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CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Participants in the Multi-lateral Discussions on the Draft Bill of Rights
FROM: Executive Director
DATE: 21 February 1996
RE: Memorandum from Technical Committee 4 on Sections 25 and 26 of the *"Working Draft"*

We enclose for your consideration a memorandum from Technical Committee 4 on Sections 25 and 25 of the *"Working Draft."*

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TECHNICAL COMMITTEE 4

MEMORANDUM

TO: Chairpersons and Executive Director of CA
DATE: 14 February 1996
RE: Technical Committee 4 Memorandum on Sections 25 and 26 of the Working Draft

1. Noting that there was general agreement on the core values protected in these sections, the Technical Committee and the Panel of Experts were requested by the CC Sub-Committee meeting on 7 February 1996 to refine the draft of the rights in sections 25 and 26.

2. PROPOSED REFORMULATION OF SECTIONS 25 AND 26

[* Note: land rights are not dealt with in this memorandum as the parties are still in the process of deciding where they should be located]

25 (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within the state's available resources, to achieve the progressive realisation of this right. [or: The state must take reasonable legislative and other measures which promote and advance access to adequate housing]

(3) No-one may be evicted from their home or have their home demolished arbitrarily without an order of court made after considering the relevant circumstances

26 (1) Everyone has the right to have access to -

- (a) health care services, including reproductive health care;**
- (b) sufficient food and clean water; and**
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.**

(2) The state must take reasonable legislative and other measures, within the state's available resources, to achieve the progressive realisation of each of these rights [or: The state must take reasonable legislative and other measures which promote and advance access to each of these rights]

(3) No one may be refused emergency medical treatment.

3. NOTES

3.1 The concept of 'adequate housing'

The right to adequate housing is recognised in article 25 of the Universal Declaration of Human Rights and article 11 of the International Covenant on Economic, Social and Cultural Rights (1966) [this Covenant was signed by SA in October 1994]. The core content of the right to adequate housing has been elaborated in a General Comment adopted by the UN Committee on Economic, Social and Cultural Rights in interpreting article 11 of the Covenant [see in this regard pp. 149 - 150 and annex 'A' to the Explanatory Memorandum of the Technical Committee on Adequate Housing]. Thus the Committee has said the following in relation to the standard of adequacy:

"Thus the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute 'adequate housing' for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include following:..." [General Comment No. 4, para. 8]

The Committee then goes on to elaborate seven core standards which are set out in Annex "A" to the Explanatory Memorandum on Adequate Housing. This is the most comprehensive international standard which has been adopted on the core content of the state's obligations in relation to the right to adequate housing. It is also further interpreted in the review by the Committee of states' reports under articles 16 - 25 of the Covenant.

Using a similar formulation will have the following advantages -

- it will facilitate consistency between South Africa's domestic policies and laws, and its international human rights obligations. This is important as it will be primarily the legislature and the executive who will be responsible for adopting the necessary policies and legislation to give effect to the right.
- it will point the courts in the direction of a legitimate international source in interpreting the right. This is consistent with the principles of interpretation contained in s. 39(1)(b) and (c).

3.2 The meaning of the phrase, "reasonable measures to achieve the progressive realisation of the right"

This phrase is also to be consistent with the formulation in article 2 of the Covenant on Economic, Social and Cultural Rights [set out on p. 149 of the Explanatory Memorandum]. It is also in line with the type of obligation which is placed on states in other Constitutions which recognise this right [see pp. 143 - 148 of the Explanatory Memorandum]. As the Panel

of Experts have pointed out in their memorandum on progressive realisation:

“...it is clear that the term “progressive” in international law captures the idea that the full realisation of socio-economic rights will generally not be achieved in a short period of time, that economic realities are taken into account, and that the need for flexibility is taken into account, although the achievement of these right have to be a matter of priority.”

The above formulation has been chosen to indicate that government measures in fulfilling these obligations must be **“deliberate, concrete and targeted as clearly as possible”** [General Comment No. 3, Committee on Economic, Social and Cultural Rights, para. 2] This is the basis on which government’s policies and legislation will be constitutionally reviewable.

The DP referred to the alternative phrasing proposed in the submission of the Association of Law Societies of South Africa: **“reasonable and effective legislative and other measures which promote and advance access to adequate housing”**. [p. 13] A similar meaning and standard of review seems to be conveyed in this choice of words to that proposed above. If this formulation is preferred by the parties, the Technical Committee suggests that it is adapted for inclusion in the section as set out above.

3.3 The phrase, “within the state’s available resources” and the nature of the state’s obligations

An explicit qualification related to resource constraints has been inserted in the section in accordance with the instructions of the parties. The phrase used in article 2 of the International Covenant on Economic, Social and Cultural Rights is, “to the maximum of its available resources.”

A common misconception relating to social and economic rights is that it requires the State itself to be the provider of housing, health services etc. This is not supported by international jurisprudence regarding social and economic rights. The state can chose to relegate delivery to the market or a combination of public and private mechanisms [General Comment No. 3, para. 8]. It is responsible for monitoring and regulating public and private processes to ensure that obstacles which deny people access to these rights are removed. The Committee on ESCR’s also expects states to give priority consideration to groups who are vulnerable and disadvantaged [General Comment No. 3, para. 12; General Comment No. 4, para. 11]. Thus the state may be in a position to improve access to the rights through a range of regulatory, educational and social measures (e.g. negotiating with banks and building societies to improve poor people’s access to credit) without necessarily allocating an increased amount in the budget for direct public delivery.

3.4 The relation between section 25(1) and (2), and sections 26(1) and (2)

These sections have been framed to assert the right and then to specify certain dimensions of the right - for example, the nature of the positive duty on the State, and the protection against arbitrary evictions. A similar approach has been adopted in relation to the rights to freedom and security of the person, privacy, the right to freedom of religion, belief and

opinion and others. It is important to bear in mind that these rights cannot **solely** be reduced to an obligation on the state to take positive steps to improve people's access to housing, health care etc. It also has negative dimensions such as the right of persons not to have their housing, health, food supplies etc. subjected to an unjustified interference. For example, given the constitutional commitment to housing, can a law which deprives lessees of all security of tenure be justified? Like the other rights in the Bill of Rights, there there may also be a degree of indirect horizontal application of these rights through common law rules. For these reasons we recommend that the present structure of sections 25 and 26 be retained.

References: General Comments of the UN Committee on Economic, Social and Cultural Rights:

General Comment No. 3 (Fifth session, 1990) UN Doc. E/1991/23
General Comment No. 4 (Sixth session, 1991) UN Doc. E/1992/23]

