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Western Cape
Women's Coalition

# Comments on the Seventh Report of the Technical Committee on Fundamental Rights during the Transition.

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**DEFINITION OF EQUALITY: CLAUSE 2**

1. The definition is highly problematic for a number of specific reasons, most of which can be summarised by saying that the equality which it espouses is a classically neutral, defensive and negative type of equality, which is not going to be a particularly powerful weapon for dealing with the manifest inequality of the past.

2. Subclause (1) is a significant regression compared to previous formulations. "[E]qual protection of the law" may limit the role of the equality provision to a wholly negative one: one can only protect that which already exists. In *Attorney-General, Canada v Lavell* (1974) SCR 1349 discriminatory state welfare benefits were held not to be in violation of the clause in the constitution which guaranteed that all should be "equal before the law", as this phrase was held to refer only to "protection of the law" and not to benefits conferred by law. Of course, it is always possible that "protection of the law" will be interpreted widely enough to include benefits provided by the law, but the *Lavell* interpretation is far more likely. In the light of the legacy of apartheid inequality, it is unacceptable that the benefits bestowed by the law are not available equally to all citizens.

   The earlier formulation "equal protection and benefit of the law" is a much more sensitive and sophisticated approach which recognises that equality will have to be a negotiated

point, midway between the existing privilege of the powerful and the legitimate claims of the dispossessed.

3. Subclause (2) prohibits discrimination and provides a *prima facie* list of classes of persons who may not be discriminated against. For some of the more general problems related to listing, see *Charter for Social Justice* (1992) 17, 31. However, a particularly difficult problem in relation to lists is what is now commonly known as the problem of "intersectionality". This refers to claims by a class of persons who are uniquely disadvantaged in that they belong to two historically disadvantaged groups. For example, there is a line of American cases in which the court refused to accept that Black women were a distinct class of persons who had suffered discrimination in the past [See, for example, *DeGraffenreid v General Motors* 413 F Supp 142; see also the work of Kimberle Crenshaw in this area]. The easiest way to deal with this problem would be to reformulate this subclause as follows:

*No person ... generality of this provision, on the grounds of <u>one or more of the following:</u> race, gender.....*

4. Subclause (3) purports to address the problems created by the defensive equality provision in subclause (1) by expressly permitting proactive measures aimed at addressing disadvantage. It is the "affirmative action" clause. It is important to pause here for a moment and consider the aims of affirmative action. In *Johnson v Transportation Agency* (1987) 480 US 616, the American Supreme Court considers that "an

employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part. ... Rather, it need point only to a 'conspicuous... imbalance in traditionally segregated job categories'... [V]oluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts." What this decision highlights is that the purpose of affirmative action is not to compensate individuals for *specific* discrimination suffered at the hands of other *specific* individuals who are beholden to them as a result, but rather that affirmative action serves to prevent the on-going effects of past discrimination. As a result, affirmative action is primarily aimed at groups, rather than at individuals.

However, subclause (3) refers to "persons disadvantaged by discrimination". What the proviso does is to individualise discrimination, as it bears the implication (or at the very least, exposes itself to the interpretation) that anyone who wishes to benefit from such a scheme would have to prove that s/he personally had not only been discriminated against, but in fact disadvantaged by that discrimination. This is a phenomenally heavy, if not impossible, burden of proof [and note that (4), which recognises the urgency of the onus issue and attempts to address it, does not apply to (3)].

Furthermore, it is crucial to remember that subclause (3) is an *enabling* provision - it does not *require* anybody to do anything, it merely permits programs which redress disadvantage. A restrictive formulation, such as the present one, is thus inappropriate in a Bill of Rights.

We recommend that this clause refer to "disadvantaged classes of citizens" rather than "persons disadvantaged by discrimination".

## THE RELATIONSHIP BETWEEN EQUALITY AND OTHER CLAUSES

## FREEDOM OF ASSOCIATION - CLAUSE 11

We support the formulation of this clause, and particularly its express prohibition of racial discrimination. We do not think that other forms of discrimination (such as gender discrimination) should be excluded in absolute terms.

1. While the absolute prohibition of association on the basis of race is justified, there may be compelling reasons for allowing the membership of groups to be based on, for instance, gender/sexual orientation/age/religion. For example, it would be disastrous if a support/counselling group consisting solely of women who had been raped were to be exposed to a constitutional claim forcing it to admit men. Similarly, in the case of educational institutions, there are important considerations which might justify single-sex institutions. In *Mississippi University v Hogan* (1982) 458 US

735, Justice Powell refers to a Carnegie Commission Report on Higher Education which highlights the benefits of single-sex education (these institutions provide an element of diversity and an environment in which women generally speak up more in their classes, hold more positions of leadership on campus and have more role models and mentors.) The jurisprudential basis of his argument is that the equal protection clause in the constitution could not possibly be used to restrict, rather than expand the choices available to women.

2. We recognise, however, that often the exclusion of women from all-male private clubs results in a more subtle level of exclusion from other benefits, such as access to business and power networks. [See *New York State Club Association v New York City* (1988) 487 US 1]

However, the right to freedom of association is made expressly subject to the equality clause by the phrase "without derogating from the generality of the provisions of section 2(2)". The effect of this is that the exclusion of persons from associations on the basis of sex is permitted unless that exclusion amounts to unfair discrimination, whether direct or indirect. We support this approach.

**Clause 19(1)(d): Detained, Arrested and Accused Persons**

We are of the view that "spouse" and "next-of-kin" is too narrow a formulation of family relationships. It does not cover people

who choose to live in family units not corresponding to the nuclear family. For example, this clause potentially conflicts with clause 2(2) which prohibits unfair discrimination on the basis of sexual orientation, as a partner in a gay relationship is not generally considered a "spouse" or "next-of-kin". It also excludes all co-habitees. As the institution of heterosexual marriage is a cultural one, this conflicts with the right in clause 26 to participate in the cultural life of one's choice.

**Clause 26: Language and Culture**

We strongly believe that this clause ought to be subject expressly to the equality clause:

1. We refer to the attached document ("Annexure A"), Resolution of the Conference on Custom and Religion in a Non-racial, Non-sexist South Africa. This conference constitutes possibly the most representative meeting of women of colour in South Africa to date and is quite clear as to its concerns:

   1.1 There is an inherent contradiction between the current status of indigenous law in South Africa and fundamental rights for women. Indigenous law discriminates against African women in terms of marriage, access to land, inheritance, contractual rights and in other vital areas.

   1.2 Traditional institutions often systematically exclude women's participation in community decision-making and

enforce existing discriminatory elements in indigenous law.

1.3 A constitution which guarantees fundamental rights for women based on the principles of racial and gender equality must clearly state that the fundamental right of equality for women will prevail over the promotion of traditional institutions or any rule of custom which denies equality. To sanction any other approach is to sanction a racist distinction between white women and African women.

2. We believe that one of the central pivots around which a charter of human rights ought to spin is the principle of equality. It is inappropriate and dangerous to allow freedom of culture to assume the central gravity of a document such as this. We recommend the following be added to this clause:

*Nothing in this clause shall permit derogation from clause 2.*

**Clause 28: Limitation**

With reference to 28(1)(a)(ii), we support wholeheartedly the principle that limitation of rights in the charter is only permissible to the extent that it is justifiable in a society based on the principle of equality.

**Clause 30: Interpretation**

30(1): We support the formulation of clause 30(1), particularly its reference to equality. Cf our remarks relating to Clause 26 (note 2).

We agree with the Technical Committee's comments in 30(1) concerning the use of "liberty" in this clause.

30(2) We recommend the inclusion of the words "indigenous law" in addition to "custom in this clause, because principle 12 of the constitutional principles provides specifically for the protection of indigenous law. This could help to avoid difficulties in interpretation.

We also recommend that consideration be given to religion in the context of this clause, as it affects the pursuit of fundamental rights for women.

30(4): We are appalled by the fact that laws limiting political rights are to be strictly construed for constitutional validity, whereas equality rights are not. We understand that the purpose of this clause is to protect political freedom during the run-up to the elections, but inequality is really at the heart of the legacy which has necessitated the entire process of negotiations and the drawing up of a bill of rights. It is <u>absolutely unacceptable</u> that the strict test applicable to political rights does not apply to equality too and we can see no good reason for the present exclusionary nature of this clause.

## COMMENTS ON ABORTION

A Bill of Rights should ideally include a woman´s right to an abortion. This should be complemented by legislation which provides for those state assisted services necessary to obtain an abortion. We refer you to the Black Sash National Conference Resolution on Abortion(Annexure B), which proposes an adequate formulation of this right. The Charter for Social Justice provides an alternative formulation of this right in Article Four:

1) Everyone has the right to life

2) Nothing in this article shall prevent legislation permitting abortion.

Although a wide range of women´s organisations has accepted the neccesity of entrenching the right to an abortion in a future constitutional dispensation as a fundamental human right, we recognise that it is unlikely that the Chapter of Rights will provide for such a right.

We propose that an issue as complex and fundamental as abortion, should be decided by a representative constitutional court, through interpreting the provisions of the Chapter of Rights. Such a structure will hopefully be in a position to strike an equitable balance between the fundamental human rights provided for in the constitution and the well being of women. The current political process should not dictate the solution.

The seventh progress report includes rights akin to those in the Bills of Rights of other jurisdictions. Certain of these have been interpreted elsewhere to include the right to an abortion. It is essential that nothing in the drafting of the Chapter of Rights prohibits or curtails an interpretation which would provide women with the right to an abortion.

The analysis below scrutinises the Seventh Progress Report, focussing upon the interpretation of those clauses which could found a right to an abortion. We have highlighted problematic formulations and suggested alternatives in the hope that the technical commitee will take these into consideration.

**Clause Five - The Right to life**

We wholeheartedly support the Ad Hoc Committee proposal that the right to life is not qualified. The provision of previous progress reports which stated that this right would be subject to the qualification of current abortion legislation was ill-founded. When this qualification is attached to the right to life, it lends itself to an interpretation that a foetus is a person and secondly, that a foetus has a right to life in all those instances not covered by the limited grounds for abortion provided in the current Act. When those trained in the respective disciplines of medicine, philosophy and theology are unable to resolve the difficult

question of when life begins, it seemed inappropriate for the technical comittee to decide this through a stroke of the pen for the operational period of the IBOR . The suggestion that a foetus has a right to life sets up the mother and the foetus in competition by suggesting that the foetus is simply a disposable part of a woman´s body and ignores the complexity and uniqueness of the relations between a woman and her foetus, and submerges the woman´s experience of pregnancy. We propose that the clause retain its present formulation.

**Clause Two - Equality**

Although reproduction has major consequences for both women and men, its impact on men and women is not the same, because of the conditions of social inequality within which women live and experience pregnancy and childbirth and the uniqueness of such experience. Women often do not control social conditions under which they become pregnant. The social context of sex inequality between men and women often denies women control over the reproductive uses of their bodies because it denies women control over sexual access to their bodies. Sexual access is often forced or pressurised. Frequently, contraception is inadequate or unsafe and sex education misleading or unavailable. Poverty and enforced economic dependence often undermine women´s physical integrity and sexual self determination. It is not realistic to rely on the individual women´s sense of self respect as a bulwark against these life circumstances; social supports for that self respect are simply too frail.

Further, the social consequences both of being pregnant and of not being pregnant are not controlled by women, whatever their age or social station. Historically women's role in child bearing has provided an occasion for women's social disadvantage. Women's autonomy in making fertility decisions has been affected by a number of outside influences, ranging from government enforced sterilization to decisions concerning the allocation of contraceptive resources. Decision makers in health care and government have left women with little choice about the type of care they will receive during pregnancy, who will attend them in childbirth and whether the birth will be in hospital or not, social and economic supports for pregnant women are seriously inadequate.

After birth women are traditionally allocated primary responsibilty for the intimate care of children. However women often do not control the circumstances under which they raise children, because of poverty, inadequate housing, lack of day care, and the structuring of paid work in the assumption that everyone in it- women included- has the same freedom from child care responsibilities that has long characterised male workers. In these circumstances, women certainly do not and cannot, control the impact which child bearing will have in their own lives.

By contrast men are not comparably disempowered by society through their reproductive capacities. No one forces them to impregnate women or to bear children. They are not generally required by

society to spend their lives caring for children to the comparative preclusion of other life pursuits.

Thus it is women who are caught, in varying degrees, between the reproductive consequences of sexual use on the one side and the economic and other consequences of sex role allocations of labour in the market and family on the other. Women are prevented from having children they do want and forced to have children they do not want and cannot want because they cannot responsibly care for them. We believe that this reality is best described as one of sex inequality. Current abortion legislation reinforces this inequality and would hopefully be struck down under an effectively drafted equality clause.(See attached comment on Equality Clause)

In conclusion, an Interim Bill of Rights which entrenches equality as its fundamental principle should not include any clause or qualification which restricts reproductive rights.

**Clause Seven - The Right to Privacy**

The right to privacy has been used to found a right to abortion in the American constitutional jurisprudence. The possibility exists that it will be used to found a right to abortion in South African. The present formulation of the IBOR grants a right to privacy and then contextualises this by refering specifically to provisions concerning search and seizure. The historical disregard of the South African state for personal privacy might neccesitate such specificity, but this should not be at the cost of other rights encompassed in a right to privacy. The present formulation could

result in the right to privacy being narrowly construed. We propose that the wording should be reformulated to read:

> Every person should have the right to his or her personal privacy *including, amongst others, the right* not to be subject to searches of his or her person, home or property, seizure of private possesions or the violation of private communications.

Through locating the right to abortion in a right to privacy the American Courts have provided women with the right to choose with the assistance of their physician, whether to have an abortion or not. This right of choice does not have a corelative social/economic right that provides women with the health care and counselling services neccesary. American jurisprudence has failed to grant the state funding neccesary to ensure that the right to choose an abortion translates into the ability to procure an abortion.

The right to an abortion in Canada has been more succesfully founded jointly in the right to privacy and the right to security of the person. This has ensured that a Canadian woman has the right to choose and to procure an abortion.

These lessons from abroad highlight the neccesity of abortion being perceived as a social and economic right as well as a cultural and political right.

**Additional Matters**

One of the parties has suggested that the right to protection of the integrity of the family should be entrenched in the Chapter of Rights. It is trite that historically and currently the family has been a major site of women's oppression. We believe that it would be inappropriate to entrench such a right in a BOR. The proposed formulation of the clause could entrench the nuclear heterosexual family as a cultural institution and fail to protect other family options(see attached comment on Equality). If such a clause is to be included it should rather focus upon the right to choose a family. Protecting the integrity of the family could be interpreted to prevent a woman from having an abortion where her significant other desired that she continue her pregnancy to full term.

If the technical committee finds it appropriate to include the family in the Interim Bill of Rights, we propose that they adopt a formulation similar to that in the Charter for Social Justice:

1)Everyone shall have the right to live with partners of their choice

2)Everyone shall have the right to found a family

3)Marriage shall be based on the free consent of the partners, and spouses shall enjoy equal rights at and during marriage, and in respect of its dissolution.