

A CRITICAL REVIEW AND ANALYSIS OF ZIMBABWE’S ELECTORAL AMENDMENT BILL, 2011

BY

THE ZIMBABWE ELECTION SUPPORT NETWORK (“ZESN”)

ITEM	SUBJECT	LAW AND ANALYSIS
I	INTRODUCTION	<p>This is a review by the Zimbabwe Election Support Network (“ZESN”) of the proposed amendments to Zimbabwe’s legislation on the management and conduct of elections in the country. The Electoral Amendment Bill, 2011 (hereafter, “the Bill”) seeks to amend the Electoral Act (Chapter 2: 13) (hereafter, “the Act”). For purposes of this report, the Zimbabwe Electoral Commission will be referred to as “the Commission”. The overriding purpose of electoral laws is to facilitate a free and fair election between competing parties. To this end, ideally, electoral legislation provides for rules and institutions to ensure a fair and level ground for contestants and voters. The rules must be robust enough to prevent manipulation and to ensure that they can be implemented and enforced by interested parties and institutions. This critique will, therefore, outline the nature of the rules and institutions provided for in the Bill and critically assess whether they are fit to fulfil the overriding purpose, which is to facilitate free and fair elections. The critique will highlight strengths, point to any pitfalls and weaknesses and where relevant and necessary alternative suggestions will be made. It will conclude with a set of recommendations.</p>
II	ISSUES	<p>The Bill covers many issues, all of which are of critical importance to the legal machinery governing elections. For purposes of comprehensive and holistic analysis, the matters covered by the Bill have been organised and divided in accordance with the following Thematic Issues:</p> <ul style="list-style-type: none">• Voter Registration and the Voters Roll• Polling Station Based Voters Roll• Presidential Elections and Results• Pre-Emption of Results• Vote Recounts• Voter Education

		<ul style="list-style-type: none"> • Election Observation and Accreditation • Nomination of Candidates • Voting Processes and Procedures • Voting By Illiterate or Physically Handicapped Voters • Postal and Special Voting • Politically Motivated Violence and Intimidation • Media Coverage of Elections • Electoral Court • Delimitation of Constituencies • Independence of the Commission <p>In preparing this critique, efforts have been made as far as possible, to bring together various but similar issues covered in different parts of the Bill. The approach is to explain the legal meaning of each relevant clause whilst analysing its legal significance and implications. The critique will point to the strengths and weaknesses of each clause and where appropriate and necessary suggestions for improvement will be submitted during the course of the analysis. At the end, a set of suggestions and recommendations will be made.</p>
III	VOTER REGISTRATION AND THE VOTERS' ROLL	<p>Electronic and Printed Voters Rolls</p> <ul style="list-style-type: none"> • Clause 5 which amends Section 20 of the Act introduces a requirement that voters rolls should be kept by the Commission in both electronic and printed form. The Commission will also be required to keep a consolidated national voters' roll at its head office. <p>Provision of Searchable and Analysable Voters Rolls</p> <ul style="list-style-type: none"> • Clause 6 amends Section 21 to oblige the Commission to provide members of the public, upon request and payment of a prescribed fee, with print or electronic copies of any voters roll. When an election has been called, the Commission must within a reasonable period thereafter provide a printed and electronic copy of every voters roll to every political party that intends to contest the election and to any accredited observers who requests it. Further, within a reasonable time after nominations, the Commission must provide every candidate with an electronic and printed

		<p>copy of the relevant constituency voters roll at no cost to the candidate. Furthermore, the Chief Elections Officer is obliged (through the relevant constituency elections officer) to provide sufficient copies of the ward voters roll to every polling station.</p> <ul style="list-style-type: none">• There is an obligation that where the voters roll is provided in electronic form, it must be in such a format that allows its contents to be searched and analysed. In addition, the electronic voters' roll must be secured against alteration or tampering. The Commission has the power to control its use for commercial or other purposes unconnected with an election. This is a new clause where previously, the requirement to do so had not been explicitly stated.• The penalties for anyone tampering with or commercially exploiting any voters rolls provided to them by Commission is also increased from a fine of level 6 and imprisonment for one year to a fine of level 10 and imprisonment for 5 years. <i>Clearly the purpose of this is to safeguard the integrity of the voters roll.</i> <p>Analysis</p> <ul style="list-style-type: none">• The requirement to make the voters rolls available to political parties, candidates and members of the public in searchable and analysable electronic form is a welcome development as it promotes transparency in the election process. It is in step with modern forms of data handling and communication.• However, whilst there is a requirement to provide a constituency voters roll to candidates, it is not clear why the relevant ward voters rolls are not captured in the same provision. Subsection (8) only requires that sufficient copies of the ward voters roll be available at the polling station. There is no good reason why the requirement to provide free copies of the constituency voters roll to candidates does not extend to ward voters rolls, if anything to ensure there is consistency in the provision of voters rolls. <p>Proof of Identity and Residence</p>
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		<ul style="list-style-type: none"> • Clause 7 amends Section 23 of the Act in regards to proof of residence of voters upon seeking registration. The amendment allows people who seeking registration to prove identity and that they are resident in the constituency concerned by documents prescribed by the Commission or by any other acceptable means. • The open-ended nature of means to prove identity or residence may be regarded as useful especially in rural constituencies where physical residential addresses are not generally available for everyone. The same reasoning also applies to urban areas where it is not uncommon for relatives in the extended family to leave with relatives but they may not have evidence that meets the prescribed criteria to prove residence. The <i>Operation Murambatsvina</i> in 2005 also caused displacement of voters leaving many people without homes or evidence to prove residence. Youths also often struggle to prove residence therefore the open-ended nature of this provision is welcome since it will encourage flexibility. <p>Closure of Voter Registration</p> <ul style="list-style-type: none"> • Clause 8 amends Act by removing the current discrepancy between general elections and by-elections where different rules applied regarding the closure of the voter’s roll before voting so that in all cases the voters rolls will be closed 24 hours before nomination day. This is a useful synchronisation of provisions relating to elections which is necessary for consistency and simplification of the process. <p>New Voters Roll</p> <ul style="list-style-type: none"> • Clause 9 introduces through a new Section 36A, provisions dealing with voter registration. The new provision will allow the President, on the advice of the Commission, to call for a completely new registration of voters, either in all wards and constituencies or in particular wards and constituencies. The period for such new registration is fixed at six months, however the Commission may, by notice in the <i>Gazette</i>, extend the new registration beyond the day
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proclaimed by the President if this becomes necessary.

- The provision also clarifies that the system of **continuous registration** of voters will operate uninterrupted during any new registration of voters.
- It also states that voters on the old voters roll will be **automatically transferred** to the new voters roll by simply presenting themselves to the appropriate constituency registrar and producing proof of identity.
- In addition, it enables voters otherwise registered in constituencies in which they are not resident to be re-registered in appropriate constituencies upon proof of identity and residence.
- Furthermore, the clause inserts new section 36B, stipulating an expedited procedure for the removal of deceased, absent or disqualified voters from the voters roll.

Analysis

- The state of the voters roll has long been a contentious issue in Zimbabwe with many calls for a more transparent and credible system of voter registration. Analysts of the current voters roll argue that it contains too many irregularities including inaccuracies and omissions, even names of persons who are deceased. It also excludes persons who otherwise should be on the roll. The possibility for a completely new voters roll which is introduced by this provision is a welcome development for a fresh start.
- The only challenge at this stage is the timing and resources, in that the process would have to be expedited before a new election is called. At present there are indications that the election may be held in August 2012. Before that a Constitutional Referendum would have been held. This leaves just 12 months between now and August 2012 to carry out all the necessary obligations required before an election is held. All these take a great deal of time and if new voter registration is to be one of them, it is imperative that the process is commenced as soon as possible to ensure everything is in place by August 2012. Voter registration is resource-

		<p>intensive process that requires enormous levels of support from the state and other donors and the sooner it is done the better.</p> <ul style="list-style-type: none">• However, since there is provision for transferring already registered voters and since also continuous registration is not interrupted, one way around this problem of timing would be to encourage all unregistered voters to do so meanwhile and for those who think they are registered to confirm that they are so that if and when the proclamation is made, automatic transfer of registered voters to a new roll will be expedited. Voters must also be encouraged to make use of the new Section 36B to ensure the removal of deceased or absent voters who are still registered on the voters roll. In some countries there are incentives for voters to notify the electoral authorities to remove deceased voters from the roll. In Mozambique, for example, they gave an incentive of a state-assisted burial if relatives assisted in deleting their deceased relatives from the voters' roll.• It is suggested that instead of relying solely on the relatives to ensure the removal of deceased or absent voters, there should be legal provisions requiring relevant authorities such as the Registrar General's Office to give to the Commission monthly notifications of any deaths so that the Commission can automatically remove the deceased from the voters rolls. This is the practice that is used in Mozambique.• It is clear that even in the event of a new voter registration exercise, Zimbabweans living abroad (the Diaspora) are still not covered. Zimbabwe is lagging behind its counterparts, such as South Africa and Mozambique, where Diaspora vote has been recognised legislatively and judicially. The Constitutional Court in South Africa upheld the right of registered voters living abroad to be permitted to vote in national elections. Mozambique is a step further, actually requiring the state to put in place measures to register voters in the Diaspora. Before the 2004 and 2009 elections, Mozambique took active measures to register voters in countries where there is a significant Mozambican population – this included regional countries like South Africa and Zimbabwe and also overseas in countries like Portugal and Germany. Mozambique has the further incentive of
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		<p>two parliamentary seats that are specifically reserved for the Diaspora. In failing to cater for its significant Diaspora population, Zimbabwe is therefore lagging behind what is becoming regional best practice to ensure maximum participation of its citizens in national processes wherever they may be based.</p> <ul style="list-style-type: none"> • Responsibility for Voter Registration: One of the long-running contentious issues is the fact that the registration of voters and compilation of the voters roll is shared between the Commission and the Registrar General of Voters Office. It is important that voter registration be wholly integrated in a single office and that this should ideally be the Commission, which has responsibility for the conduct of elections. It is responsible for maintaining, distributing and using the voters roll and so surely it must have the sole responsibility to create it, especially if a new voter registration exercise is going to take place. Not only will this be more efficient, it will also promote more accountability on the part of the Commission. At present, each party is likely to shift blame to the other for any shortcomings, thereby diluting accountability. • An analogous example where divided roles in the same responsibility can be found in the area of financial services, where traditionally banks were given licences by the Ministry of Finance whereas bank supervision was the responsibility of the Reserve Bank of Zimbabwe. This created problems because of the ridiculous situation that meant the supervisor and lender of last resort had no control over the licensing of banks. This created confusion, inconsistency and mediocrity hence the changes that were eventually made to ensure the licensing of banks came under the single roof of the RBZ. • Likewise, it makes sense to integrate the registration and maintenance of the voters' roll under the single roof of the Commission. It is recommended that the Commission be given sole responsibility for registration of voters and all matters concerning the voters roll.
IV	POLLING STATION BASED VOTERS	Polling-Station Based Voters Rolls

	<p>ROLL</p>	<ul style="list-style-type: none"> • Clause 42 introduces a new section 22A by which a new system of voting and the voters' roll whereby there will be permanent polling stations and voters rolls will be based on polling stations rather than constituencies or wards. The current system allows registered voters to vote at any of the polling stations located in the ward. • <i>However, these electoral landscape-changing provisions will not come into operation immediately, but only when the Commission has prepared all the polling-station voters rolls. The Commission will publish a notice in the Gazette commencing the operation of Section 22A.</i> • This clause also includes consequential amendments to the Act that will come into effect upon the publication of the notice. • On analysis, this provision will introduce a fundamental change in the way voting is conducted in Zimbabwe. In past elections, particularly in the March 2008 there were allegations of double-voting as voters within a constituency could move from one polling station to another and avoid detection. Polling station based voters' rolls will mean that a person can only vote in the polling station where his name is registered on the roll unless an exception applies. This will promote transparency and credibility of the system. Nevertheless, being a completely new system, it will be necessary to conduct extensive and effective voter education campaigns to ensure an easier change from the present system to the polling station-specific voters' roll. • However, there are two negatives that should be considered regarding the use of the polling-station specific voters' roll. These are likely to be smaller and therefore very specific making it easier for identification of communities that would have voted for or against a particular political party or candidate. If the results overwhelmingly favour a particular candidate, the risk is that the local community will become an easy target for post-election violence. • The other downside of the polling-station specific voters roll occurs where voters are otherwise displaced during elections. Incidents of voter displacement occurred in the 2008 election. If unable to access the specific polling station such voters would be unable to exercise their right to
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		<p>vote. This can become a problem where there is a concerted and organised effort aimed at displacing voters from areas close to their specific polling stations or to bar them from voting altogether.</p>
<p>V</p>	<p>PRESIDENTIAL ELECTIONS RESULTS</p>	<p>Harmonisation of Provisions</p> <ul style="list-style-type: none"> • Clause 29 repeals and substitutes Section 110 of the Act which deals with the determination and declaration of Presidential election results. The main object is to bring within a single section all the special provisions presently contained in Section 112 and the Second Schedule for the determination and declaration of the results of a presidential election or presidential runoff election. Section 112 and the Second Schedule will therefore be repealed. <p>Posting of Returns</p> <ul style="list-style-type: none"> • The provisions attempt to promote transparency in the counting and collation of votes requiring constituency returns to be posted outside the constituency centre for the public to access and the presence of candidates or chief election agents at the verification of returns and adding the votes. All candidates must be given reasonable notice to attend, as are observers. <p>Run-off Election</p> <ul style="list-style-type: none"> • Paragraph (f) specifies the options to be taken after the counting of results. The key is that where there are three or more candidates, the winner must be the person who has received "more than half the number of votes". According to sub-paragraph (iii), a run-off election must be held if no candidate has received more than half the number of votes in the election. • There is a discrepancy in the statement of the period within which the run-off election must be held. Section 110(3)(f)(iii) refers to the period as being "a fixed date not less than twenty-one and not more than sixty-three days after the polling day or last polling day". However, the "sixty-three days" here seems to be out of place as both section 38(1) (a) (iii)

as amended by this Bill refers to **"forty-two days"** and indeed the explanatory note to the Bill makes reference to **"forty-two days"**. It could well be an error and it needs to be corrected for purposes of consistency.

- Nevertheless, the Commission may apply to the Electoral Court for a deferred date for the run-off election if the delay can be justified.
- Only the two candidates with the highest vote will be eligible to contest the run-off election. It does not mean that they should contest – eligibility to contest simply gives one a right to contest, which right one may choose not to exercise at any point before the election.
- This provision which refers to only two candidates with the highest vote is based on the assumption that the first round of elections can only ever produce a scenario where there will be two candidates with the highest votes. There is no allowance for the fact that there can be more than two candidates, for example in the event of a tie between the candidates with the second-highest votes. This is most unlikely but a possibility nevertheless that should be accounted for in the law otherwise there will be problem since the provisions regarding the run-off election only cater for a scenario where two candidates are involved. In Ghana, their Constitution anticipates such a scenario so that a new election must be held within three weeks and if still there is no candidate with more than 50 percent of the vote, there will be another election until such time that a winner is found. This leaves the decision of the Presidency, a key office, in the hands of the voters. This brings into question Zimbabwe's provision where the power to elect the President in the event of a deadlock is delegated to Parliament. ZESN urges that the decision should remain with the voters. The Presidency is too important an office to be delegated to Parliament. The Ghanaian scenario which leaves the decision in the hands of the voters is preferable.

Parliament as Electoral College

- There is a slight problem in paragraph **(g) (iii)** which states that where each of the run-off

candidates receive equal votes, it will be left to Parliament to meet as an **Electoral College** to elect by secret ballot one of them as President. This is because this provision is based on the assumption that Parliament will have been convened by the time of the Presidential run-off election. As the experience of the 2008 elections reminds us, this may not necessarily be the case, particularly when there is harmonisation of general and Presidential elections. Parliament was not convened until after the Presidential run-off election had been held which means in the unlikely event of a deadlock at the run-off election, it would have been impracticable for Parliament to exercise its power to sit as an Electoral College to elect the President. This would have produced a constitutional crisis. It would be better if the legislation gave a specific time-line of when the Parliament should be convened after the election, even in the event of a run-off Presidential election. If Parliament is convened, it will fill in the power vacuum that would otherwise occur where everything would have to wait until the end of the Presidential run-off election. (Note the above comment regarding the use of Parliament to elect the President in the event of a deadlock)

Announcement of Results

- **Section 110(3) (h)** is a particularly important addition in that it sets a specified period within which presidential election results must be announced. It requires that the Chief Elections Officer must declare the results **within five (5) days** of the last polling day in the presidential election or the presidential run-off election. Where a recount has been ordered, results must be declared **within five (5) days** of the completion of the recount. It must be noted that where a recount is ordered it must, in terms of **Section 67A**, be completed within **five (5) days** after the last polling day of the election (although the Electoral Court has the power to extend this period upon application by the Commission).
- On analysis, setting a period for the declaration of results is an important step given what transpired in the 2008 Presidential election when it took more than m before the initial results were officially announced. This caused anxiety, uncertainty and gave rise to concerns of election

rigging. This severely compromised the credibility of that Presidential election result. The new limit goes some way to minimise the risks of such undue and inordinate delays. It must be noted that the Law (Section 110) requires that results be declared forthwith after the counting which means that although there is a five day-period within which to announce results, the primary obligation is to make the announcement forthwith. Thus where the Commission has finished counting on the second day, the declaration should be done forthwith upon completion rather than wait for the fifth day. Also, in light of this, although the Electoral Court can extend the period, it is expected that it would use its discretion sparingly, in the interests of expediting the election process and bringing finality to the process which has fundamental consequences to the conduct of the affairs of the state. Any extension would therefore have to be well considered and reasonable.

Computation of Certain Periods

- The potential difficulty may arise in the area of computation of the periods regarding:

Firstly, results' declaration (which should be done within 5 days of the polling day),

Secondly, the vote re-count, (which should also be completed within 5 days of the polling day) and

Thirdly, the declaration of the vote-recount (which should be done within 5 days of the completion of the recount).

This means in effect the period within which a recount must be completed runs concurrently with the period within which the election results must be declared, i.e. 5 days of the polling day. Assuming therefore that the results are declared on the fifth day of the polling day and a recount is ordered, it is unlikely to be completed within the stipulated period (there will only be a matter of hours to the end of the fifth day). This means the Electoral Court would be called upon to extend the days to allow a recount. It is better the sake of clarity to place a limit on the

recount to run from the day that it is ordered and to make this period not more than two days.

- In addition, the provision allows for results of the re-count to be announced within a five day period from the **completion** of the re-count. This will mean potentially a further five days from the day the recount is completed before the vote-recount result is declared. This is unnecessary and causes unwarranted delays in the results declaration process. There is no need for allowing a five day period **"after the completion of the recount"** to declare the re-count result. It is reasonable to expect that once completed, the re-count result should be announced. It is difficult to see any point or rationale for potentially waiting for a further 5 days from completing the recount before the result is declared. It only breeds anxiety, uncertainty and fears of rigging that the statute is trying to minimise. Ideally, the vote-recount must be declared as soon as it is completed – if any limit must be imposed, it should be no more than 24 hours after the completion of the recount.

When Does a Person Become President?

- Section 110(3)(i) states that the declaration by the Chief Elections Officer shall be final although it can be set aside by the Electoral Court on petition by an aggrieved party. This provision preserves the right to challenge the proceedings relating to the election and/or the result before an impartial judiciary.
- Whilst the period of declaration set under paragraph (h) may be necessary to give the maximum time-limit within which a declaration of the result must be made, the primary provision that should guide declarations is paragraph (f) (and paragraph (g) (iii) for the run-off) which requires mandatorily that it should be done **"forthwith"** after the counting and addition of the votes. As such paragraph (i) should refer not to paragraph (h) but to paragraph (f) (and paragraph (g) (iii) for the run-off). The current reference to paragraph (h) in paragraph (i) only serves to present opportunities for confusion as to when the winner is declared duly elected as president.
- Further, on the same reasoning paragraph (j) which requires the Chief Elections Officer as soon

as possible after he or she has declared the result of an election to the office of President should refer to the declaration as having been made not in terms of paragraph (i) as it presently states but in terms of paragraph (f) (and paragraph (g) (iii) for the run-off). Paragraph (j) which requires the Chief Elections Officer to cause the result to be widely published (in the Gazette and through other means) stating that the person is "**duly elected as President of the Republic of Zimbabwe ...**" only serves to reiterate what is already stated in paragraph (f) (and paragraph (g) (iii) for the run-off).

- Following this reasoning it is clear that a person becomes duly elected President upon such declaration under paragraph (f) (and paragraph (g) (iii) for the run-off). Indeed, this is confirmed by Section 110(5), which states that a person elected as President shall in accordance with section 28(5) of the Constitution assume office on the day when he or she is declared as such by the Chief Elections Officer "**or within forty-eight (48) hours thereafter**".
- This implication of this is that the formal swearing-in ceremony must be held within the 48 hour period after the declaration of the result, which means there is a very short period for handover where there is a change of person occupying the Presidency. It also means that should a person wish to challenge the result of the election so that for example a re-count must be held, this has to be done without delay. A challenge to the result will therefore necessarily suspend the declaration that the Chief Elections Officer would have made pursuant to paragraph (f) (and paragraph (g) (iii) for the run-off).

Potential Lacuna between Presidential Election and Presidential Run-Off Election

- One thing that is not adequately provided for under the current system is what happens where there is need for a Presidential run-off election, when the person who is the current president is not one of the two candidates for the run-off because he would have come third or lower in the first poll.
- Under the Constitution, the incumbent President retains office until he is replaced by a winning

		<p>candidate. This means that essentially the country for that period between the declaration of the initial poll's result and the declaration of the presidential run-off result will be under the leadership of a person who has virtually no prospect of becoming president going forward.</p> <ul style="list-style-type: none"> • Ordinarily that would not be a big problem but given the extreme sensitivities that attend politics of power in Zimbabwe, this could be a cause for uncertainty and instability during that period. It may be a point to consider if a provision could be inserted, either in the Constitution or under the Act to deal with that possibility, however remote it might seem in the foreseeable future.
VI	<p>PRE-EMPTION OF RESULTS' ANNOUNCEMENT</p>	<p>Pre-emption of Results</p> <ul style="list-style-type: none"> • The new Section 66A seeks to prohibit any person from pre-empting the official announcement of the results of an election. Persons who purport to announce the results of an election before they are officially announced by an electoral officer will be subject to criminal prosecution. Official declaration and announcement of results of an election is the sole preserve of electoral officials. Paragraph 2 specifically bars office-bearers or members of a political party from purporting to declare and announce the results of any election prior to official declaration by an electoral officer. Paragraph 3(b) is the catch-all provision as it covers both office bearers and members of political parties. • In order to prevent pre-emption of results as envisaged in the Bill, ZESN also urges the Commission to ensure that results are declared forthwith after counting and without any delays to prevent any anxieties or concerns. In the past pre-emption of the official declaration has occurred as a direct response to failures to declare results promptly. This can be avoided by the Commission ensuring prompt declaration of results. • This clause may pose risks and challenges particularly given that polling stations and constituency returns will be made public at the relevant stages of the process. Many people who are merely members of political parties are at risk of contravening this provision even if they are

		<p>simply stating what is apparent from the posted returns. Journalists in the media especially will be at greater risk but presumably can be argued to be outside the reach of these provisions as they appear to cover members and office-bearers of political parties.</p>
VII	VOTE RE-COUNTS	<ul style="list-style-type: none"> • Clause 25 amends Section 67A of the Act deals with recounting of votes. It must be recalled that vote re-counts may be done at the Commission’s own initiative or at the request of a contestant. The Commission is obliged to advise all other parties to the election of the request, including the date and time of its submission. • The standard to be applied before ordering a recount is that the Commission must consider that there exist “reasonable grounds for believing that the alleged miscount of votes occurred and that if it did occur, it would affect the result of the election”. • Therefore it is essentially a two-part test, first reasonable grounds for believing that a miscount occurred and second, that even if a miscount occurred it would have affected the election result. It is highly likely however that if the first part is demonstrated, there would be little cause to refuse the recount as it would be more likely that the miscount would have affected the result. • The new provision also requires that the recount must be completed within five (5) days after the last polling day of the election. The Electoral Court may however extend this period upon application. Given the peremptory language employed on the five day limitation, it is to be expected that any extension by the court would be done sparingly and only in those circumstances where it is unavoidable as the essence of the provision and indeed the intention of the legislature would be to expedite the election process and allow for finality.
VIII	VOTER EDUCATION	<p>Entitlement to Provide Voter Education</p> <ul style="list-style-type: none"> • Clause 13 of the Bill introduces Part IXA to the Act which deals with matters relating to Voter Education. The net effect of the provisions under sections 40B and 40C is that persons that are entitled to provide voter education are: <ul style="list-style-type: none"> - The Commission

		<ul style="list-style-type: none"> - A person permitted (by the Commission) to assist the Commission under section 40B(3) and - Political parties - Other persons satisfying conditions outlined under paragraphs (d) to (j) • This essentially means that there is room for a broad network of voter education providers although whether this can become a reality depends on the Commission which has wide powers to control the provision of voter education. The two key avenues for persons other than the Commission and political parties are: <ul style="list-style-type: none"> i. Section 40B (3) which provides that the Commission "may permit any other person to assist it in providing voter education". The use of the word "may" as opposed to the more peremptory "shall" means the inclusion of other players in the provision of voter education is left to the discretion of the Commission. Section 40B (3) is really a permissive power to enable the Commission to appoint other persons to help it in its provision of voter education. It is recognition that the Commission may not on its own have the capacity to provide voter education across the country and therefore, this provision empowers it to appoint other persons to assist it in exercising that function. This facility is therefore available only to those other players whom the Commission chooses and in any event, they have to work in accordance with the Commission's mandate. This on its own would be unduly restrictive, which is why the other facility is significant. ii. Section 40C (1) (d) opens the way for other persons to provide voter education. These persons must however, fulfil certain conditions, which essentially are that they must be Zimbabwean citizens or permanent residents domiciled in Zimbabwe. In keeping with the 'Zimbabweanness' requirement, if it is an association it must comprise "wholly or mainly of citizens or permanent residents of Zimbabwe domiciled in Zimbabwe". Also in the case of trusts, the majority of whose trustees must be citizens or permanent residents of Zimbabwe domiciled in Zimbabwe. There are further requirements for an association or a trust in which case they must be registered as a private voluntary organisation in terms of
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		<p>the Private Voluntary Organisations Act [Chapter 17:05] or registered in the Deeds Registry as a trust and is mandated by its constitution or trust deed to provide voter education. In addition, there are other conditions:</p> <ul style="list-style-type: none"> ▪ the person must employ individuals who are citizens or permanent residents of Zimbabwe to conduct any voter education; ▪ the person must conduct voter education in accordance with a course or programme of instruction furnished or approved by the Commission; ▪ the voter education is funded solely by local contributions or donations. However, foreign funding may be used but only if channelled through the Commission for onward allocation in accordance with Section 40F; ▪ the voter education materials used by the person and the course or programme of instruction in accordance with which the voter education is conducted are adequate and not misleading or biased in favour of any political party; and ▪ no fee or charge is levied for the provision of voter education or voter education materials. <p>Commission as Gatekeeper in Voter Education Provision</p> <ul style="list-style-type: none"> • Section 40C (2) provides that any person providing or proposing to provide voter education shall be required by the Commission to provide copies of all materials relevant to the provision of voter education and personal details of all persons who shall provide the service. The sources and manner of funding of its proposed voter education activities must also be provided. . Any contraventions of the prohibitions are punishable by penalties set out under Section 40C (3) – fine, imprisonment or both. <p>Effect on Academic Freedom</p> <ul style="list-style-type: none"> • An important provision here is paragraph (c) of Section 40C (3) whereby an offence is committed where "<i>with intent to circumvent the restrictions on the provision of voter</i>
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education specified in subsection (1), provides voter education under the guise of providing it as part of a course in law or civics or any other subject for students at an educational institution". This has the potential, even if remote, of interfering with academic freedom under which academics in institutions of learning should be unrestricted in the execution of their duties. It is highly unlikely that academics providing courses that include elements that would otherwise fall under the heading of higher education would be liable under this provision however; it presents an unnecessary risk of harassment if applied unreasonably by law enforcement agencies. This is particularly relevant in the Zimbabwean context where education providers, including teachers and academics have occasionally suffered harassment in their institutions.

Commission's Power to give Directions

- Under section 40E, the Commission has the power to monitor the provision of voter education by other persons. The Commission may by written notice give directions to every person responsible for providing and publishing the programme to cease providing or publishing it or to make such alterations to it as the Commission may specify to render it accurate and fair. This power is exercisable where ***"the Commission considers that any programme of voter education is—***
 - (a) false, in that the information provided by it is materially false or incorrect; or***
 - (b) misleading, in that while the programme purports to be impartial it is materially and unfairly biased in favour of or against a political party or candidate contesting the election"***
- However, any person affected by any proposed direction is entitled to be heard before such direction is issued, which essentially complies with a basic rule of Natural Justice and indeed the Constitution which under Section 18 guarantees the protection of the law.

Foreign Funding

		<ul style="list-style-type: none">• This new Section 40F is an important provision, requiring that all foreign funding (described as “foreign contribution or donation”) for the purposes of voter education must only be made to the Commission. The Commission “may” then allocate such funding to any person referred to in section 40B (3) or section 40C (1).• This is essentially a ban against direct foreign funding to persons or organisations that provide voter education. From a foreign policy point of view, this may be seen as a measure to control foreign interference in the election process. However, the scarcity of local funding due to the economic challenges and limited culture of philanthropy, the reality is that most organisations are almost entirely dependent on foreign contributions and donations. It will therefore mean logistically, funding would have to be channelled through the Commission for onward passage to the relevant organisations. This will depend on the Commission’s efficiency and fairness otherwise delays and bureaucracy could effectively hamper the activities of voter education providers who have to rely on foreign donations.• Further, it is not entirely clear from the provision that the Commission has the discretion to refuse any foreign funds for onward passage to the local organisations. If it does have such discretion, the hope is that it will be used reasonably in favour of the primary goal of enabling the provision of voter education.• In addition, it is not entirely clear that the funding that it receives will be passed on intact to the relevant organisation or whether the Commission will have the discretion to allocate it to other organisations. It is important to clarify that the funding will not be used in this broad way and that essentially the Commission is a receiving agent for the specific organisation that applied for funding. The last option is that organisations may wish to reorganise their finances and funding streams more creatively in order to avoid having to go through what may be a lengthy and bureaucratic process.• The key point for any provider of voter education is that they must satisfy their “Zimbabwean” character, be prepared to provide material for the provision of voter education and that this
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		<p>material shall be vetted to ensure that it is not materially false and misleading and that it is fair and impartial to the broad range of contestants. In essence, voter education programmes are subject to approval by the Commission.</p>
<p>IX</p>	<p>ELECTION OBSERVATION AND ACCREDITATION</p>	<p>Accreditation and Election Observers</p> <ul style="list-style-type: none"> • The new Part IXB makes provision for the accreditation and role of election observers. This is an important institution in any election process as it ensures that there are both local and external 'monitors' to ensure that the election is conducted in a manner that is not only free and fair but is seen to be free and fair. • Election observers are accredited by the Commission and they are entitled to observe the whole process, including the conduct of polling, the counting, collation and verification of votes and polling station returns. They are also entitled to bring to the Commission's attention any irregularities appertaining to the process. It is a legal requirement that they be assisted in the execution of their role by the Minister (of what), the Commission and all election officers (40G (2)). • The power of accrediting observers is given to a committee established by the Commission, which shall be known as the Observers' Accreditation Committee (hereafter "the OAC"). It has the role of vetting the applications of observers and making recommendations to the Commission which shall have the ultimate power and responsibility of making the final decision. The composition of the OAC is that 3 members (including the Chairperson) are from the Commission but a further four are essentially direct political nominees - one person nominated by the Office of the President and Cabinet; one person nominated by the Minister; one person nominated by the Minister responsible for foreign affairs and one person nominated by the Minister responsible for immigration. • If the aim was to reduce political interference in the accreditation of observers, this is not fully achieved given that political nominees outside the Commission dominate the OAC. In the current

		<p>specific circumstances of the GNU, one must consider also that ministries are allocated so that there is fair and equitable representation of all the main political parties. In addition to the nominee of the President's Office, the other nominees are from Ministries that are controlled by one political party (ZANU PF) – except that the Ministry of Home Affairs controlling immigration is currently shared between ZANU PF and the MDC-T. This domination by one party could mean that the OAC will be overly dominated by representatives of one political party, a reality that in the circumstances of Zimbabwean politics cannot be overlooked. A suggestion would be to expand the OAC, to include more non-political appointees to include civil society and members of the professions.</p> <ul style="list-style-type: none"> • Persons who may apply for accreditation include both local and foreign observers although there is also a facility for direct invitations by the Minister (Justice), the Commission and the Foreign Affairs Ministry. Since the Ministries and the Commission are represented in the OAC it is likely that their invitees will face little if any problems in the process of accreditation. The main challenge will be for those who apply under Section 40H (a) and (b). Indeed, Section 40I (4) provides that the Foreign Affairs Minister may make objection to the accreditation of a "foreign individual or eminent person" and states that the OAC "shall pay due regard to the objection" in its decision-making process. The fact that a person with a nominee on the OAC has a right of objection could compromise the impartiality of the OAC in respect of the applicant so a suggestion here is that the Foreign Affairs Minister's nominee should recuse himself from the decision-making process in such circumstances. • It is important to note that this clause decentralises the power to invite applications so that it is no longer left to the Minister of Justice to perform this role. Besides the Ministers of Justice and Foreign Affairs, the Commission itself has the power to invite applications. Indeed, this must be interpreted to mean that any other person, even those who have not been directly invited, are entitled to make applications to the Commission. • Section 40I (5) ensures that the Commission is the ultimate decision-making body in respect of
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		<p>accreditations since the OAC is only a recommending body. However, the Commission must indicate in writing within 48 hours of receipt of the recommendations that it objects to any of them. However, it may be useful to get clarity on the nature of the 'recommendations' that the OAC is entitled to issue – are they recommended names of accredited observers or do they include a list of applicants that have been rejected? The risk here is that whilst it appears that the Commission is the ultimate deciding body it is not clear that it has the power to revisit the applications that have been rejected. If it does not have sight of these rejects, then its role as the ultimate decision-making body is in reality very limited, with greater power resting in the OAC.</p> <ul style="list-style-type: none">• Also of concern is that there is no provision for the rejected applicants to seek recourse against the decision of the OAC. This may lie with the courts under the normal laws of the country but it would be lengthy and time-consuming, especially given the urgency of such matters in periods leading up to elections. It would be better to have clear provisions enabling an appeal process against the decision of the OAC, in particular given that the Ministers have the right of objection against specific applicants whereas there is no provision for hearing the side of the applicants in such circumstances.• Overall, ZESN notes that the Observers' Accreditation Committee ("OAC") which is responsible for the accreditation of both local and foreign election observers is comprised of a high number of political nominees. If the aim was to reduce political interference in the accreditation of observers, this is not fully achieved given the domination of political nominees. ZESN recommends that the composition of the OAC be exclusive decision of the body charged with running elections, i.e. the Commission. Ministers, who are usually also contestants in an election, should have no role in the accreditation of observers since all other candidates in an election who are not Ministers do not have the same facility. Likewise, it is not necessary to give power to the Ministers of Government to invite persons to apply for accreditation to observe elections. Indeed, on the same basis, Ministers' right of objection against certain observers is not justified given that other contestants or parties with an interest in an election do not have the same
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		facility of objection. All this should be the exclusive domain of the Commission.
X	NOMINATION OF CANDIDATES	<p>Nominations</p> <ul style="list-style-type: none"> • Clause 14 of the Bill amends Section 46 of the Act by providing for stronger requirements to ensure that candidates standing for election on behalf of a political party must satisfy the nomination court that they are the true choice of the party that they want to represent. The party is required to provide to the Commission names of persons who may vouch for the candidate that they are the party’s choice. There is also an additional requirement that candidates wishing to be nominated must submit, as part of his or her nomination papers, two copies of the electoral code of conduct for political parties and candidates signed by the candidate or his or her chief election agent. • It is important to note that failure to comply with this requirement may result in the refusal of nomination by the nomination court. Therefore its is important that political parties and candidates ensure they adhere to this formality beforehand, rather than wait for the nomination day when bureaucratic processes might cause undue delays and therefore cause potential disqualification. • There is also a minor amendment through Clause 15 and Clause 28 of the Bill providing for the repeal and replace provisions of the Act that currently provide for the “deposits on nomination” to be substituted by “nomination fees”, which is the more appropriate name for the fees paid on application for nomination of a candidate.
XI	VOTING PROCESSES AND PROCEDURES	<p>Setting Election Dates</p> <ul style="list-style-type: none"> • Clause 11 deals with setting dates when elections will be held. The current position under Section 38 of the Act is that the President specifies the dates of the various processes in an election. That section requires polling day in all elections to be between 28 and 50 days after

		<p>nomination day. This provision will alter the period so that polling day may be between 42 and 63 days after nomination day.</p> <ul style="list-style-type: none">• This will extend the time between the day of calling for elections and the polling day, giving more time for preparations, fulfilment of certain legal requirements under the Act and also more campaign time for candidates and participants.• Setting Possible Presidential Run-Off Election in Advance: The clause requires the President to specify in advance of the first election the date on which a Presidential run-off poll must be held in a presidential election if none of the candidates succeed in getting more than 50 per cent of the votes cast in the first round. In other words, the date will not be set after (but before) the first round of Presidential elections. This must be read in conjunction with provisions of Section 110 which require the Presidential Run-Off election to be held on "a fixed date not less than twenty-one and not more than sixty-three days [this should be forty-two days] after the polling day or last polling day". The date cannot be more than 42 days or less than 21 days after the polling day of the first round of elections. This will prevent the risks that exists under the present system that the timing might be manipulated in view of the results of the initial presidential election. It will also mean that by the time the candidates are setting out for the run-off election, there is no chance that one of the contestants will also be the rule-maker in terms of when the run-off election will be held. Having the date set in advance means everyone is certain and clear about the timing and other candidates are not liable to be held at ransom by one candidate who may set a date that suits his or her advantage.• It's worth noting that in Ghana, which has a similar system, the clause is a lot simpler. It requires the Presidential-Run-off election to be held within three (3) weeks of the first round of elections. This allows for a quick resolution of the Presidential contest. There is no need to have a long waiting period between the first election and the run-off – it only provides opportunities for manipulation and intimidation. The need to prepare for the run-off cannot be used as an excuse for the lengthy interval because the country must have back-up measures in place to
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cater for the run-off election should the need arise. It is recommended that the period between the first election and the possible run-off election be limited to not more than three (3) weeks.

- **Setting Election Dates:** There is also a strong argument to be made to giving power to set all election dates to the Commission as opposed to giving such powers to an incumbent President. The alternative may be to have the date set by law. Either way, the power to set election dates would be removed from a person who will also be a candidate in the election and is therefore an interested party. The Commission must be in full control of the election process, and this should include setting the polling dates in consultation with relevant parties and state authorities. Fixing the election by law may present challenges in terms of implementation – for example poor preparations and other factors might cause delays which could make it difficult to meet a date set by law. ZESN believes that the power should be given to the Commission and not leave it with the President who, along with the ruling party, is an interested and therefore biased party.

Separate Ballot Boxes

- **Clause 16** amends **Section 52** of the Act to clarify that where there is more than one election held at the same time there must be separate ballot boxes at every polling station for the votes cast in each of the elections.

Disclosure of Details About Ballot Papers

- To promote further transparency in the process a new **Section 52A** is introduced by **Clause 17** of the Bill to require the Commission to disclose specific details about ballot papers printed for each election. Such information includes where and when the ballots are printed, their total number and the number that has been distributed to each polling station (including special polling station, where that facility applies). The provision does not stipulate specifics as to when and where these disclosures must be made save for stating that it shall be done “*without delay*”. It is recommended that a specific time-period be stated, for example, that the disclosures should be made not more than fourteen (14) days before the election and also that the location of the disclosures must be specified as the constituency, provincial election centres or the National Command centre. In matters of this nature, to prevent circumvention of the law, timing and

location must be clear and certain.

- This is an important provision, which will enable observers and monitors to have a standard against which to determine the accuracy of votes that have been cast at any given polling station and in the election as a whole. The number of votes cast cannot therefore exceed the number that has been officially printed or distributed to each polling station. Observers (and the media) must therefore make a note of these specific details as soon as they are available so that a public record is always available.

Election Agents

- **Clause 18** amends **Section 55** of the Act so that candidates will be allowed to have one election agent in each polling station and another agent outside but within the “immediate vicinity” of the polling station ready to relieve the first one when necessary. This must be read alongside **Section 95(5)** which empowers the Commission to prescribe that only one election agent may be appointed to represent a party during concurrent elections. It is important to note that the language preferred is that the agent stationed outside must be within the ‘immediate vicinity’ which means he must be stationed very close to the polling station and the law enforcement agents must be apprised of this requirement so that agents are not unnecessarily harassed. The legislature would not have used the word “immediate” to describe the “vicinity” if it did not intend that the agent must be in close proximity with the polling station.

Police Officers’ Restricted Role

- The second and probably most significant provision introduced by this clause relates to the role and power of the police officers at polling stations. Under the new Section 7a, police officers are prohibited from interfering with the electoral process at any polling station. It is notable that the language used is peremptory and does not offer discretion to the police. It says, police officers, “**(b) shall not interfere with the electoral processes at a polling station**”. They are not even allowed to enter a polling station unless they have been called upon for help or to cast their votes. Also important is that when inside the polling station, police officers come under the

		<p>ultimate command and direction of the presiding officer. This clause means that within the jurisdiction of the polling station, the presiding officer is the overall authority and even police officers should act in accordance within his directions and instructions.</p> <ul style="list-style-type: none"> • The sole function of the police officers is to maintain order and prevent contraventions of the law to ensure a free and fair election. This demarcation of authority and limitation of the police authority by deferring to the presiding officer is a welcome development which reduces the risk of interference by persons outside the Commission which should be solely responsible for elections. This prevents the dilution of the Commission’s authority. • In the past, police officers even had the power s to assist voters to cast their votes where such help was needed. This was unnecessary (and potentially undue) interference by persons outside the Commission in the electoral process. The political context is such that police officers are seen as figures of authority, often-times, repressive authority which may intimidate voters, especially in remote rural areas. The distance created by this provision between the electoral process and authority exercised in that process and the police officers could potentially remove some of these barriers that affected the freeness and fairness of elections. <p>Provision of Polling-Station Returns</p> <ul style="list-style-type: none"> • Clause 20 introduces a provision requiring presiding officers at polling stations to give candidates copies of the completed polling-station returns. These polling-station returns will record details of the votes cast for each candidate and the number of spoilt ballot papers. • This is yet another measure to enhance transparency of the voting process. It means that each candidate will know details of the voting process immediately after the counting at polling-stations. • Clause 22 also reiterates the requirement for the provision by electoral officers to political parties and candidates that contested an election of all copies of their returns, i.e. polling station returns, constituency returns. The availability of all these copies will also enhance transparency
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		<p>as candidates and parties can take the opportunity to perform due diligence and ensure that the correct information is being transmitted right from the polling-station to the National Command Centre. These requirements are mandatory as depicted by the use of the word 'shall' in all instances where the electoral officers are required to provide the returns. This is an important step for transparency.</p> <ul style="list-style-type: none"> • There is a point worth noting that the explanatory note to the Bill is misleading in that it suggests that such returns are to be provided upon request yet the provisions have no mention of this requirement for a request by candidates of political parties. The provisions (all three paragraphs of Section 65A) simply require the presiding officer, the constituency elections officer and the Chief Elections Officer to provide the returns to the political parties and candidates 'forthwith'. This should be clarified to reflect the correct position of the law. • This provision must be read alongside the other provisions (below) requiring the posting of polling and constituency returns after the counting of votes at each level of the collation and counting process. <p>Verification & Collation of Results</p> <ul style="list-style-type: none"> • Section 65 of the Act which deals with the verification and collation of polling station returns at constituency level is also amended by Clause 21 of the Bill. It will require constituency election officers to complete constituency returns as soon as they have verified and collated the returns from polling stations, and forward their returns for transmission through the appropriate constituency and provincial centres to the National Command Centre (in accordance with Section 37C (4) of the Act). <p>Posting Returns Outside Polling Station</p> <ul style="list-style-type: none"> • Significantly, they will also have to provide candidates and polling agents with copies of their returns, and post copies of them outside their constituency centres. The constituency return must, in addition to separately recording the results of the counting of the postal and ordinary
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		<p>ballots, separately record the results of the counting of the special voting ballots.</p> <ul style="list-style-type: none"> It is important to note that these measures are also designed to enhance transparency of the process by ensuring that candidates and the public are fully informed at every stage of the voting, counting and collation process. <p>Conveyance of Results</p> <ul style="list-style-type: none"> Clause 24 amends Section 67 extending ways in which constituency elections officers may convey the results of elections to the Commission. It was already possible to convey the results by "telegram, telefacsimile (fax), or electronic mail" but the extension is by the words "or such other means as may be prescribed ..." This not only helps to expedite the process of conveyance of the results but also provides flexibility to prescribe and use other means to achieve the purpose.
XII	<p>VOTING BY ILLITERATE OR PHYSICALLY HANDICAPPED VOTERS</p>	<p>Voting by Illiterate or physically handicapped voters</p> <ul style="list-style-type: none"> Clause 19 introduces a new Section 59 into the Act to allow illiterate and physically handicapped voters to be assisted by persons of their choice rather than by electoral officials. However, in circumstances where such voters who do not have relatives or other persons of their choice to assist them, the presiding officer of a polling station and two other electoral officers can provide the assistance. The presiding officer is required to keep a register in which any person who provides assistance must record his or her name, identification particulars and the name of the voter he or she assisted to vote. Whilst this list may be regarded as necessary for purposes of transparency, it also poses a potential risk that voters may feel intimidated especially if the administrative purpose of this list is not properly clarified. Voters believe that their vote is their secret and often frown upon any

		<p>recording of personal details, fearing retribution from opponents. It is therefore important that the voter education programmes clarify the purpose of this list and allay fears that voters may harbour in respect of having their names and particulars recorded by the polling officer.</p> <ul style="list-style-type: none"> • Another point to note is that where the voter is visually impaired Section 59 (5) provides that the presiding officer shall have the power to observe the casting of the vote to ensure that the voter’s intention is respected by the person who is assisting the voter. This means the presiding officer would in these circumstances become aware of the voter’s choice. This might pose a risk where voters may feel that they are unable to exercise their free will for fear of potential retribution. Again voter education programmes must address this aspect to allay the fears of visually handicapped and illiterate voters. • Further, Section 59(4) states that where the presiding officer is assisting a person, he may put such questions to the voter as are necessary to ascertain his intentions where such wishes are not clear in the first place. Such questioning may also be viewed with circumspection by voters and it is important that presiding officers’ only resort to this power when it is absolutely necessary otherwise it should be used very sparingly. In all circumstances, it is important that election observers exercise vigilance to ensure that voters’ are not unnecessarily questioned or harassed and that their intentions are carried out. • Overall, this provision is a generous and welcome departure from the old provision whereby police officers were given the power to provide assistance to illiterate or physically-handicapped voters. This had the potential to interfere with the electoral bodies by persons outside the electoral institutions and also risked intimidating the voters particularly given the tense relations between the police and the general public, especially opposition supporters. By ensuring that voters bring a person of their choice or are assisted only by the presiding office or electoral officers, this keeps the process within the exclusive jurisdiction of the Commission.
XIII	POSTAL AND	Clause 26 deals with amendments to provisions relating to two forms of voting outside the normal voting on polling days, namely, Postal Voting and Special Voting. Most of the provisions relating

<p>SPECIAL VOTING</p>	<p>particularly to the counting, collation and verification of votes are similar for both postal and special voting and will be analysed together to prevent unnecessary duplication.</p> <p>Postal Voting</p> <ul style="list-style-type: none"> • Clause 26 introduces a new Part XIV in the Act which will restrict postal voting to people who are outside Zimbabwe on Government business, as well as their spouses if they are also out of the country. It also simplifies the previously elongated and bureaucratic procedure for obtaining postal ballots and for voting by post. A significant step introduced through a new Section 71 with the effect that persons in the Government or Diplomatic service who wish to apply for a postal ballot may be authorised by electronic mail to do so by their head of Ministry or station, Embassy or consular mission. • However, to ensure the authenticity of such electronic communications certain safeguards are provided in the new provisions. For example, they must use official electronic mail addresses, the email must be authenticated by the sender's electronic signature and to constitute a 'letter' for purposes of the legislation, the email must be printed in hard copy. It may be necessary, however, to provide a legislative definition of what is meant by "official electronic mail address" for the avoidance of doubt. • Also important is Section 73 (5) which is designed to enhance transparency by requiring chronological recording of all applications for postal voting and make them available for free public inspection. Similarly Section 74 (4) requires that the Chief Elections Officer keeps a list of all ballot papers issued and relevant details of the person to whom they were issued which will also be available for free public inspection. The voters' roll for each constituency should record clearly that specified individual voters have been allowed to use postal voting. • The remaining provisions – Section 75, 76, 77, 78 and 79 deal with the modalities of postal voting the central line being to safeguard the integrity of the procedure by promoting transparency and accurate distribution of ballots to relevant wards and constituencies and recording of the results. There seems to be a discrepancy in Section 77, where paragraph (4) should probably come before what is contained in paragraph (3). It seems logical that the Ward Elections Officer can only place in the postal ballot box all the unopened ballot paper envelopes before that box is sealed in the presence of election agents and observers. The present sequence does not seem appropriate and could be confusing. Additionally as a security measure, tamper proof envelopes can be used to prevent fraudulent activity.
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		<ul style="list-style-type: none"> • Section 78 ensures that there is verification of postal ballots so that any discrepancies can be identified and dealt with. • Also intended to safeguard the integrity of the process, the procedure requires that whilst the postal ballots must be counted together with the ordinary ballots they must be kept in separate packages – including those rejected or in respect of which rejection is objected to (Section 79). Section 80 deals with offences relating to contraventions of the special procedure of postal voting. • Whilst the simplification of the special procedure, especially the adoption of email communications, which will help to expedite the process, is a welcome development it is apparent that it remains too restricted and unavailable to other voters who may be outside the country but still entitled to vote. It is not just persons on government duty who find themselves outside the country on critical voting days. There is no good reason why, if postal voting is available to those on government duty, it cannot be available to them too. For example, it discriminates against those in business who may have to be away to do business during election days. To give a simple example, if a government delegation on a trade trip to China includes businessmen and government officials, the latter would be able to use postal voting whereas the business persons would not have the same facility and yet they are all pursuing the same cause in the national interest. Postal voting does contain risks but it should be more widely available than it is at present. • Exclusion of the Diaspora: Also worth noting is that the restriction clearly excludes many Zimbabweans based abroad (the Diaspora). If there were no restrictions, the registered voters in the Diaspora would potentially be able to vote in this way. Indeed, there has been much clamour for the so-called Diaspora vote in recent years, given the large number of Zimbabweans living abroad but this campaign has come to nought. The restrictions to postal voting confirm that the door is currently closed to the Diaspora unless they are on government business. It has already been noted above how Zimbabwe lags behind other countries in the region such as South Africa and Mozambique which permit Diaspora voting and in the case of Mozambique, have taken active steps to register voters in the Diaspora to ensure that they exercise their right to vote. Zimbabwe needs to adopt a similarly open approach to ensure it has a truly representative government.
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		<p>Special Voting</p> <ul style="list-style-type: none">• Special Voting introduced by the new Part XIVA is restricted to electoral officers and members of the “disciplined forces” responsible for performing security duties during elections. This refers to members of the Police and Defence Forces who will perform duties during elections. Note however, that in addition, persons who have been accredited as election observers will be eligible to apply for special voting. The applicants from these categories must demonstrate that they will be away from their constituencies on electoral duty and they will be able to vote in advance of an election at special polling stations set up at district centres (and, in some cases such as where districts are too large, district sub-centres) for the purpose by the Commission.• Voting at these special polling stations will be conducted over two days in order to minimise disruption to security duties. It will be subject to the same scrutiny by electoral officials, election agents and observers as voting at ordinary polling stations on polling days. A person must apply for a special vote with accompanying certifications from the applicant’s superiors or other persons as specified in the Bill.• Similar provisions relating to maintaining a list of persons granted authority to cast Special Votes and crossing out names of those persons from the voting roll sent to individual constituencies as we have observed above for postal voting apply in the case of special voting procedures too. The same point raised in respect of Section 77(3) and (4) regarding postal votes and the illogical sequence of those clauses applies to Section 81F (10) and (11) in that paragraph (11) should probably come before what is contained in paragraph (10) to make better sense.• The casting of an ordinary ballot by a person who has not been authorised to cast a special ballot is made an offence under the new section 81H (“Offences in relation to special votes”).• The special voting procedure, like postal voting, is too restrictive as it could easily be used to cover the elderly or persons who may be too ill or unwell to attend at polling stations during polling days. It is a fact that the long distances and limited means of transportation in rural
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		<p>areas in particular make it extremely difficult for the elderly and sick to exercise their voting rights. It has been recognised by the courts in other countries in the region, such as South Africa where the Constitutional Court held that the right to vote is one that requires the state to take a pro-active approach that enables voters to fully enjoy its existence. It is arguable that where it is impossible or difficult for persons to enjoy that right, this could be a violation of individuals' political rights as guaranteed under Section 23 A of the Constitution. It is recommended that just as the state has made special procedures for those who cannot be physically present on government business, it must also account for the voting rights of those who cannot be present by reason of old age, physical incapacity or generally ill-health. At present the voting procedures which effectively limit the participation of the aged could be seen as discriminatory on the grounds of ageism and therefore potentially in violation of Section 23 of the Constitution. It is recommended that special voting procedures be set out at law to enable the elderly, physically-incapacitated and ill to exercise their voting rights.</p> <ul style="list-style-type: none"> • Overall, the key thing is that election agents and observers must keep a vigilant and watchful eye over the procedures relating to postal and special votes. Both procedures are necessary in any democracy to enable those otherwise unable to attend on polling days to exercise their right to vote. The main criticism is that postal voting remains too restricted in scope and reach. It could be expanded to include otherwise who are not necessarily on government business and with more scope could have provided a facility for those in the Diaspora to exercise their right to vote.
XIX	POLITICALLY-MOTIVATED VIOLENCE AND INTIMIDATION	<p>Code of Conduct and Responsibility of Political Parties</p> <ul style="list-style-type: none"> • Clause 33 of the Bill introduces a new Part XVIIIIB ("Measures Against Politically-Motivated Violence") in the Act. Section 133G essentially places a responsibility on political parties and candidates contesting an election to take steps to prevent politically-motivated violence and intimidation. It calls upon them to undertake to abide by a code of conduct set out in the Fourth

Schedule to the Act.

Appointment of Special Police Liaison Officer

- **Section 133H** places a duty on the Commissioner General of Police to appoint a senior police officer for each provincial centre who will be the special police liaison officer responsible for the expeditious investigation of cases of politically-motivated violence or intimidation within that province which come to the attention of the police, a multiparty liaison committee, the Commission or the Zimbabwe Human Rights Commission (hereafter, "**ZHRC**") during the election period. Significantly, this appointment must be done "in consultation with" the Zimbabwe Human Rights Commission, which is a constitutional body responsible for oversight on observance of human rights.

Special Investigation Committees

- The special police liaison officer will be assisted by Special Investigation Committees set up in each province during elections by the Zimbabwe Human Rights Commission (in consultation with the Commission). The SIC will direct the special police liaison officer to investigate cases of politically-motivated violence and intimidation during election periods. The members may resolve to accompany the special police liaison officer in his investigations and where they choose to do this, they will be entitled to powers of peace officers under the legislation for criminal investigations, i.e. the Criminal Procedure and Evidence Act (Chapter 9: 07).
- The SIC will be chaired by a ZHRC Commissioner or a member of the ZHRC's staff chosen by the ZHRC and will consist of the special police liaison officer for the relevant province, two representatives of each political party taking part in the election. Where an independent candidate is contesting a Presidential election, he is entitled to also appoint two representatives. There is however no provision for independent parliamentary candidates to have representation in the SIC.

Attorney General's Office Special Prosecutor

- Under **Section 133I**, if the Commission is satisfied, after an investigation by the SIC, that an incident of violence or intimidation did take place, it has powers to warn the persons responsible, or refer the case to a **special prosecutor** designated for the purpose by the Attorney-General, for prosecution before a **special magistrate** designated by the Judicial Service Commission. *Note* however that the explanatory note to the Bill makes reference to the ZHRC as having these powers but this is an error as **Section 133I** refers specifically to the Commission, i.e. the Zimbabwe Electoral Commission. If it was intended that the ZHRC has these powers, then it needs to be clarified in the provision.

Special Police Units

- Section 133J requires the Commissioner General of Police, in consultation with the ZHRC to establish one or more special police units to carry out expeditiously investigations of politically motivated violence and intimidation.

Special Magistrates

- The Judicial Service Commission is required to designate in each province **special magistrates courts** to handle cases of politically motivated violence and intimidation during elections.
- The Attorney-General is required under **Section 133J (4)** to ensure that there are sufficient competent prosecutors to expeditiously carry out prosecutions. To more effectively fulfil this function there must be some direction or encouragement here to ensure that the Attorney General can appoint special prosecutors from among members of the practising legal profession. This would not only enhance the capacity of the AG's Office but also lend to it much needed expertise and experience to tackle the volume of work that is likely to arise in such a climate. Section 133K ensures that severe penalties are visited upon any person convicted of an offence relating to politically-motivated violence and intimidation during elections – this can include

disqualification from voting, campaigning or standing as a candidate for up to five (5) years.

Analysis

- On analysis, this part sets up a fairly robust legal architecture for curbing and dealing with politically motivated violence and intimidation during elections. Politically-motivated violence and intimidation has been a major issue in elections in Zimbabwe in recent years. In the past, much of it has been left to the police to deal with it as the law enforcement agency but it has also been much criticised by opposition political parties, civil society and others. The fear that the police force is politically compromised has reduced confidence among the public.
- The key innovation in this part is the inclusive character of the proposed regime, in that the ZHRC and participants in the election will have an active role in the investigations. The expectation therefore is that the inclusion of other bodies in the area of investigating such offences will add confidence in the law enforcement system during elections when tensions are generally heightened. Whilst the legal architecture to prevent and deal with violence looks impressive, the test will be in the implementation. The ZHRC and related parties will have to be vigilant, pro-active and execute its role efficiently.
- Having said that, the provisions could have a boomerang effect on those who have previously complained of such practices as this part seeks to curb. In particular, if the law is selectively applied, and this will depend on the independence and impartiality of the Attorney General's office – in particular how it takes up and prosecutes cases of politically-motivated violence and intimidation. This is pertinent because **selective application of the law** has been a key problematic issue in recent years, with perceived rivals to ZANU PF being especially targeted for arrests and prosecutions and the Attorney General making no secret of his political allegiance. It may be that cases allegedly involving rivals of ZANU PF will be prioritised, leading to arrests on allegations of having committed these offences, when alleged perpetrators from ZANU PF are dealt with more softly by prosecution authorities. If that is the case, it could lead to exclusions,

		<p>bans from contesting of opposition candidates or indeed voters.</p> <ul style="list-style-type: none"> • Therefore, it is important to keep a watchful eye on how the law is applied, ensuring that it is done uniformly rather than selectively. If selectively done, it could pose a worse problem as any action would be regarded as lawful and therefore in conformity with the rule of law. The Commission, the ZHRC and interested observers should ensure that the law is applied fairly and uniformly across the board. • There must also be a requirement that matters brought to the special prosecutors and special magistrates courts be dealt with on an urgent basis. Justice must be seen to be done during the relevant period of elections if the deterrent effect is to be achieved. To that effect there must be a requirement to ensure urgency is the key word in these matters and that matters must as far as possible be finalised during the election period. Perpetrators of offences during election periods must suffer the consequences of their actions without undue delays and the more this is visible to the general public, the more it will inculcate a culture of accountability and therefore build confidence in the system. The same urgency should inform the operations of the Electoral Court.
XV	<p>MEDIA COVERAGE OF ELECTIONS</p>	<p>Clause 34 introduces Part XXIB which is essentially based on an equivalent part of the Zimbabwe Electoral Commission Act. The main aim is to ensure that news media, particularly the public news media, give fair and equitable coverage to all parties contesting an election.</p> <p>Public Broadcasters</p> <ul style="list-style-type: none"> • Section 160G (1) specifically places a mandatory requirement on public broadcasters to give all parties contesting an election free access to the broadcasting services as prescribed. Subsection 2 envisages that regulations will be made to give the prescriptions contemplated in subsection 1 so that the time allocation and coverage are fair and balanced, allowing each party in an election <i>"reasonable opportunity to present a case through the broadcasting service"</i>. • This mandatory obligation on the public broadcaster is particularly important given that

Zimbabwe has always had one broadcaster which is owned by the state. The only other broadcasters are privately-owned and operate outside the country and have a limited reach compared to the public broadcaster. It has therefore been an area of serious concern that the public broadcaster has been seen to give preferential coverage and treatment to the former ruling party, ZANU PF. This has been bitterly contested by opposition parties. Although the Supreme Court struck down the monopoly of the state broadcaster almost ten years ago in the **Capital Radio** case, reforms to allow private broadcasters have been slow and ineffective. For this purpose ZEC may request the assistance of the Zimbabwe Media Commission and the Broadcasting Authority of Zimbabwe in monitoring the conduct of the media during elections. It is therefore of critical importance that the only public broadcaster is being legally required to treat fairly all parties in an election.

Print Media and Broadcasters

- Similar rules of fair play apply to other broadcasters and the print media. Section 160H deals with political advertising. Although no broadcaster or print media is obliged to publish political advertisements, if it is prepared to do so on behalf of one party, it must offer the same terms and conditions to all other parties contesting an election. The rules also ensure that the cost is not prohibitive. This requirement for equal and equitable treatment means that both the public and private media are legally required to give fair coverage to all parties contesting an election.
- Section 160J is of critical importance to all media houses as it covers things that they must observe in their news coverage, including separating factual reporting from opinion, retracting errors in a prominent manner, providing parties contesting an election with the right of reply, ensuring that all parties are treated equitably with regards to the extent, timing and prominence of coverage. The requirement of fair-play in coverage must also take into account that coverage can tick all the boxes on timing and prominence but it would be unfair by reason of bias. Fair coverage must therefore be extended to ensure that where the weight of coverage is negative, this would fail the test of fairness. This must be clear and specific to ensure that media houses

are fair and balanced in their approach.

- **Gender Omission:** It also prohibits the use of hate speech and any language that incites violence or encourages racial, ethnic or religious prejudice or hatred. All this is commendable. However, there is a glaring omission in the list of indices of prejudice or hatred in that 'gender' is not specifically stated. Given the high levels of prejudice suffered by women politicians or public figures in generally male-dominated terrain, it is imperative that 'gender' be expressly stated in paragraph (g) (i).

Monitoring the Media

- These rules would be inconsequential without an effective media monitoring system. Section 160K provides a framework for monitoring the print and broadcast media to ensure that the provisions of this Part are observed by everyone concerned, including the media. Paragraph (1) states that in carrying out this monitoring responsibility, the Commission is entitled to assistance from the Zimbabwe Media Commission and the Broadcasting Services Authority. Subsection (3) keeps the door open to other private persons or entities to monitor the conduct of news media during elections.
- **Omission of Sanctions for Breach:** The biggest problem with this part is the lack of specific and effective sanctions for breaches of these requirements by both print and broadcast media. The position is particularly significant in respect of the publicly funded broadcasters whose conduct has always been the subject of criticism by opposition political parties and civil society. The Bill simply specifies legal requirements but does not specify sanctions that follow failure to abide by those stipulated rules. A law that fails to provide effective sanctions against breaches is not likely to make any impact. This part needs to be strengthened to ensure that broadcasters and the print media can be held to account directly under the Act for breaches of the stated rules and requirements.
- **Preventing Circumvention:** A final point is that there must be prohibition of attempts to

		<p>circumvent these requirements through programming that purports to be otherwise than it actually is. The public broadcaster may for example have current affairs culture or lifestyle programmes during which political discussions are held, even though the programme may not be described as such. Participants may be drawn from members of a single political party. Such platforms may be used to disproportionately favour the coverage of one party over the others. Such attempts to circumvent the rules set forth in this part must be specifically prohibited. Then again, unless there are clear and effective sanctions against such circumventions, the prohibitions will be merely salutary as are most of the present rules that are not backed up by sanctions.</p>
<p>XVI</p>	<p>ELECTORAL COURT</p>	<p>Electoral Court’s Exclusive Jurisdiction</p> <ul style="list-style-type: none"> • Clause 35 will amend Section 161 of the Act by extending the powers of the Electoral Court so that it will have all the powers of the High Court in relation to electoral matters such as appeals, applications, petitions and reviews under the Electoral Act. It will have exclusive jurisdiction over these matters falling under the Act. However, the Electoral Court will not have jurisdiction to try criminal cases, all of which have to go through the normal judicial avenues. Nevertheless, it must be noted here that this Bill introduces, under measures to curb politically-motivated violence and intimidation, special magistrates’ courts to deal expeditiously with cases of electoral violence, which are generally of a criminal character. At present the court’s jurisdiction is much more limited. • The challenge, as with the whole judicial system is the independence and impartiality of the Electoral Court. Critics of the judicial institution in Zimbabwe argued that it is politically-compromised and that since 2001, the judiciary has been packed with judges who are sympathetic to ZANU PF. This is probably an unfair, blanket criticism which does not distinguish between the different judges. Whilst there may be some who are compromised, it is also fair to consider that there are those who remain guided by their professional standards.

		<ul style="list-style-type: none"> An important concern is the resourcing of the Electoral Court. Adequate resources are important not just for independence but also for efficiency in the handling of matters, particularly in election-related cases where often matters must be dealt with on an urgent basis. <p>Enhancing Capacity</p> <ul style="list-style-type: none"> Clause 36 amends Section 162 so that the requirement now is that at least two High Court judges must be appointed to the Electoral Court. In the past the requirement was just for one or more judges. This enhances the capacity of the Electoral Court. Setting the minimum threshold at two is a welcome recognition of the importance of this institution and it must be hoped that it is also an acknowledgement and signal of the need to increase the levels of resources required to fully execute the mandate of the Electoral Court.
XVII	DELIMITATION OF CONSTITUENCIES	<p>Consulting the Commission</p> <ul style="list-style-type: none"> Clause 10 introduces a new Section 37B whose effect is to require the President to give the Commission adequate time to complete the delimitation of constituencies and wards before calling a general election. The President has the constitutional power to notify the Commission to start determining the limits of wards and constituencies. However, this new requirement places an obligation on the President to consult with the Commission before doing to ensure that it has sufficient time to perform the mandate of delimiting constituencies and wards prior to the calling of the election. This is a sensible clause which will ensure that the President does not act unilaterally and that the body responsible for the conduct of elections is involved at all relevant stages. The one question that may arise here is the sequence between the delimitation of constituencies required under this provision and the registration of voters under section 36A. As we have observed, apart from the national roll, there will be voters rolls for constituencies and wards. It is difficult to see how these will be compiled, before the delimitation of constituencies and wards,

		<p>which often comes not long before the election itself. Yet the delimitation exercise, which depends on voter numbers as much as geography, may also need a voters' roll. It may be a point to consider whether the delimitation exercise can be done using estimates of the current roll and then allow the voters' roll to accurately reflect persons in each of those constituencies and wards. Otherwise there is the risk of a mismatch between wards and constituency rolls prepared before the delimitation and the actual wards and constituencies that the exercise will create.</p> <p>Election Centres</p> <ul style="list-style-type: none"> • A new Section 37C requires the Commission to designate centres from which parliamentary, presidential and local authority elections can be conducted at constituency and ward level, namely, the National Command Centre (from which the Commission will organise elections), the provincial command centre, the senatorial constituency centre and, for the purposes of special voting, the district centre. • The national command centre may be the Commission's headquarters or 'any other place' which leaves room for the Commission to choose an appropriate location with adequate facilities. Subsection (4) makes provision for the transmission of election results through all the relevant centres in a manner that is transparent and credible. The results for each separate polling station, ward and constituency must be distinctly captured throughout the process. (the command centre should be accessible, permanent and known, should not change before results are announced) • The setting out of the process of results transmission under Section 37C is important in enhancing the transparency of the electoral system. Much will depend on how this is implemented on the ground. The efficiency of the system will turn heavily on the training and professionalism of the persons charged with responsibilities for conducting the elections.
XVIII	INDEPENDENCE OF	Re-statement of the Commission's Power and Functions

	<p>THE COMMISSION</p>	<ul style="list-style-type: none"> • As part of the harmonisation of electoral legislation, Clause 4 will incorporate many of the provisions of the Zimbabwe Electoral Commission Act into the Electoral Act. The Commission is a constitutional body with its powers and functions stated in the constitution. However, the new Part II inserted by this clause will give the Commission the additional functions that it presently has under the Zimbabwe Electoral Commission Act. It will make substantially the same provision for its membership, staff and procedures. Clauses 38, 39, 40 and 41 all provide further rules on the work of the Commission and are generally restatements of the provisions of the ZEC Act. <p>Independence</p> <ul style="list-style-type: none"> • The key aspect regarding the Commission is its independence and impartiality in the execution of its mandate. There is nothing substantially new that is introduced by this amendment, which is essentially about harmonising the laws and therefore restating provisions from the old law. In the past, particularly in respect of the 2008 elections, the Commission was much criticised for delays in the announcement of results in the Presidential election. Its conduct has created perceptions that it is partisan. • However, reforms in the appointment of the Commission and the changes that took place since the unity government have led to some key changes in the personnel leading the Commission. The hope has to be that the newly constituted Commission will perform better than its predecessor and execute its mandate in a fair, efficient and impartial manner. (secretariat independent, consolidated fund- report to parliament, security of tenure- truly independent) • The Commission is saddled with many obligations under the electoral laws. To execute the mandate efficiently, it will need more well-trained and competent staff. It will also need a large supply of resources so that it doesn't have to rely solely on the state and allocations from the national budget. Major fund-raising efforts must be invested in – even within civil society, so that the Commission has access to greater financial and material resources to ensure that it is able to execute its role competently and efficiently.
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		<ul style="list-style-type: none"> • The appointment, financial resources and removal provisions all impact on the Commission’s independence. Clause 4 which restates Section 6 from the ZEC Act provides that the President may appoint a tribunal to investigate the question of removal of a Commissioner. Although the present arrangements for appointing the tribunal appear fair as members are drawn from the judiciary and the legal profession, the power of appointment vests solely in the President. There is need for safeguards so that the power is not held exclusively by the President but rather that he may make the appointments in consultation with or better still, on the advice of another body, such as the Judicial Service Commission (“JSC”). • Paragraph (8) does require the President to seek the approval of the JSC and Committee on Standing Rules (CSR) where the Tribunal has recommended the removal of a Commissioner. This is an important safeguard so that the President and the Tribunal’s power are subject to checks by the JSC and the CSR in respect of the chairperson of the Commission or the CSR for any other commissioner. However, reference to the CSR may cause a potential problem. This is because the provision is based on the assumption that the CSR is present at all times, which is not the case. In times when Parliament is dissolved, which is the case during election periods and periods preceding or after the elections there is technically no CSR. This may cause problems in the implementation of the law. would suggest that a more permanent body, such as the JSC has residual power in both circumstances, to consider approval of the recommendation to remove a commissioner. • As far as the independence of the Commission is concerned, all the legal provisions need vigilant monitoring. Civil society, observers and members of the public in general ought to keep careful watch on the conduct of the Commission. The importance of its role cannot be overstated but it is also true that there will be many pressures seeking to influence it. Its accountability can be enhanced by greater vigilance and scrutiny exercised by those around it. • ZESN recommends that the independence of the Commission remains the most important factor in facilitating and ensuring a free and fair election. As the ultimate referee of elections it must
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		<p>not only have powers to set rules, manage elections exclusively without interference or direction from any other person but it must be financially self-sufficient and autonomous. To that end, provision must be made so that it draws its primary resources from the Consolidated Revenue Fund and that it must be in control of its own budget. The Commission must not be financially dependent on the President or ministers of government, all or most of whom will be candidates in elections that it manages. ZESN urges further tightening of the relevant rules and practices that impact on the independence of the Commission to ensure that the Commission is truly independent and the ultimate manager of all elections in the country.</p> <ul style="list-style-type: none"> • As discussed in this paper, the Commission must be given full control of elections, including setting the dates of elections. This would mean changing the current system in which the President sets dates and yet he is an interested party by virtue of him and his party being contestants in those elections. The recommendation is that the Commission be given full powers to set election dates in consultation with the relevant parties and state authorities.
XIX	RECOMMENDATIONS	<p>1. New Voters Roll</p> <p>1.1 While ZESN notes the significance of creating an entirely new voters roll, if this option is to be taken, new registration of voters must commence immediately and significant resources must be deployed by the state and harnessed from the donor community since the process takes time and requires considerable resources.</p> <p>1.2 Further, in order to expedite the process of creating a new voters roll, ZESN urges that all unregistered voters must be encouraged to do so and those that are registered must confirm the accuracy of their registration so that if and when the proclamation to start registration for a voters roll is made, the facility for automatic transfer of registered voters to a new roll will be used to ease and quicken the process.</p> <p>2. Removal of Deceased Voters from the Voters Roll</p>

		<p>2.1. ZESN notes the new facility for removal of deceased or absent voters but recommends that incentives should be used to encourage relatives of deceased voters to notify the Commission to ensure their removal from the voters roll. In Mozambique, for example, they gave an incentive of a state-assisted burial if relatives assisted by notifying electoral authorities to delete their deceased relatives from the voters’ roll.</p> <p>2.2. Alternatively or in addition, instead of relying solely on the relatives to ensure the removal of deceased or absent voters from the voters roll, there should be a legal requirement on relevant authorities that record deaths such as the Registrar General’s Office to give to the Commission monthly notifications of any deaths so that the Commission can automatically remove the deceased form the voters rolls upon such notification. This is the practice that is used in Mozambique.</p> <p>3. Ward Voters Roll</p> <p>3.1 The requirement to provide a constituency voters roll to candidates must be extended to also cover the provision of ward voters rolls There is no good reason why the requirement to provide free copies of the constituency voters roll to candidates does not extend to ward voters rolls.</p> <p>4. Diaspora Vote</p> <p>4.1 ZESN urges a reconsideration of the issue of the Diaspora vote with a view to upholding the Diaspora’s right to vote. Allowing the Diaspora to vote encourages broader participation in politics and helps the country retain the loyalty of tits citizens abroad. In doing so Zimbabwe would be following precedents already set in neighbouring countries like South Africa and Mozambique. The latter specifically mandates the electoral authorities to register Mozambicans living abroad so that they participate to fill the two seats reserved for the Diaspora.</p> <p>5. Security Sector and Elections</p> <p>ZESN strongly urges the incorporation in the Bill of provisions that specifically prohibit senior</p>
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state employees, in particular senior members of the security forces, from engaging in conduct that unduly influences or has potential to unduly influence the election process. This conduct may include public statements that insinuate the unsuitability of candidates or parties that are qualified and eligible to participate in elections in Zimbabwe. This would deter such persons from conduct that has occurred in the past when senior security officers have issued public statements to the effect that they would only support an election result that favours certain candidates or parties but not other contestants. ZESN recommends the insertion of clauses in the electoral laws which would make it a punishable offence to engage in such conduct. It is therefore recommended that the Bill incorporates provisions to prohibit such conduct. The purpose of these prohibitions would be to ensure that senior employees of the state or state-related institutions, including those that have a role in the elections process, such as the Attorney-General, exercise their powers impartially and in accordance with rules of fair-play.

6. Commission's Exclusive Role in Elections

6.1 ZESN recommends that the Commission be given sole and exclusive responsibility for the management of elections, including in particular, the registration of voters and all matters concerning the voters roll. The current system whereby responsibility is shared between the Commission and the Registrar General's Office causes confusion and dilutes accountability.

7. Monitoring Pre and Post-Election Violence in Polling Station-Based voting

7.1 If the proposed new system of polling station-based voters roll is used ZESN urges close monitoring to prevent pre and post election violence given the risk that it will be easier to identify voting patterns within the small communities around which polling station-based voters rolls will be created. The Commission is urged to have back-up measures to cover those situations where during an election voters are displaced from their polling stations, which would prevent them from voting under this proposed system.

8. Presidential Election

		<p>8.1 ZESN urges that electoral legislation on the Presidential election must be designed to cater for a situation where whilst there is no candidate who wins by more than 50% of the votes in the first election and therefore needing a Presidential Run-Off election, there will be more than two candidates having the highest votes. This may happen where for example two candidates are tied in second place by reason of having an equal number of votes. The current rules on a Presidential Run-Off election are based on the assumption that there will only be two candidates with the highest votes in the first election. Failure to cater for the unlikely scenario raised in this recommendation could produce an unnecessary crisis.</p> <p>8.2 ZESN recommends a review of the role of Parliament in the election of the President in the event of a deadlock at the Presidential run-off election. Currently, the rule is that where there is a deadlock Parliament will sit as an Electoral College to make the final decision. ZESN believes the Presidency is too important an office for decisions on its holder to be delegated to Parliament. It is recommended that this be changed so that where there is a deadlock, a new election is held until such time that a clear winner is found. This recommendation is consistent with the position in Ghana, which has a similar system providing for run-off elections. Simply put, the decision on the Presidency must remain in the hands of the voters.</p> <p>9. Convening Parliament pending Presidential Run-Off Election</p> <p>8.1. ZESN recommends that the legislation should give a specific time-line of when the Parliament should be convened after the election, even in the event of a run-off Presidential election. This will ensure Parliament is able to commence its role and that it is not dependent on the timing of the outcome of the Presidential election.</p> <p>10. Declaration of Results “Forthwith”</p> <p>10.1 Although the proposed law sets up a requirement that the results of the Presidential election must be declared within a period of 5 days from the last polling day, ZESN urges that best practice is to follow the mandatory requirement that the results be declared forthwith. The 5</p>
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		<p>day limit should only be seen as the maximum possible date within which to announce the results otherwise the primary requirement is that results must be declared forthwith upon completion of counting.</p> <p>10.2 In order to prevent pre-emption of results as envisaged in the Bill, ZESN also urges the Commission to ensure that results are declared forthwith after counting and without any delays to prevent any anxieties or concerns. In the past pre-emption of the official declaration has occurred as a direct response to failures to declare results promptly. This can be avoided by the Commission ensuring prompt declaration of results.</p> <p>11. Votes Re-count Period</p> <p>11.1 ZESN recommends that as the requirement that the vote re-count be done within 5 days of the last polling day clashes with the above requirement for the announcement of results, it is better to require that the period within which the recount must be done be counted from the day that it is ordered by the Commission and that this be limited to not more than two days, unless the Commission extends it upon application to the Electoral Court.</p> <p>12. Announcement of Re-Count Results</p> <p>12.1 Still on the re-count, ZESN urges that instead of requiring that the results of the re-count can be announced within a 5 day period “after the completion of the recount” it should be declared forthwith upon completion and in any event, not more than 24 hours after the completion of the recount. There is legitimate justification for potentially waiting for a further 5 days from completing the recount before the result is declared. It only breeds anxiety, uncertainty and fears of rigging all of which the statute is ostensibly designed to minimise.</p> <p>13. Funding for Voter Education</p> <p>13.1 ZESN recommends a reconsideration and clarification of rules relating to the handling of foreign funding to support voter education. It is not entirely clear from the provision whether the</p>
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Commission has the discretion to refuse any foreign funds for onward passage to the local organisations. If it does have such discretion, ZESN urges that it should be used reasonably in favour of the primary goal of enabling the provision of voter education.

13.2 In addition, it is not entirely clear that the funding that it receives will be passed on intact to the relevant organisation or whether the Commission will have the discretion to allocate it to other organisations. It is important to clarify that the funding will not be used in this broad way and that essentially the Commission is a receiving agent for the specific organisation that applied for funding.

14. Accreditation

14.1 ZESN notes that the Observers' Accreditation Committee ("OAC") which is responsible for the accreditation of both local and foreign election observers is comprised of a high number of political nominees. If the aim was to reduce political interference in the accreditation of observers, this is not fully achieved given the domination of political nominees. ZESN recommends that the composition of the OAC be the exclusive decision of the body charged with running elections, i.e. the Commission. Ministers, who are usually also contestants in an election, should have no role in the accreditation of observers since all other candidates in an election who are not Ministers do not have the same facility. Likewise, it is not necessary to give power to the Ministers of Government to invite persons to apply for accreditation to observe elections. Indeed, on the same basis, Ministers' right of objection against certain observers is not justified given that other contestants or parties with an interest in an election do not have the same facility of objection. All this should be the exclusive domain of the Commission.

14.2 ZESN is also concerned that there is at present no provision for the applicants who would have been rejected for accreditation to seek recourse against the decision of the OAC. It is necessary to put in place an expedited procedure to deal with any appeals.

15. Shorten Period for Run-Off Election

15.1 ZESN recommends that the period within which the Presidential Run-off election be limited to a shorter period of time, for example, that the run-off be held within three weeks of the declaration of the first round results. This allows for a quick resolution of the Presidential contest. There is no need to have a long waiting period between the first election and the run-off – it only provides opportunities for manipulation and intimidation. The need to prepare for the run-off cannot be used as an excuse for the lengthy interval because the country must have back-up measures in place to cater for the run-off election should the need arise. Ghana, which has a similar system, has a very simple clause which requires the run-off election to be held within three (3) weeks of the first round of elections.

15.2 ZESN notes that one thing that is not adequately provided for under the current system is what happens where there is need for a Presidential run-off election, when the person who is the incumbent at the time is not one of the two candidates for the run-off election because he would have come third or lower in the first poll. Placing power in the hands of such a person who is aggrieved by the loss of an election and is sure that he will not be in office for much longer is risky and problematic especially where politics of power transfer is sensitive. ZESN urges Parliament to reconsider this scenario and provide for back-up measures to cover for leadership in the interim period.

16. Disclosure of Ballot Paper Information

16.1 ZESN notes that while the provision requiring the disclosure of information regarding ballot papers is an important step, it must state clearly when and where the disclosures will be made. Presently it simply requires that disclosures be made 'without delay' and make no reference to the location. There must be clear guidance in the law on the timing and location of the disclosures. It is recommended that a specific time-period be stated, for example, that the disclosures should be made not more than fourteen (14) days before the election and also that the location of the disclosures must be specified as the constituency, provincial election centres

or the National Command centre.

17. Postal Voting

17.1 It is recommended that as a security measure, tamper proof envelopes should be used in postal voting to prevent fraudulent activity.

17.2 ZESN urges the extension of postal voting to cover other persons who are eligible to vote but would not be present on the polling day. It should not be available to persons on government business only. If a person can show proof that he or she will not be present to cast his vote on polling day, he should be allowed to apply for postal voting. At present the system discriminates against those in business who may have to be away to do business during election days. Postal voting does contain risks but it should be more widely available than it is at present.

17.3 Further to the recommendation on Diaspora voting, ZESN urges a reconsideration of postal voting to allow Zimbabweans in the Diaspora who are eligible to vote to use it.

18. Special Voting for the elderly

18.1 ZESN recommends that the special voting procedure be broadened to include the elderly, physically handicapped, the sick and infirm who would not otherwise be able to attend at polling stations on polling day. The state must take a pro-active approach that enables voters to fully exercise their right to vote in line with individuals' political rights as guaranteed under Section 23A of the Constitution. It is recommended that just as the state has made special procedures for those who cannot be physically present on government business, it must also account for the voting rights of those who cannot be present by reason of old age, physical incapacity or generally ill-health. At present the voting procedures which effectively limit the participation of the aged could be seen as discriminatory on the grounds of ageism and therefore potentially in violation of Section 23 of the Constitution.

19. Widening the Pool of Special Prosecutors

19.1 In order for the Attorney General’s office to more effectively carry out its special prosecution duties during election times, ZESN urges that the Attorney General be encouraged to draw from the pool of practising legal practitioners in the appointment of special prosecutors. This would not only enhance the capacity of the AG’s Office but also lend to it much needed expertise and experience to tackle the volume of work that is likely to arise in such a climate. ZESN urges observers to be vigilant and watch out for selective application of the law.

20. Urgency as a General Rule in Election-related Matters

20.1 In order to ensure that the special legal machinery for preventing politically-motivated violence and intimidation fulfils its purpose, ZESN urges that, as a general rule, urgency must be the keyword in dealing with investigations and prosecutions. It is important that the electorate sees the legal machinery at work and that justice is done expeditiously as this will give them confidence and deter would-be perpetrators. Likewise, matters before the Electoral Court must as a general rule be dealt with on the basis of urgency. An applicant does not have to justify the urgency of any election-related matter brought before the Electoral Court and the special magistrates’ courts.

21. Media Coverage

21.1 ZESN notes that the requirement of fair-play in both broadcast and print media coverage must also take into account that coverage can meet all the requirements on timing, amount and prominence but still be unfair by reason of bias and excessive negativity. ZESN therefore recommends that fair coverage must be defined to ensure that where the weight of coverage is negative, this would fail the test of fairness. This must be clear and specific to ensure that media houses are fair and balanced in their approach to all competing parties and candidates.

21.2 The prohibition of hate speech and any language that incites violence or encourages racial, ethnic or religious prejudice or hatred is an important step but ZESN notes that the list of

		<p>indices of prejudice or hatred in the provision omits 'gender'. Given the sensitivity and importance of addressing gender issues, this is a glaring omission that must be corrected.</p> <p>21.3 ZESN also notes that there are no specific sanctions provided for against breaches of the rules set for the media and that this omission makes the rules sound hollow and ineffective. ZESN recommends that clear sanctions, including possible loss of a licence or significant fines or indeed temporary suspension of publication be set out in the law. A law that fails to provide effective sanctions against breaches is not likely to make any impact and this must be corrected.</p> <p>21.4 A final point is that there must be prohibition of attempts to circumvent these requirements through programming that purports to be otherwise than it actually is. In looking at fair coverage, monitors must look at the content rather than the form of programming. A political campaign for one party or denigration of others should not, for example, be dressed up as a lifestyle or culture programme.</p> <p>22. ZESN urges that the Electoral Court, alongside other electoral institutions must be well resourced in order to more effectively carry out its functions and execute its duties.</p> <p>23. Independence of the Commission</p> <p>23.1 ZESN recommends that the independence of the Commission remains the most important factor in facilitating and ensuring a free and fair election. As the ultimate referee of elections it must not only have powers to set rules, manage elections exclusively without interference or direction from any other person but it must be financially self-sufficient and autonomous. To that end, provision must be made so that it draws its primary resources from the Consolidated Revenue Fund and that it must be in control of its own budget. The Commission must not be financially dependent on the President or ministers of government, all or most of whom will be candidates in elections that it manages. ZESN urges further tightening of the relevant rules and practices that impact on the independence of the Commission to ensure that the Commission is</p>
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truly independent and the ultimate manager of all elections in the country.

23.2 Finally, ZESN strongly recommends that the Commission be given full control of elections by granting it the power to set election dates in consultation with relevant parties and state authorities. The present system, retained by the Bill where the President sets dates and Ministers have some roles in the electoral processes is unfair because they are interested parties by virtue of being contestants in the elections. It means they are both players and referees in the same game which puts the other contestants at a disadvantage.

