohangwena region, reported: "I was victimised during the National Assembly and Presidency elections. I was buried alive next to a woman who was not my wife. My child witnessed the incident, and is still traumatised." He confirmed that he had referred the matter to the police, but to date the incident had not been followed up. Tellingly, he supported the opposition party.
318. Such incidents underline the relevance of a mediation and conflict resolution body such as an Electoral Court/Tribunal. With the institution of an Electoral

Court/Tribunal serious and principle issues can be referred to it for adjudication. Its existence has become a necessity.

Recommendation 47

Differences, such as on the interpretation of rules and regulations, should in the first instance be referred to the EC for attention and action. Such processes could start at the lowest level of administration, at a polling station. If the matter cannot be solved at this level where it had been addressed by the presiding officer, then the matter could be referred to the respective returning officer. If he/she and the regional coordinator of the EMB cannot find a solution, the matter should be transferred to the Director of Elections for a solution. If the Director of Election cannot provide a solution, then he/she could approach the EC. Only if no solutions can be found at all these levels, can the EC decide to refer the matter to the Electoral Court/Tribunal for final adjudication.

Party agents and observers should not be permitted to directly approach the Director of Elections for attending to their problems, but should follow the prescribed way and hierarchy of decision-making bodies during an electoral process.

Serious matters such as the violation of human rights should immediately be brought to the attention of the Electoral Court/Tribunal. Any criminal matters should promptly be directed to the police.

Once the Electoral Court/Tribunal is instituted, it can significantly contribute to a fast settlement of disputes and conflicts relating to elections. Presently, the Electoral Commission and the Director of Elections have limited judicial power when it comes to settling disputes. They can contribute to mediation. Both the Electoral Commission and the Director of Elections should duly be capacitated to contribute to conflict resolution and mediation.

Certainty must be achieved on the proposal that a period of ninety (90) days after the election results have officially been announced, is sufficient time to challenge the election results, and whether only the election outcome at a particular polling station is allowed to be challenged, and not the whole election.

Drafting and publication of rules and regulations

319. Presently the *Electoral Act* contains many rules and regulations which could be excluded from the Act and published separately in the Government Gazette.
320. Consequently, a total review should be undertaken by the Directorate of Elections of all rules and regulations, particularly the Elect Forms. Serious attention should be given to whether all the Elect Forms fall within the parameters of the law.
321. For example, Elect 27 could be considered illegal. Different interpretations are assigned to a situation when a voter is in possession of a voter card, but his/her name does not appear in the voter register. Should he/she be allowed to vote after completion of Elect 27? What about the situation where the name of the voter does not appear on the voter register, but he/she has the voter's card and he/she is not allowed to vote?
322. Section 130 of the *Electoral Act* makes provision for the EC to make regulations. No regulations have yet been made for the conduct of elections under part V of the Act. An elaborate system of election returns and forms exist that are generally used in the election process. They play an important role in the accounting and verification process envisaged by Section 85 and 87 of the Act. It has been held by the High Court that these election forms were designed enhance transparency and accountability in an election process under Part V of the Act.
323. Presently the position is that no registration forms have been promulgated under Section 130 (or any other provision of the Act), which could serve to regulate these forms and to give them a statutory pedigree.

Recommendation 48

Regulations should be put in place, which not only prescribe the format of the election forms, but also the manner in which they should be used.

Section 130, as well as other provisions of the Act, should be amended specifically to give the EC the power to make regulations giving the aforementioned status to the election forms and their use.

Procedures applied during the conducting of elections and which are currently set out in handbooks, manuals and other publications issued by the EC, should also be incorporated into the new regulations to be drafted.

Procedures followed which are not sanctioned in the *Electoral Act*

324. During the court application in respect of the 2009 election, the Director of Elections presented evidence of an entire process which was followed and also made reference to actions which were not sanctioned by the *Electoral Act*, and also not sanctioned by any regulation. Amongst others the Director of Elections referred to the use of a so-called “nerve centre” where results were processed, audited and verified and where, amongst others, “provisional results” and “final results” were prepared. This entire process is not sanctioned by the *Electoral Act*, and can thus be considered illegal.

325. It could be argued that the final results should simply be the total result of all polling station results. For every political party and also every member of the public, it should be a simple matter of adding up all results of the polling stations for each political party (and posting them at the polling stations) and seeing if it adds up to the total result of the votes announced for each party in the National Assembly and for Presidential elections on a national level. Such process fosters transparency. It also enables all political agents at polling stations during voting and counting to ensure that the final result at the national level exactly corresponds with the total results of the votes received by all the political parties, as represented by their agents, at all polling stations. “Processing results” at “nerve centres” could create a suspicion of manipulation of results.

Recommendation 49

If establishing a national ‘nerve centre’, alternatively a national verification centre is considered relevant and useful, then such an entity, as well as its objective, role and expected task performance should be legalised. A definition of such an entity should be contained in the legal arrangement.

Election applications to Court

326. The thirty (30) days period prescribed by Section 110 (1) of the *Electoral Act* during which election applications should be presented to Court, is seemingly too short, particularly when National Assembly and Presidential elections are held at the end of the year. Such an arrangement renders it a virtually impossible task for political parties who intend to challenge the outcome of an election to study the election material and records (which can usually only be accessed after obtaining a court order) and then to prepare and present a proper election application in time, all during the Christmas/New Year recess when people are usually on leave.

327. Confusion prevails on the use of the concepts ‘trial’ and ‘application’ in the *Electoral Act* and according to the Chairperson of the Law Reform and Development Commission, Mr. S.E. Shangala, “the implications involved depending whether what is truly intended in Section 109 (of the *Electoral Act*) is a ‘trial’ or an ‘application properly so called”. Shangala opines that it is important that the Legislature removes this uncertainty as a matter of urgency. (See Statement of the Chairperson of the Law and Reform and Development Commission on the occasion of the launching of the Electoral Law Reform Project, 30 August 2011, p.3).

328. The *Electoral Act* speaks of an “*election application*”, but at the same time, speaks of a “*trial*” (Section 116) and about witnesses who are to give oral evidence (Section 118). As was found by the High Court in the latest judgment in the RDP application concerning the 2009 election, all election challenges in the history of independent Namibia were done by way of application (i.e. notice of motion), and not by way of a trial where witnesses give oral evidence in Court. The *Electoral Act* should be clear on this.

329. Another fundamental issue is what effect the setting aside of an election would be, for example:

- a) In the case of a National Assembly Elections, the status of all legislation passed by the National Assembly until the date of the setting aside of the election;
- b) All administrative acts performed in terms of legislation passed by the National Assembly before the date of the setting aside an election.

330. A possible answer could be that, in terms of Section 116 (5), (6) and (7), the members of the National Assembly are only deemed to vacate their seats from the date that the election is set aside, and that all previous acts performed by them as members of the National Assembly would, by analogy, be valid. Possibly, the *Electoral Act* should be clearer on this.

Recommendation 50

The provisions relating to election applications (Sections 109 to 120) should be revisited for interpretation and application.

Storing, preserving and archiving election material

331. In the past, inadequate attention was paid to the return of all the election materials from all polling stations to headquarters in Windhoek; the intention

was to store them safely in a secure and neutral place. Also, the compilation of an inventory of the returned election material was not given sufficient professional attention. Currently the Director of Elections has the authority to open up archived material.

Recommendation 51

The *Electoral Act* should be very clear on what happens to used and unused election material of a particular election. Clarity needs to be given regarding how the material is handled and stored before, during and after elections, how it should be returned to the electoral headquarters, and how it should best be stored, and also how it must be reflected in an inventory which enables easy access to election material. The Act should also be clear on how long such material, and particularly which material, should be archived and catalogued. Suggestions vary between five to ten years.

The *Electoral Act* should also identify who possibly can have access to the stored election material and when and how it should eventually be destroyed. Political parties, organisations and associations should be consulted before election material is destroyed. Stored ballot boxes can only be opened if a court order has been given to that effect. Stakeholders should be present when ballot boxes are opened. All ballot boxes should be stored with the original seal, and storage should be agreed upon by stakeholders.

Penalties and their enforcement

332. It has become evident that due to the lack of authority the enforcement of penalties cannot be executed. The present fines, which are legally determined for particular transgressions, are seemingly out of proportion compared to the present value of the Namibian Dollar.

Recommendation 52

Regarding the enforcement of penalties, the whole *Electoral Act* should be reviewed. It is also recommended that the fines should be reviewed and that they should be much more severe. There should also be a balance between prison sentences and fines. Consideration could also be given to the possibility that particular identified transgressions should automatically carry prison sentences without the option of a fine.

Transport

333. Presently, the EC does not have its own fleet of transport that could meet its needs during registration and election processes. Huge amounts of money are spent on renting cars from private enterprises.

Recommendation 53

Sufficient capital should be made available for the acquisition of a transport fleet suitable and sufficient for use during registration and election periods, and also between elections for training and voter education purposes. Vehicles not in use by the Directorate of Elections and the Electoral Commission in between registration and election processes could be rented out to government institutions. Such income can be used for the maintenance of the transport fleet, and to fund new acquisitions.

Research

334. Research is not referred to in the *Electoral Act*, and it should form an important activity of the EMB. Not only is it important to compile information on all the conducted elections, but also to compare notes with other EMBs, particularly in the SADC countries, and in Africa at large.

Recommendation 54

A separate section combined with the library and information section, known as a Resource and Research Centre, should be established and should also be headed by a well-qualified person. Such an entity could be related to the Information Centre, but would function as a separate entity. Both units should make ample use of electronic media in the gathering and dissemination of information.

Rules must be laid-down regarding the access to election material.

The EMB should pursue close contact with research institutions dealing with electoral issues and processes, such as the Electoral Institute of Southern Africa (EISA) in Johannesburg, and the International Institute for Democracy and Electoral Assistance (IDEA) in Stockholm, Sweden. Namibia is a permanent member of IDEA. The EMB should also make ample use of the

UNDP Regional Service Centre for Eastern and Southern Africa, and particularly of the expertise of Joram Rukambe, a former director of elections with the ECN in Namibia, who is presently its Regional Electoral Advisor.

Research could address projects and themes such as: Election evaluation since 1989; Voter education; Electoral Justice; Voter Apathy and Exit Poll Surveys.

Part 10

Issues related to Elections and the Revision and Reform of the *Electoral Act*

Referendum

335. To date Namibia has not formalised and legalised the holding of a referendum. Article 132 (3&4) of the Namibian Constitution makes provision for the holding of a referendum. It also makes reference to the institution of an Act of Parliament for holding a referendum. Article 63(g) states that a referendum can be initiated, approved and decided upon by the National Assembly.

336. Article 132(3) is of particular relevance:

(a)“...

(i) if a bill proposing a repeal and/or amendment of any of the provisions of this Constitution secures a majority of two-thirds of all the members of the National Assembly, but fails to secure a majority of two-thirds of all the members of the National Council, the President may by Proclamation make the bill containing the proposed repeals and/or amendments the subject of a national referendum.

(b) The national referendum referred to in Sub-Article (a) hereof shall be conducted in accordance with procedures prescribed for the holding of referenda by Act of Parliament.

(c) If upon the holding of such a referendum the bill containing the proposed repeals and/or amendments is approved by a two-thirds majority of all the votes cast in the referendum, the Bill shall be deemed to have been passed in accordance with the provisions of this Constitution, and the President shall deal with it in terms of Article 56 hereof.”

Recommendation 55

It is recommended that a Bill on Referendum should be put in place. Once being properly construed, regulations must be established providing for the following: the rights of voters in a referendum exercise; regulating the formation of referendum committees in all regions to spearhead the referendum process; appointing the necessary officials; drawing up voting procedures and the proposed conduct of a referendum; and, dealing with referendum related offences.

A bill on holding a referendum has already been devised, but needs further scrutiny. It should make provision for the right of the Electoral Commission to make proposals to Cabinet to hold referenda on issues related to the responsibility of the Electoral Commission.

On the operational side, a referendum could be conducted by the Electoral Commission and should be as such reflected in the proposed Electoral Commission Act. To conduct a referendum is similar to that of holding an election.

For composing an act on conducting a referendum, the *Zimbabwean Referendum Act (Act 12/1999)* and the *Zambian Referendum Act (Chapter 14 of the Laws of Zambia (CAP 14))* could be used. Botswana also has legalised referenda.

Election of the President

337. There should be amendments to the *Constitution* pertaining to a second round of election when a president has not obtained the prescribed majority. Presently a presidential candidate must obtain 50 per cent plus one (1) vote to be duly elected. The implication of this rule (Article 28(2)(b) of the Constitution) could be that in the case of more than two candidates, each one not achieving the prescribed minimum of fifty (50) percent plus one of the cast votes will cause new elections *ad infinitum*.

338. The second round of elections of a presidential candidate should, if so decided, be contested between fewer candidates. This can either be between the top two candidates (majority-run off), or between more than two candidates (for example three) (= majority plurality). Most countries adhere to the two- round-system (TRS). In Africa it is applied in the Francophone countries as well as elsewhere in Africa: Angola, Cape Verde, Gambia, Ghana, Guinea-Bissau, Kenya, Mozambique, Nigeria, São Tomé and Príncipe, the Seychelles, Sierra Leone, Sudan. Tanzania, Uganda and Zimbabwe.

Recommendation 56

It is advisable that the EC requests the Government to amend Article 28 (2) (b) of the Constitution which presently reads: ” ... provided that no person shall be elected as President unless he or she has received more than fifty (50) percent of the votes cast and the necessary number of ballots be conducted until such result is reached.”

The Constitution should be amended to the effect that if none of the candidates obtains 50 per cent plus one during the first round of presidential elections, only the two candidates with the highest vote obtained during the first round will stand for election during a second round of elections.

Even should a counter-candidate for the position of the president not be nominated and therefore only one candidate stands for election, an election must take place. The Constitution is clear on this. The candidate must prove that he/she has obtained 50 per cent plus one vote.

Time gap between dissolution of National Assembly and inauguration of the new National Assembly

339. Presently the National Assembly remains in session while the members of the new National Assembly have already been elected. National Assembly members are elected in November and sworn in on 21 March the year following. Lasting approximately four (4) months, the period of time between the election of the incoming members of the National Assembly and their assumption of office, is unnecessarily long. This is an uncommon situation, unfamiliar to at least the SADC countries.

Recommendation 57

The National Assembly should address this uncommon situation. A solution could be that the National Assembly is dissolved shortly before the general elections and is constituted and inaugurated within one (1) month after the results of the National Assembly election have been announced. This would bring to an end the situation where outgoing elected members of the National Assembly are still in office, while the newly elected members, as presently practiced, without office and income for at least four (4) months.

To solve this problem one could consider delaying the elections for the National Assembly until early March. This will require a change to the *Electoral*

Act (and not to the Constitution) to postpone the elections of the members of the National Assembly to the first week of March every five (5) years.

Another solution has been recommended under the heading 'Voting Date'.

Revised composition of the National Assembly and adaptation of the electoral system to that effect

340. As all members of the National Assembly are elected according to the proportional electoral (party list) system, and are thus not responsible to a particular constituency (that is, directly to the voter), it is worth considering the mixed electoral system. At national level it would imply that members of the National Assembly are partly elected according to the present proportional electoral system, and partly directly elected. While the current proportional system remains, additional members are directly elected on a regional basis. Such mixed electoral system would benefit the standing committee system, as more National Assembly members can serve on them should an additional number of elected members be added to the present total.

341. During the consultative process the mixed electoral system, which was a new concept to many and not very well understood, did garner partial support. Concern was, however expressed that the proportional electoral (party list) system makes no provision for direct accountability to the voter, but only to parties.

342. Suggestions have been made that ministers should not be represented in the National Assembly, thus there would be no representation of the executive in the National Assembly, or alternatively that not more than a third of National Assembly members should hold the seat of a minister or deputy minister in the National Assembly.

Recommendation 58

The existing practice of the list system, according to which the 72 members of the National Assembly are elected, should not be done away with. The same holds true with the six (6) members nominated by the President; there should not be done away with. To introduce a mixed electoral system would imply that the National Assembly is constituted of an additional number (e.g. 26) of members to form a body of 98 elected members plus the six (6) nominated by the President.

The proposal is that two (2) additional members per region are directly elected. When the National Assembly is elected, which according to the presently applied proportional electoral system is on a party basis, an additional ballot paper is issued to elect two (2) nominated candidates in each region. Parties nominate two (2) candidates in a region, which would be different candidates in each region. Independent candidates could also stand for such election. It is worth asking whether the National Council should then continue to exist, or whether a unicameral system should be instituted.

The impact of such an arrangement of directly elected candidates per region would result in direct representation of the thirteen regions in the National Assembly and also represent particular regional interests in the National Assembly. The voters in a region can take such directly elected members to task. Should they not perform according to the expectations and wishes of the electorate in a region, they would in all likelihood not be re-elected during the next round of elections.

Another implication of enlarging the National Assembly would be that the standing committee system can be strengthened and extended. Presently, due to the parliamentary rules, no minister or deputy minister can serve on a standing committee. This leaves Parliament with about thirty members who could serve on a standing committee. For that reason a number of standing committees are composed of different portfolios and not directly related to each other. Also, some parliamentarians have to serve on more than one standing committee.

Adding twenty-six (26) members to the National Assembly would immediately imply that the standing committee system can be extended and strengthened. Present combined standing committees, consisting of different portfolios, could be subdivided into different standing committees with fewer portfolios. This would open the door for specialisation and more efficient work performance by the standing committees.

More standing committees could have another implication. They could be tasked with preparing draft legislation in the initial stage. Draft legislation would then be discussed in depth by the standing committees, which are constituted of representatives of all political parties represented in the National Assembly. Such discussion and decision-taking tasks would culminate in the submission of a draft bill to the National Assembly for final consideration and approval. The preparatory work performed by standing committees would shorten the National Assembly sessions. This again would enable ministers and deputy ministers to spend more time in their offices and in the execution of their tasks.

The introduction of a mixed electoral system at National Assembly level, as discussed above, needs further consideration and investigation. Should the suggestion arouse substantial interest, it would be worth considering a commission/committee of inquiry which should include members of Parliament of both the ruling and opposition parties.

Another recommendation made was that political parties should, after the allocation of seats in the National Assembly, be free to appoint anyone on the list not represented in the National Assembly yet, and even persons outside the list, if a vacancy should occur in the National Assembly. Parties should not be bound to the rule/practice that the next on the original list should be the next representative in the National Assembly.

Ward System at Local Authority level

343. In the *Local Authority Act* (Act 23 of 1992) provision was made for the first local authority elections to be conducted according to the proportional (list) electoral system. The Act also stipulated that the next round of elections should be conducted according to the 'first past the post' (also named the 'winner takes all') electoral system once the ward system had been introduced.

344. The next round of elections at local level was due in 1997. The then Director of Elections realised that should the 1997 local authority election be conducted according to the ward system, the composition of the local authority system would be predominantly ethnic based. It would replicate an apartheid-based representative system in many local authorities.

345. Windhoek was taken as an example. By 1997, residential integration would only be in a starting phase. A local authority council elected in Windhoek in 1997 would most probably have consisted of a German speaking white councillor in Windhoek East (Klein Windhoek), and possibly also in a neighbouring ward, Afrikaans speaking white councillors in Suiderhof, Pionierspark, Windhoek West and Academia. Then there would have been so-called coloured councillors in Khomasdal, and black councillors in Katutura, again elected according to the then prevailing residential pattern in the township, implying that different ethnicities/language groups would have their own representatives serving on the Windhoek City Council. Such arrangement would not have served national unity in the country as many existing local authorities elsewhere in the country would have the same kind composition. The time was not right for a ward system.

346. The Director of Elections then requested that the Electoral Commission submit a memorandum to Cabinet requesting that for the time being local

authority council elections should be conducted according to the proportional electoral system, although a Delimitation Commission had been appointed to subdivide existing local authorities into wards. This Report was completed in September 1996. It never became an official document, and thus was not sanctioned by Government. The Cabinet complied with the request from the Electoral Commission that till further notice coming local authority elections should be conducted according to the proportional electoral system.

347. The unofficial Report by the Second Delimitation Commission, which dealt solely with the subdivision of local authority areas into wards, also showed that it was nearly impossible to divide small local entities such as villages into a minimum of the seven (7) prescribed wards. Places such Aranos, Aroab, Aus, Kalkrand and Gochas can be cited as examples of that time. At a later stage villages were entitled to only five (5) councillors, while towns continued to have seven (7) councillors. Exceptions are the City of Windhoek with twelve (12) councillors, and Walvis Bay and Swakopmund with ten (10) councillors each.

348. A further implication of introducing the ward system would have been to do away with proportional gender representation as presently prescribed in the Local Authority Act. A ward system would imply the introduction of the 'winner takes all' electoral system and would do away with legally guaranteed gender representation as it cannot be applied in a 'winner takes all' system when individual candidates are nominated for election in a ward.

349. Considering the present situation: the residential pattern of towns has over the years progressively changed. The ward system could thus be selectively considered.

Recommendation 59

A referendum should be conducted to consider the subdivision of local authority areas into wards. It should also be determined which local authorities should qualify for a ward system. Presently it could probably be only municipalities. Should certain local authority areas be subdivided into wards use could be made of the unofficial Second Delimitation Commission Report on subdividing local authorities into wards, as completed in September 1992.

The proposal to subdivide all local authorities into wards, as originally stated in the Local Authority Act, has seemingly divided support. This was evident during the consultative process. There is, however, strong support for it to be instituted at municipal level. While considering the introduction of wards at municipal level, it could be combined with the introduction of the executive mayor system at the same level.

Part 11

Final Remark

350. Many submissions and recommendations, most of them invaluable, were made by various individuals, institutions, and other entities. They have influenced the deliberations to improve the *Electoral Act* and matters hitherto related. Many comments have been integrated in the text and are available separately in an electronic format.

351. It is anticipated that some of the proposals will cause amendments to standing acts, proclamations, regulations and possibly also the Constitution. New acts may also flow out of the recommendations.

352. A number of the proposals made in the report are fundamental and far-reaching.

Part 12

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In addition:

Submissions and Proposals received by:

- National Democratic Party (NDP);
- United People’s Movement (UPM);
- Namibian Non-Governmental Forum (NANGOF) – 2 submissions;
- Institute for Public Policy Research (IPPR);
- Metusalem Neib;

- Swakopmund Residents Association;
- SWANU Proposals on Democratising the Electoral Process in Namibia;
- Combined proposed reforms by: All Peoples Party (APP), Communist Party (CP), Congress of Democrats (CoD), Democratic Party of Namibia (DPN), DTA of Namibia (DTA), National Unity Democratic Organisation (NUDO), Rally for Democracy and Progress (RDP), Republican Party of Namibia (RP), United Democratic front of Namibia (UDF), United People's Movement (UPM).