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Our ref: LDS/mg
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Date: 10th August 1993

Attention: Melody

Multi-Party Negotiations
JOHANNESBURG

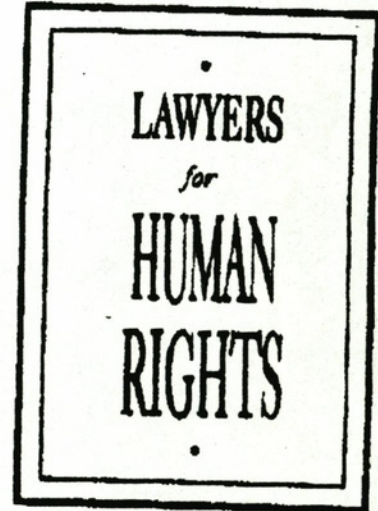
Per fax no: 011 - 3972211

Dear Melody

Attached is our initial submission to the Technical Committee regarding the "interim Bill of Rights". Please forward this to all members of the Technical Committee on Fundamental Rights, the Planning Committee and any other appropriate recipients.

Yours faithfully

Lucy Seafeld
LUCRECIA SEAFIELD



**SUBMISSIONS TO THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION ON DRAFT DATED 29 JULY 1993**

INTRODUCTION

The Implementation of Human Rights has three faceted dimensions, it encompasses the principles themselves, the implementation procedure and the enforcement mechanism. First and foremost the principles should be clear, precise and unambiguous and enforceable. The rights and duties as set out in the Seventh Draft on Fundamental Rights and Freedoms of the Technical Committees is problematic in this respect and would create numerous problems in the effective implementation of human rights.

This Bill will be in force at least until a new constitution takes effect, for several years and perhaps longer. The transition period during which this Bill will be in force will be the formative years of a newly democratic government: a crucial time for South Africa and for the establishment of a human rights culture in the country. This interim Bill will have an influence lasting beyond the transition period: its provision will become accepted legal norms, it will establish precedents, and it may well become the basis for a permanent South African Bill of Rights. These are all reasons why it should be as carefully drafted as possible. A mere catalogue of common ground between parties is inadequate.

The procedure for the implementation of these rights have also not yet been established and we would urge the negotiation forum to set up a committee that would specifically deal with legislation relating to the implementation of these fundamental rights contained in the draft. It is imperative that the mechanical details of rights be set out in legislation if human rights are to be effectively implemented.

The enforcement mechanisms is very important for the effective implementation of human rights. The evolution of Human Rights and consequently its wider application and enjoyment will to a great extent depend on the confidence the public will repose in the enforcement agencies and the manner it defends Human Rights. The current court structures does not enjoy the support and confidence of the majority of South Africans and would therefore not have the credibility to advance the Human rights cause in our country. We therefore support the idea of establishing additional structure to enforce and strengthen human rights.

We however at the outset wish to place on record our misgivings relating to the manner in which the Negotiation forum intends dealing with this matter. We are of the opinion that the technical committees sole mandate was initially to draft a charter of fundamental rights. For some reason unknown to the majority of South Africans this mandate was extended. It is our opinion that the extension of the mandate resulted in the

technical committees usurping the powers of a democratically elected Constituent Assembly. This state of affairs adversely affect the credibility of the Acts coming into existence as a result of such process. It would also further impact on the credibility of the institutions established by the process.

In principle there is nothing wrong with taking initiatives for the establishment of a National Human Rights Commission. In fact the state governed by a democratic Constitution is expected to create countervailing mechanisms of checks and balances against possible misuse of its own executive powers. It is however imperative that the correct procedure be followed. Short circuiting the process would only affect the credibility of the very important Institutions.

We are however mindful of the fact that a number of important decisions are being made at the World Trade Centre irrespective of our criticisms about the manner in which they are made. The only manner in which we could have an impact is by submitting proposals to the various commission. We are hopeful that in this manner we would be able to put our views on the table.

We would however urge the committee in the interest of the credibility of this institution to release a tentative proposal for the setting up of the commissions before adopting a final draft. Before finalising the draft proposals it is also imperative that hearings be conducted to invite experts and Human Rights movements to discuss the draft. The proposals should also be subjected to wider public debate and scrutiny.

Due to the limited time period allowed for submissions these proposals are in no way conclusive and we reserve the right to make a complete submission at a later date.

COMMENTS ON SPECIFIC PROVISIONS IN THE BILL AS DRAFTED

Section 1 (1) (b)

The provision of this chapter shall bind where just and equitable.

The phrase where just and equitable should be deleted. The possible respondent should have the onus to prove that his action is just and equitable.

Section 1 (3)

The provisions of this chapter should apply to

This clause should be extended to include state action and all decisions taken by the judiciary during the period of operation of this charter.

Section 2

This section should weigh heavily in influencing interpretations of all other provisions of a Bill of Rights.

We would therefore recommend that an explicit statement of its central importance as a statement of the spirit of the entire Bill, such as "The spirit and purpose of this section shall act as the governing principles in interpretation of the entire chapter.

Section (3)

It is recommended that this clause should in the interim contain an explicit prohibition on the death penalty. We recognise the controversial nature of this provision and we support the previous compromise provision contained in the Technical Committee draft dated the 11 June 1993 with the following changes made to the language.

No sentence of death shall be enforceable for as long as this transition bill remains in force.

We support this position and are of the opinion that this issue is very important and should be subject to a decision of the constituent assembly .

Section 7

Although we support the right to privacy in principle, we are mindful of the possible effects this clause could have on the development of interventions aimed at the prevention of Domestic Violence.

We also have reservations about the possible impact it could have on the Trade Union Movement in as far as it relates to their rights to access of information to the employers record.

We would therefore recommend that a reformulation of this clause be considered.

Section 8: (2)

Sub- section (2) of clause 8 should be deleted. It is unnecessary because the freedom of religion includes its apparent inherent. The clause is extremely vague and its effect not clear.

Section 9

We are of the opinion that the inclusion of the further provision is unnecessary and inappropriate.

Freedom of Association

We agree with the inclusion of Freedom of Association as one of the fundamental rights imperative for the transition period and more specifically for the creation of a culture of tolerance that is imperative for the creation atmosphere that is conducive to a free and fair election.

The implication that this right to associate with its logical corollary right of disassociation could have an effect on the Labour Movement is however a cause for concern. We are hopeful that the interpretation of this clause will be clause 28(2).

Section 14

A sub clause should be added that specifically state that no person shall be deported in the event of a dispute relating to his/her citizenship without a proper hearing before a properly constituted court or a tribunal established for this purpose.

Section 16

The wording justiciable dispute

The provision elevates justiciability to a constitutional issue, so that every single court case could go to a constitutional court for a determination of whether it is a "justiciable" dispute or not.

We recommend rewriting this section as follows "every person shall have the right to have a dispute settled by a court of law.

Section 19 - Detained, Arrested and Accused Persons

The Bill's structure should reinforce the idea that arrest precedes detention. The order of sub-sections 1 and 2 and their headings in the section title should be reversed.

Section 20

Eviction

This wording of this clause is extremely vague and its intent is not apparent. We acknowledge its importance with reference to the rights of people on informal settlement and squatter camps but are mindful of the adverse effects it could have on a land reform policy.

This clause further strengthen the property rights clause and would adversely affect a reform policy that is vital for a future South Africa.

We would therefore recommend that this clause be deleted for the purposes of this bill.

Legislative change to regulations and ordinance dealing with this issue could however be effected to that specifically state that no person shall be evicted without a order of court and that the court could consider the lawfulness of the occupation and the availability of alternative accommodation in coming to a decision.

Section 21

Economic Activity

Economic Activity is a loaded concept with a broad range of meanings. The sub-section introduced also presupposes a certain policy and could limit economic activities. We honestly believe that the inclusion of this right is unnecessary during the transition period.

Section 22

Labour Relations

This clause could have a possible effect on the already established rights of workers. The interpretation of this clause in relation to clause 28 is a bit worrisome. We would therefore recommend that clause 28 is extended to include the provisions of this clause or alternative that this clause specifically contains the provisions of clause 28. The status of the different clauses could be problematic in the interpretation of Labour Rights.

Section 23

Property

The inclusion of subsection (3) is recommended. In the event of subsection 3 not being acceptable we would recommend the total scrapping of the property clause in its entirety.

Section 24

Environment

This clause is vague and we recommend strengthened environmental rights.

Section 27

Education

Sub-clause (a) equal access. This wording is problematic in that it could in its interpretation presupposes and equality in society. Although the equality clause in subsection 3 makes

provision for special measures we would recommend that Section 27 (a) should specifically make reference to the fact that equal in this clause. would be interpreted with reference to clause 2 (3).

Section 28

Limitation 8

Section 29 (b). Declaration of a state of emergency.

Because of severity of a state of emergency, we recommend requiring ratification by 2/3, rather than a simple majority, of the members of the legislature, and a renewable maximum period of three months, rather than six.

Section 29 (c) "The detention of a detainee shall be reviewed within ten days of his or her detention"

This period is too long. We recommend a five day maximum limit on emergency detention without trial.

Interpretation

Section 30 (1) We recommend the inclusion of the words "liberty" and "before equality".

(2) Clarity should be given as to the use of the words "custom and indigenous law" in this draft and the draft constitutional principles respectively.

It is imperative that core rights should be stipulated in this section.

Additional Matters

Family

We recommend that this clause be excluded for the purpose of this Charter on Fundamental Rights since we are of the belief that the right as is presently formulated could have an adverse impact on women's rights in general.

In principle we approve of a right to family that is properly formulated.

SUBMISSIONS ON THE ENFORCEMENT MECHANISMS

THE HUMAN RIGHTS COMMISSION

In the setting up a Human Rights Commission there are critical issues that need to be considered. These issues refer to the independence and credibility of the institutions. We would therefore recommend that the following issues be considered in relation to this factors.

INDEPENDENCE

The creation and maintenance of a independent and impartial body is a prerequisite for the effective operation of a National Human Rights Commission. The Commission should be totally independent from the Executive and its enabling Legislation should reflect this.

WE THEREFORE RECOMMEND THAT:

- 1) The Human Rights Commission be established in terms of the Constitution.
- 2) The institution be under the control of the Judicial Service Commission.
- 3) Budgetary provisions of the commission be accommodated in the budget of the Department of Justice . With the express proviso that the Department would have no control over the manner in which the funds are utilised
- 4) The commission should have a duty to submit reports relating to its activities and audited financial statements to the minister of justice who should table this reports in Parliament. These reports should also be made available to the public at large.
- 5) The executive would have no control or involvement in the appointment process. The State President should endorse that appointments but he has no right to veto any appointment.

CREDIBILITY

In order to establish credibility of the Commission special provision should be enacted to provide for the manner and criteria of opportunities of members of the Commission.

The members of the Commission should consist of men and women who are known for their integrity , impartiality of judgement.who shall decide matters before them without any restrictions , undue influences threat or interference from any quarter or for any reason.Its members should be independent from Government, political neutral and persons of high integrity.

The method of selection should be fair and transparent should afford all necessary guarantees of independence and broad representation.It should also be representative in terms of its race and gender composition. Members should serve the commission in their own individual capacity.

We would therefore propose that:

- 1 That the institution be fully independent of the executive.
- 2 That the appointment procedure be totally independent from the executive.
- 3 That a selection board be established by the Judicial Service Commission or any similar body .This board should be representative of a wide base of society and include representatives of community based organisations, non governmental organisations, trade unions etc.
- 4 That the election process be fair and transparent.

STRUCTURE OF THE COMMISSION

The enabling legislation of the Human Rights Commission should make provision for the establishment of a National Office . Regional offices and local offices. In the establishment of regional offices due preference should be given to rural offices.

The commission should also consist of different divisions being the administrative division , investigative division and the adjudicative division which would broadly speaking have the following functions:

ADMINISTRATIVE

- a) Law Reform
- b) Education and promotion of Human Rights
- c) Regional and International Cooperation
- d) Monitoring of the implementation and compliance with international and Regional Human Rights Instruments
- e) Research

INVESTIGATIVE

The investigative division should investigate Human Rights violations on receipt of complaints or initiate investigations on its own initiative. Investigations should be published to enable witnesses to come forward.

ADJUDICATIVE DIVISION

This would be a quasi judicial body that would hear and examine witnesses and give enforceable orders.

SUB-COMMISSIONS

The enabling legislation should also empower the Commission to appoint sub- committees to deal with specific areas and categories of Human Rights violations. The sub commissions should have statutory status subject to a special appointment and process and procedure.

The sub-commissions would not only be of a fact finding nature but would be capable of making enforceable recommendations relating to their specific areas of their concern.

INVESTIGATIONS:

The commission should have its own investigative machinery and should have access to expert assistance whenever required to verify alleged violations. It should have adequate facilities to carry out investigations and should have unhindered access to all places.

The investigative division should have precisely defined powers to investigate human rights abuses. Being largely focused on human rights and discrimination issues the commission would have the powers to investigate complaints in the private and public sector. By the mere nature of the categories of persons and gross that could be investigated we would strongly recommend that the investigative department should be fully autonomous and independent of the state security apparatus.

It should investigate complaints lodge with the commission but should also have the powers to initiate investigations on its own initiative.

PROPOSALS RELATING TO THE POWERS OF THE INVESTIGATION DIVISION:

WE PROPOSE THAT THE INVESTIGATION DIVISION BE GRANTED THE FOLLOWING POWERS:

- 1) To order the furnishing of information by relevant officials bodies and organisation.
- 2) To order the production of all document relevant to its investigation.
- 3) To order a person to submit to an interview.
- 4) To prevent interference with investigations.

ADJUDICATIVE POWERS OF THE COMMISSION:

A factor that severally hamper the effectiveness of Human Rights Commissions is the lack of power to hand down enforceable decisions. It is our submission that a Human Rights Commission could only be effective if it is given the necessary teeth. In order to render the commission more effective we propose:

1. That the Human Rights Commission have a adjudicative division in the form of a tribunal with quasi Judicial Powers. The tribunal should be empowered to hand down enforceable decisions.

We however do not support the idea that the Human Rights Commission should as a general rule be empowered to hand down punitive orders. Any matter requiring punitive redress should be referred to the criminal courts. We therefore propose that the enabling legislation should slot gross violations of human rights. The Human Rights Commission would then be empowered to report gross violations of human Rights to the Attorney Generals Office.

2. The commission should have full and effective powers to compel the attendance of witnesses and the production of documents.
3. The commission should have full and effective powers to protect witnesses, complainants and other providing evidence to the commission. The Commission should also be able to provide financial assistance to witnesses enabling them to present their evidence before the commission.
4. The Commission should conduct its hearings in an open forum. In Camera hearing should be the exception on the rule and should only be resorted to in specific pre established circumstances.
5. A decision of the Human Rights Commission should have the same force and effect as a decision of a division of the Supreme Court.
6. Decisions of the commission should be appealable in the Supreme Court.

FUNCTIONS OF THE COMMISSION

We propose the following functions for the Commission:

1. It shall be the function of the commission to examine and investigate and adjudicate on allegations of human rights violations by complaints including human rights organisations and individuals or suo moto.
2. To conduct wide ranging National inquiries on Human Rights concerns of importance to the general public.
3. To scrutinise government policies whether in the form of legislation or otherwise and report to parliament and the public its compliance with National and international Human rights standards.

4. To review the effectiveness of existing legislation and or the administrative provisions in the protection of human rights with the aim of making recommendations for the amendment of such legislation or the introduction of new legislation as necessary .
5. The commission should also examine bills and proposals for new legislation but forward by regional and national government to verify its compliance with International and National Human rights Standards
6. Recommend for considerations special programmes designed to relieve economic disadvantage or to assist persons or groups to attain equal opportunities.
7. To undertake special studies and investigations into specific areas identified as sensitive and prone to human rights abuses and to report and make recommendations to the responsible authority.
8. To conduct and promote human rights education with a view to disseminate human rights literature and promote and understanding of the human rights situation in the country and enhance respect for human rights among all sections of society and all levels of the administrative system.
9. To lobby for the adoption of international and regional human rights documents and on the adoption thereof monitor and report on compliance thereof.
10. To establish communication with and between national and international human rights organisations.
11. The commission should also work towards the promotion of cooperation with regional and international human rights organisations

ADDITIONAL FACTORS TO BE CONSIDERED

The commission should be provided with adequate resources to effectively run the institution.

It should have adequate funding, adequate staffing and adequate facilities.

The Constitution should therefore place a duty on the National Government to ensure that all arrangement are made and staff and facilities provided to enable and facilitate the proper and effective performance of all the functions of the commission.

CONCLUSION

To ensure that the commission functions effectively strong support of the Government would be essential. The Central and Regional Governments will have to commit themselves to undertake the follow up action on the recommendations of the Commission. Without the National Consensus and support the Commission would start with a disadvantage.

THE OMBUD

The advocate General Amendment Act of 1991 created the office of the ombud. In terms of this Act the Ombud is appointed by the State President who also have the power to suspend his / her term of office although this have to be done in consultation with the Parliament. The State President also determines the salary and conditions of employment of the ombud.

The office would not investigate any complaints until other available remedies have been exhausted. Complaints are made by means of an affidavit or affirmed declaration specifying the nature of the allegations and the grounds on which the allegation is based and any other relevant information. The function of the ombud is then to investigate the matter and to make recommendations as to the possible ways and in which the dispute could be settled if a dispute is established to exist. The ombud however has no power to enforce this recommendations.

A report is submitted to the Speaker of the parliament who will hand it the Minister of Justice to table it in parliament. If some of the reports content will in the ombud opinion not be in the interest of the state security to publish, the ombudsman would recommend in his report that such publication is prohibited.

There is no doubt that the institution in its current form have fundamental problems that impacts on its credibility and effectiveness as a National Institution. The institutions statutory and perceived dependence on the Executive. Its limited jurisdiction and its lack of power to enforce its recommendations are causes for concern and renders the institution in its current form inappropriate.

In the light of the aforesaid we therefore intend in this submission to identify critical areas of concern in the establishment of a ombud office and further wish to make certain recommendations with regard thereto. The recommendations on the Human Rights Commission with regard to manner of employment, financial obligations, independence, credibility and resources should be read into the submission on the Ombud as it forms part of the submission.

JURISDICTION OF THE OMBUDSMAN

One of the major areas of concern in regard to the establishment of an office of the ombud relates to the question of jurisdiction. The ombud generally operates in the public sector and it has as its main function the investigation of complaints by individuals concerning a grievance they have against the Government. It therefore investigate complaints against public officials in Central, Regional and Local government.

We are however of the opinion that the Ombuds office should be extended to cover a wide range of issues that are generally not regarded as falling within the ambit of its traditional area of jurisdiction.

We therefore submit the following proposals in regard to the jurisdiction of the ombud:

JURISDICTION IN REGARD TO MATTERS

The ombud be empowered to investigate and consider :

- a) The conduct of Government officials other bodies and persons where it is alleged that it is contrary to law, unreasonable, unjust; improper, oppressive or discriminatory.
- b) Allegations of misconduct in Departments, institutions and other organisations and recommend or institute public enquiries, criminal proceedings or disciplinary action where appropriate.

JURISDICTION OVER PERSONS AND BODIES

We are further of the opinion that this widening of the area of operation of the Ombudsman could be achieved by extending its jurisdiction with regard to the persons and groups that could be investigated.

WE THEREFORE PROPOSE

That the Ombudsman be empowered to investigate complaints against:

1. Public Officials—No public official or body should be exempted as a subject of investigations.
2. Public practices and actions by persons enterprises and other institutions.