

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 4**

**19 APRIL 1995**

2/4/4/5/11

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CHAIRPERSON:

... ladies and gentleman we are ready to commence. The attendance register is available for signature if - can you pass it round, it's being circulated please sign it. The first item on the agenda apologies, we have apologies from Mr Sizani, Professor Asmal, Mr Rhoda any further apologies?

Right we now go to the minutes of the Theme Committee on the 3rd of April which you have before you, are there any comment on the minutes - any corrections? Fine can I take the minutes as approved by the meeting, okay there is no Core Group reports at this stage and we move on to the substantive item before us item 5 on the agenda. Freedom of expression and right of access to information.

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You have two packs before you the first is called parties submissions, freedom of expression, right of access to information, servitude and forced labour, freedom of security (inaudible) ... that one, is the first one. And then there is one called headed additional, you have both documents in front of you. Good, all right we will take the - now there is a slight problem here I immediately detect and

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that is that we have no representatives from the PAC and neither from the ACDP.

UNKNOWN: (inaudible) ...

CHAIRPERSON: And - well the IFP is - they here today they not here for reasons of politics rather than simple absence and I presume we have no submissions from them. These other two parties have made PAC has made no submissions, so those that will go to one side the ACDP isn't here.

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Well, then I suggest that just alphabetically we start with the ANC whose submission is from pages 1 to 8 in the first volume, who'll be making the presentation for the ANC? I did have a request earlier and I was not here for the last few weeks as you know that's it's not necessary to read out word for word the submission you can just simply draw the committees attention to the major points. Entertain questions and then we can move on. So who is going to present the ANC's submission today?

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UNKNOWN: Which one are we starting with?

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CHAIRPERSON:

We starting with the freedom of expression, and then we go - but they really are complementary so I think we deal with the freedom of expression and then move straight on to the right of access to information. I think they can be dealt with together. I think to sort of first do freedom of expression and then go right round to all the parties and then come back and do the right of accessed information would be counter productive.

So if we can agree just treat them as companion rights and deal with them together. In fact from the ANC that starts only on page 5 - 5 to 8 alright, would someone like to kick off. Mr Mfebe.

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MR MFEBE:

H'm, good afternoon Mr Chairman I will welcome you back, we've been missing you. Okay this is very short, the freedom of expression the content of the rights, the right is set out under section 15 of Chapter 3 of the Interim Constitution.

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The right to freedom of expression is closely related to free political activity. It is one of the foremost fundamental civil

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and political Human Rights that is universally acceptable.

It is advisable that the rights should be reformulated to provide constitutional protection from racist, sexist and hate speeches calculated to cause hostility and acrimony and racial ethnic or even religious antagonism and division.

The right correctly includes artistic expression and scientific activity. The word research seems somewhat restrictive and could be substituted with the word activity which shall in any event include research.

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We then prefer the following formulation with two clauses, the first one that everyone shall have the right to freedom of speech and expression which shall include freedom of the press and other media. And the freedom of artistic creativity and scientific activity. And secondly that this right shall not prevent the legislature - sorry shall not prevent the legislature from enacting legislation to prohibit any speech expression or advocacy of racial, religious, gender, ethnic or other similar forms of hatred such as we would constitute. And excitement to violence or extreme hostility or in

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compliance with South Africa's international law conventions.

It is our view the establishment of the Independent Broadcasting Authority shall chose impartiality of State media, deals adequately with the concern of State financed or controlled media.

We propose the following formulation, there shall be a right of access to a diversity of opinion. This formulation has a broader application than the existing Section 15(2) and provides the basis for groups, institutions and communities to have their viewpoints heard.

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The application of the right, yes there shall be a positive duty on the part of the State to oppose such rights. The rights shall apply to all levels of civil society, the right shall apply horizontally, subject to usual limitations.

Natural persons shall be the bearers of the right as under .2.5 of the right to freedom and security above.

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That is our submission on freedom of expression, thanks.

Then coming to the content of the rights, the primary objective of this right is to provide persons with the right to obtain information from State organs at any level of Government. This is consistent with the transparent and accountable administration of Government in an open and democratic society.

It is our view that the information must be provided in the exercise or protection of rights and that the right should bind the private institutions and other legal persons. A framework for the exercise of this rights shall be set out in law, in so far as the State is concerned sensitive information may be protected in terms of the general limitation clause.

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Such limitation should apply to inter alia information regarding State, security, public safety, law enforcement, protection of free deliberation within a democratic process and financial information. The disclosure of which could lead to speculation or otherwise damage the national economy.

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Private persons or bodies will enjoy protection afforded by the limitation clause as well as the right to privacy. The legislature may elect legislation to regulate the exercise of these rights. The importance of this right must be seen against the backdrop of clandestine and secret methods of the past regime and the systematic concernment of relevant information.

We therefor propose a construction which may be formulated as follows, everyone shall have the right of access to all information held by the State or any of its organs at any level or by private bodies including individuals in so far as such information is required for the actual or potential exercise or protection of his or her rights under the Constitution.

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As far as the application of the right is concerned a positive duty is imposed on the State. The right shall be subject to the reasonable limitations and shall apply to both common and customary law. The right shall apply horizontally, the natural persons shall be bearers of the rights as in .2.5 under the right to freedom of - to freedom and security above.

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So that is our submission on the rights to access to information.

**CHAIRPERSON:** Thank you are there questions from other parties or people here, Senator Radue, you look sir you going to ask a question.

**MR RADUE:** I was just trying to formulate it Mr Chair.

**CHAIRPERSON:** Dr Mulder, not - well just to get the ball rolling, I have one or two questions of my own if I might - from the chair just raise them. I have no real option except to raise them from the chair.

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I'd like to ask the ANC on something that troubles me very much in my party and I don't want to be misunderstood. I think everyone here at least has a objection to speech which insights racial hatred or gender discrimination. But how in fact do you legislate against it in such a way that you don't actually kill the concept of free speech.

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I mean for example you can say that the policies of a certain

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party for example to suggest a racially exclusive homeland or to promote tribalism in a certain part of South Africa is calculated towards in gendering hostility between racial or ethnic groups.

You can say that Playboy magazine degrades woman and therefor is somehow involved in gender hatred.

How do you formulate this, even though the intention is a laudable one, in a way that does not cut across the freedom of expression and how in fact do you do that and at the same time say well you know unpopular minority viewpoints should be respected and heard. That to me is an essential problem I would have with paragraph 2 and I don't know what the views are on this question.

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UNKNOWN:

(inaudible) ...

MS PANDOR:

Ja, I think Mr Chairman that one has to actually look at quite carefully is paragraph 2 of our content of the right, rather than the suggested formulation, because of course the formulation will be something that will arise from the

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panel's work with the views of the various parties and with what emerges from the Theme Committee reports.

I think in paragraph 2 we quite clearly state that we believe it's advisable that we should have a formulation that provides protection from speeches in the vain that we've identified which are calculated to cause hostility and acrimony.

So where there's a clear intention to actually cause this sort of reaction or have this effect it is in that regard that we believe you should actually provide protection for woman or blacks or other groups that may be exposed to such forms of hate, speech etcetera.

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I don't believe that a Constitution that attempts to arrive at protecting the rights of individuals should allow for a situation where the expression or the in acting of a right, infringes on individuals and we believe the Constitution should go as far as possible to prevent situations where particular groups are exposed to such forms of infringement of their rights.

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And the exact formulation would arise from what emerges in the expert's view.

CHAIRPERSON:

Could I just ask a follow up question just slightly specific let's take the are of pornography I mean let us assume that there are people pornography denigrates woman per se. And we going to have a fairly liberal censorship regime presumably in South Africa. Does this then over ride that, I mean - I mean - I don't think it's no so much the intention it's when you start giving effective intention that I think all kinds of problems arise.

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I mean pornography to me is a hard case because it actually, it is some people enjoy pornography others find it very degrading. The AWB as a political party has a certain modus operandi. Do they fall foul of this, and because of their utterances and if they do, how to then promote everyone's political rights. That to me - well the acid test.

MR MFEBE:

Well the - the rights are out in there Constitutions are not absolute there will always be limitations. And really you cannot allow a situation where you have a person exercising

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a right to be a public racist in all earnest. That has to be kept given the background in our country of a divided society along racial and ethnic lines and this formulation as we have correctly pointed out in the beginning of our submission that we believe these are universal acceptable and if you even look at Article 20 of the - on the covenant on civil and political right, it outlaws advocacy of racial and ethnic attention.

And that was born out of a situation similar to our's and we must have a strong intention in this country not to have a similar situations.

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MS PANDOR:

I think chairperson that this is actually not a situation that is unique to South Africa. In Britain a few years ago you had a situation of the International Front where in fact the conservative party at some point had to act to prevent a meeting of the national front taking place. Because their actions directly infringed the rights of black people and were intended very clearly to do so.

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So as my colleague has said, one can't say because you have

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the right of expression you can express anything whatever it's result may be. You actually have to ensure that in some way you provide for the protection of groups that may be venerable to for example racial hatred by particular groups. I don't believe that a society can say we so free that we allow a particular group to express it's racial hatred whatever in whatever way to may wish to do so.

So this is part of the - this is the intention of this suggestion emerging from our submission.

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**CHAIRPERSON:**

Can I just respond I don't want to suggest that there can't ever be restriction obviously cannot everyone of these rights, and also in Britain I mean the national front does field candidates and elections still in the local Government elections and believe me they have very racist approach. You know all immigrants out of Britain "finish and klaar" they don't give many votes, but that's by the bar.

But in order to meet this need in paragraph 2 doesn't the limitations clause actually take of it, I mean if one wanted to introduce some very carefully crafted legislation and I

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think it would have to be very carefully considered. Doesn't the limitations clause in the Constitution well I presume we have one in the final Bill of Rights which we must have actually meet the need in paragraph 2.

UNKNOWN:

Chair I think if one examines this clause 2 it's a very accommodatingly written clause. It's not an injunction and doesn't say that there has to be legislation, just says there may be legislation and it probably encourage legislation of that kind.

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So what it does allow for - it doesn't say right here in our - in the Constitution that all hate speeches is hereby banned. It says that legislation can take place and that would imply discussion and debate and careful consideration of all the factors concerned and the possibility for the various role players to make their input.

So I think it's a very accommodating approach.

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CHAIRPERSON:

Just before we proceed are there any points that the National Party or the Freedom Front wants to raise, I don't

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want to dominate this question time myself. I have another question but ... (intervention)

UNKNOWN: (inaudible) ...

CHAIRPERSON: Well no on the same on the - I mean on the freedom of expression of the right to information.

UNKNOWN: Thank you Chair I would just like to know from the ANC whether they envisaged that it only will apply to and the bearers of the rights will only be natural persons or do you also allow for juristic persons for the right of expression and the right to access to information?

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MR MFEBE: We - we have said a natural persons but of course if you look at the question of juristic persons and you have persons within those institutions referred to as juristic persons, as individuals and citizens they have a right that are protected in terms of the freedom of expression.

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CHAIRPERSON: I was just thinking in the situation where you have got for instance a newspaper involved with the right to freedom of



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expression that newspaper could stand as a juristic person on it's own and be - have it's rights infringed, would you come to the protection, should the Constitution come to the protection of such - such a company.

**MR MFEBE:**

I think if you look at clause 1 we say everyone shall have the right to freedom of expression, speech and express - which shall include freedom of the press and other media. That is already accommodated there explicitly.

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**CHAIRPERSON:**

Any further questions perhaps I could ask one of my own again. The question dealing now with the other part of the right in the Interim Constitution which you've reflected here in part there shall be a right of access to a diversity of opinion which is what the ANC has proposed as the - as it were the second part of the existing rights in Section 15.

In the existing wording of the Interim Constitution there is not just a right of access to a diversity of opinion, which is provided for in respect of the State media. But also the concept of impartiality which does is not reflected in the ANC draft.

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In other words whether the existing one says where the State controls the media, the State has an obligation to the impartial dissemination of information and reflect diversity of opinion.

You should of taken as I - well it's clear you've taken up the concept of impartiality on the State media here and you've widened this right so that every media has to provide a diversity of opinion whether it's the Black Sash magazine or the SABC.

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Now I mean that is the affect of this wording, could one get some motivations to why that was done.

MS PANDOR:

Right once more I think what is being looked at here is that we - you have a situation at the moment in our country where we have a monopoly owned press controlled by certainly not more than two large owners of the various forms of the media.

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And our concern is that in our country our people should enjoy a right of access to a diversity of opinion. That we

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should have a broader access to expression by the press or other forms of media rather than the rather limited situation that we have at the moment.

And hence the right of access to a diversity of opinion for natural persons who will be the holders of the right to freedom of expression.

**CHAIRPERSON:**

And if I can just ask what does this actually mean in practise that everyone has the right of access to a diversity of opinion or there shall be this right of access. What does it mean to the Cape Times or the Sunday Times or the New Nation and the question of impartiality why is that being dropped in respect of the State controlled media which is the current provision?

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**MS PANDOR:**

We don't believe that the notion of diversity removes the idea of impartiality. What we are looking at is that we believe that the independent broadcasting authority as a body that monitors the media would be one that would ensure that impartiality exist. However, we believe that the formulation we've proposed provides the basis for a range

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of media to exist across different forms of ownership for institutions for communities be it a grouping such as the Black Sash or other groupings to actually prepare their own media which the public would have access to.

So we looking for a broader application and we believe that referring to diversity of opinion rather than to mere impartiality which can be assured by a monitoring body allows for this greater access.

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**CHAIRPERSON:**

Thank you any other questions? Right we've any other comments, all right will the next one, alphabetical order is my own parties so I'll just deal with that and then perhaps Senator Radue can take the chair for the purpose of my - any questions if any, is that all right Senator. I'll just present it and then if you could just chair the discussion that follows.

**MR LEON:**

Freedom of expression our submission begins on page 10. We believe generally subject to one or two reservations that the existing provisions of Section 15(1) and (2) should be retained. We are convinced that a constitutional guarantee

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of free speech in the widest possible terms coupled with the strong injunction against State intervention in the press are minimum prerequisites for a creative vibrant open democracy in South Africa.

Section 15(2) which is the one that we just been discussing all media finance (inaudible) ... or under the controlled the State shall be regulation in a manner which ensures impartiality and expression of a diversity of opinion. This certainly is unusual but we think because of the background of State control, and the ruthless use of the SABC and TV as engines of propaganda for the Government in the past, hopefully not the present as well, should - does in fact require a corrective and we think 15(2) - Section 15(2) does provide that kind of corrective.

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Since it's arisen really in the discussion rather than anywhere else and it's not reflected here perhaps I can use the opportunity on 15(2) to comment in our view there is little points in legislating rights which were difficult to enforce that is our general approach. We do not know that it is either desirable or legally possible to make this

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requirement binding on actors other than the State. In other words private media, whether they owned by Mr Tony O'Reilly or by the proprietors of the New Nations newspaper.

We think that newspapers can subject to general legislation take a particular viewpoint. So can private radio and private TV stations. When it's a public organ, which is funded by the public we think different considerations apply.

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We also wish to comment specifically on one or two other aspects but let me just say on the controversial issues the so-called controversial issues of hate, speech, commercial speech or obscene speech, we believe that a limitation clause suitably worded is the most affective manner of dealing with these matters. That to us is the correct approach.

We strongly would - we would strongly desist from the temptation of applying a wide basis of potential restrictions to free speech in the actual constitutional protection of free speech clause, in other words to couple this clause with a specific curb or prohibition on free speech for whatever

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good and well motivated reasons we might exist will in fact in our view have an affect on chilling or freezing the actual concept of speech which as we note is very easily chilled or subdued by excessive constitutional or judicial zeal.

The question is what application does nature or duty does this impose on the State the obvious duty if you retain the provision on the State media, State controlled media or the impartiality and diversity of opinion that creates a very specific obligation on the State which we strongly support.

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Whether in fact the State incurs any obligations at all, in respect of 15(1) as it now frames, stands, ie. the freedom of speech is a more complex matter. Because of who exactly the State is and how it is involved whether it includes (inaudible) ... I don't want to go into all those practise, we do think it is worth quoting the views of Judge Brennan in the United States famous case. We consider this case against a background of a profound national commitment to the principles that debates on public issues should be uninhibited robust wide open and that it may well include vehement caustic and sometimes unpleasantly sharp tax on

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the Government and public officials. Which we can only  
amen.

Now common law and customary law and the constitutional  
duties on actors other than the State. To us the critical  
question here and there are a number of issues which arise  
is the law of deformation because you cannot look at the  
freedom of speech clause in our view totally in a vertical  
concept - context ie. citizen against the State because the  
impact of free expression that not arise primarily or should  
in a democracy as between the State interfering with the  
citizen.

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It happens in terms of newspapers and the press taking on  
controversial issues and then being bound or inhibited by  
the law of deformation. Now the question is are we going  
to await in free expression, are we going to wait for the  
court to eventually determine that perhaps the right to free  
expression has a horizontal application or a "drukkerking"  
a sort of spillage or are we going to actually on this issue,  
never mind the general debate which - in which it properly  
belongs, are we on this issue actually going to say if you

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going to have meaningful protection of free speech and media freedom you've actually got to have horizontal application of freedom of speech.

And if we can, it's worth noting and highlighting the very substantive submission which this Theme Committee received from the conference of editors. A submission by Advocate Gilbert Arcus and if I might quote from his observations here which I think this committee needs to consider very seriously.

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Adopting these canons of interpretation he says at page 36 of his opinion it would lead to absurd results to leave common law rules of defamation insulated from the Bill of Rights. There is no logical distinction between a statutory limitation on the freedom of expression and one embodied in the common law.

And in our view that is really one of the fundamental questions. And if you want to see in this country what has had an inhibiting affect on free speech recently, it isn't any recent wrongdoing or evils committed by the Government

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present or past in the last few years, since about 1990. It's actually being the application of the law of defamation by our courts.

Now I am not saying this is going to be overturned or it should be, but we believe it should be made clear that in terms of free speech the Bill of Rights should apply to common law situations of defamation because that has a much more inhibiting view of - on freedom of expression than State imposed curbs. It certainly would operate like that in a democracy where the State can't just close down newspapers.

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Now that doesn't mean that of course you can publish what you like about people, but it does mean that the Courts then are unambiguously obliged to consider freedom of expression in the context of for example General Neethling suing the Vroue Weekblad newspaper. That to us is fundamental.

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Question now goes onto who are the bearers of the right, well once again we of the view that here it would really

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almost be - lead to an absurd result if you were to restrict the protection of free expression to cases involving State action alone. In other words the only time you could evoke this was when you were suing the Government because the Government in a vibrant democracy should have little almost no control over the media generally.

So if you can only evoke this freedom of expression Constitution in respect of State action it actually loses much of its - much of its force and effect.

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Another fundamental question we deal with on page 13 is the limitations provision. Obviously we support the concept that there has to be a limitation on every right. But it is the nature of the limitation which is fundamental. We are in broad support of the current wording of Section 33 because it provides for legal criteria against which any limitation has to be considered.

Reasonableness, coupled with standards of justification consistent with the requirements of an open and democratic society based on freedom of - and equality do provide

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important safeguards against a wholesale limitation of the fundamental rights such as free expression.

But the question which has arisen again and it has been posed to this committee very sharply by the conference of editors and we highlight it in our report is the current higher protection afforded to certain constitutional rights in Chapter 3 of the Interim Constitution which obliges any limitation to pass a further test of necessity.

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And the question is why are certain rights in our Interim Constitution given a higher protection against limitation than others. The answer to that of course as everyone here will know is that it's an Interim Constitution and the desire in the drafters minds was to protect certain rights for election - electoral and political purposes and they would be - have to pass a higher test if you chose to limit them, which is reflected in Section 33.

And that's the consequence of drawing up the Interim Constitution in 1993 and in time for the 1994 election. But now that we are drafting a final Constitution we do not

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believe that there is a basis for distinguishing between rights on a higher standard of protection for some and a lesser standard for others and if there is a distinction to be made, then it is our view and it can be argued that freedom of expression which is fundamental to democracy must move into the higher standard of protection in 33.

That is our view, in other words if you look at the current Bill of Rights in Chapter 3, most rights you have to meet this test that before you limit them that they have to have - they have to be - the limitation must be reasonable as for your general application can't negate the content of the right etcetera, etcetera has to be constant with the requirements of a fair, free and - of an open and democratic society etcetera.

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But then there is certain category of rights including freedom of speech for political purposes according to the Interim Constitution for election purposes which you have to pass an even higher test before you can limit it and that is one of necessity that actually has to be necessary to limit the rights, so that the courts can enquire on that ground as

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well.

Now in our view, in the DP's view either those distinctions must all be put together and you don't have different differentials or you can say there are certain rights which do require a more careful protection than others and we list them. And if we going to apply that test, then we believe that freedom of speech must go into the highest form of protection. That is essentially what we are saying.

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It's probably best considered I suppose when we consider the limitations clause but because the question arises and has a arisen by a body who's opinion we think should not be ignored or trifled with unnecessarily we think it is necessary to raise it here.

That is our - then our submission of freedom of speech. Dealing with the right of access to information, we obviously just look at Section 23 and principle 9. Principle 9 begs no discussion, it's pre emtry we have no obligation except to be bound by it. The question is does Section 23 in the Interim Constitution adequately provide the holders of the

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right with real right of access to information.

Section 23 says there shall be a right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise or protection of his or her rights.

Now in our view just briefly to summarise, we think that this is too restrictive, we believe that the citizens right to information should not simply be continued or dependant on them having another legal right to exercise which is the basis of the current wording.

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We think that information including information used in the governance of the people and specific information subject to limitation calls that the State possesses in respect of a citizen - an individual citizen should be available to that person on application.

We do not believe that the Constitution should seek to capture all the relevant considerations that would ordinary form part of a detailed statue such as a freedom of

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information act. But rather that a broad principle should be stated and it's further development left to the courts.

We regard the right to information as fundamental and free standing. And our problem with the current wording of Section 23 is not a free standing right, before you can evoke it's provisions you have to prove that you are using it only to get one of your other rights under the Constitution protected or dealt with. And that to us is unduly restricted.

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Therefor we would reformulate the right as follows every citizen shall have the right to obtain from the State and from any organ of State or Government with due expedition all information concerning the organisation of such organ it's decision and decision making procedures, it's rules and it's policies and two information held by the State concerning such person.

Obviously that is subject to the limitations clause. But we think is important here is that you then make the State directly accountable and all organs of Government to the citizen or to groups of citizens so they can know what rules

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and regulations apply, what policy considerations came to be.

Obviously this would be subject to the limitation that when the Government announces an increase in the price of petrol and makes a public announcement on something, you don't know, you can't have a million people writing off to the Government in order to demand the reasons for it, because they had been stated. But we think if you want an accountable Government and you want officials and bureaucrats to actually bring their minds to bear on what they are doing, that at least we should consider a right along these lines.

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We don't think that the other questions here are directly relevant particularly freedom of information applies overwhelming as we formulate to the State. We think there is also a case to be made that when it comes to freedom of information of citizens rather than all natural persons should have that right, that would impose a further limitation. And clearly the limitation clause would be applicable.

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Chairperson that's my - our submission.

CHAIRPERSON:

Thank you very much indeed Mr Leon. Are there any questions to Mr Leon, I think he's given a very comprehensive view of the DP. Mr Fairbank.

MR FAIRBANK:

I note with interest that you do not mention - make mention of information held by other bodies other than the State for an example a particular company where the workers want information in so far as the exercise of their rights are concerned. Like production targets and they want for collective bargaining purposes for example.

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And you seem to make this applicable only to the State what is the DP's view on such issues?

MR LEON:

Chairperson first of all the way the question is presented is interesting because our view is that this flows directly from a citizens rights in a democracy. That the State does have certain obligations to the citizen and the Constitution or Bill of Rights should seek to capture those as best as possible.

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In terms of for example a trade union or a workers organisation whose rights are separately and more than adequately protected in this Constitution that we - all right we haven't got onto the final formulation. To us that flows out of the contractual or bargaining relationship between the workers and the employers that right to information. And that should be part of the bargaining process between them.

But there is no way that citizens of a country individual or even collectively can meet with the Government to bargain these rights except through a Constitution. So in our view the primary focus of this particular right to information should be in respect of the State.

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It is not that you are dealing with great respect in South Africa with disempowered workers or trade unions. In fact many would argue we have the strongest trade union movement in the world today.

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And the parties sitting opposite me is partially representative of that trade union movement. Now the

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question which arises here is does the - can citizens or individual citizens or group citizens claim the same rights against the State. Is there any forum in which the bargaining takes place that right to information can be guaranteed between citizens and the State and the answer has to be no. The only way in which it happens and it is so indirect is during the course of an election champagne. And I guarantee you - I mean everyone here knows that the last consideration anyone has in an election champagne is what a parties attitude is to freedom of information.

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So our view would be that while if you protect trade union rights as such one of the consequences of that is the bargaining process and the - that being one of the issues on which the bargaining and the negotiation and the collective bargaining actually takes place, is the right to secure information. That this become to a large extend superfluous.

But that there is no equivalent forum in which citizens regardless of whether they are trade unions or not trade unions can actually ask of the State which control the

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resources of the people of the tax payers of people who paying service charges because this would apply to municipalities as well that you actually need this to be specifically an act against the State.

MR MFEBE:

Thank you (inaudible) ... are you - are you really convinced that there are no other instances where people need protection for an example if a citizen goes and apply for a credit and he's assist and he is told no you cannot get a credit he goes everywhere and no information is given whatsoever so that he can make right what is not right so that he can be able to enjoy like other citizens his or her own rights.

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And that you have a lot of other situations similar to - to those and for an example I may add that you go for an interview for an example and then you are told no you have not been successful and because you want to improve because you need to improve and you ask for a reason, they say we cannot explain - we cannot give you any reason you just not successful that is all.

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And as a citizen you feel you have a right to information to know why you are not so that we can go back and improve on that and so you go all over and not get anything as a citizen because you are not given the information and you are not protected. It's only against the State that one is protected.

MR LEON:

Mister can I just respond to that chairperson to Mr Mfebe on two grounds.

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First of all - you Webster Mfebe are approached by Doctor Coleman who says I'd like to borrow R5,000-00 from you. And you say no, I don't want to lend you the money. Taking what you have just said to it's legal conclusions, if this right is going to apply across the board, you would have to furnish him with reasons for not granting the loan because you know he asked you for something, you've got information, you maybe don't like him. Maybe you got some kind of antipathy on a personal ground - you don't feel like lending someone that money.

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So we think very different considerations do apply and we

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don't accept that the obligations on a Government on a State on a city council on a public authority are the same as those which apply on a private authority. We actually think there are different considerations that apply.

Now you state and you say are we convinced that is the DP that in every instance of the use or the holding of private power that the same considerations apply and my answer to you is no. I am not convinced and we can look and we probably need to explore this area.

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But this is a minimum pre condition because there are the - the fact is that the State and it's bureaucracy in the exercise of it's power which is mandated by people, directly representative basis, actually influences and the citizens do - should have a right of recourse - a right of recourse.

We do not accept that private institutions or individuals are in the same position. There might be cases in the exercise or private power where in fact there is a case to be made and that should be explored I am not suggesting we just push it off the table.

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But we think the fundamental idea to capture here is that the state, it's organs and it's various subsidiaries actually be held accountable in this manner and that is the primary purpose in our view of a Constitution.

UNKNOWN: (inaudible) ... but the problem is ...

CHAIRPERSON: Thank you - Doctor Coleman.

DR COLEMAN: I'd just like to take up that last point I don't think your - 10  
your illustration here perfectly apt because you talking about the inter action between two private individuals whereas we talking about a company. It's inter acting with the public, it's advertising jobs to the public for example. And you come along as a black person or as a woman and you refused the job and you would want to know what were the considerations in refusing that job.

So I think if you going to inter act with the public you have a certain public commitment and public responsibility and 20  
I think it is in that area that Mr Mfebe is just questioning as to what are the responsibilities.



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CHAIRPERSON: I think we can ...

MR LEON: Can I just respond to that Senator. I think we can explore that issue, but I think we need to actually put it on the table. I mean for example if I go back to the ANC's proposal it just says everyone shall have the right of access to all information held by the State to any of its organs at all levels or by private bodies including individuals in so far as such information is required for the actual potential exercise of protection of his or her rights under the Constitution.

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In fact what we proposing is much wider on the State than what the ANC is and - and once again you have made that your rights in so far as it does apply horizontally that - to corporations entirely contingent on the exercise of other rights under this Constitution. Should that be the case, is that the best one for limitation, our view would be no.

I just think we've got to apply this carefully in respect of non State and non public sector because there is certain problems which can arise and we also have to you know -

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but we - I don't want to dilute this by suggesting that it isn't primarily in terms of a Constitution and necessary to actually get out of the Government out of it's organs - decision making procedures, rules and policies so that people can actually know how to order their affairs and I still think that should be primary focus.

And I think in the private sector where it intervenes with the public we should look at that, and we should take some expert views. I think this would be a very good case to take this right as we formulated it together with the concerns expressed by Mr Mfebe and ask our somewhat overstretched experts or half of them to actually consider this and to really list for us rather than us trying to do it in a debate what the sort of upside downside legal consequences would be of evoking this right as perhaps as we framed it here in terms of the public sector and with suitable application to the private sector. And then perhaps have - bring it back for consideration, that would be my proposal.

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**CHAIRPERSON:**

Mr Fairburn would you just hold on two of your colleagues are on the line first, if you would please.

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UNKNOWN:

Ja, I - I meant to re ask the question about hate speech to Mr Tony Leon. And what would you do if - if a newspaper consistently preaches the extermination of one particular grouping in the community and - and what would the State do since the DP says a constitutional guarantee of free speech in the widest possible terms coupled with the strong injunction against state intervention in the press are minimum prerequisites. What would the State do in a situation like that.

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Say the DP's Government and there is a newspaper which is preaching the extermination on one particular group in the community.

MR LEON:

I think that case is very easy to deal with first of all if we propose if you look at page 11 or page 2 of our submission - page 11 document we say on controversial issues of a hate speech we are of the view that a suitably worded limitations clause is the most effective manner of dealing with these matters. So we would say that the limitations clause would proscribe or prohibit the - the abuse of the right of free speech for precisely that reasons.

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Because no court or no newspaper would ever be able to demonstrate the satisfaction of any court least of all the Constitutional Court in South Africa that the extermination genocide against a certain group would in fact be consistent with a free and democratic - open democracy based on freedom and equality. It's just an impossible test to provide.

The State would be entitled to take action against that newspaper because of the limitations clause and it would have no difficulty in our view of actually proving it.

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The problem that you have with hate speech if I can use the phrase from - it's not incidently the case that you illustrated which is an obvious case that falls - that cannot be protected and will no court will seriously protect it. But the problem you have with putting in junctions against hate, speech and gender any quality a whole range of other things is where do you draw the line as they use to say in the 1980's one man's freedom fighter is another man's terrorist or persons terrorist to be politically correct.

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Let me just - let me just give - let me just develop this idea.

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In the extreme - in the United States in 1914 when this developed through the courts rather than through the Constitution which is simply had a first amendment which provides the free speech you could restrict speech in the United States at the time of the first World War if it constituted a clear and present danger to the Constitution itself. Very-very - very easy for the Government as it did to fetter newspapers to restrict and to shackle the freedom of expression particularly at times of war.

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You get now into America kind of 60 - 70 years after that, now you have to prove in court before you can restrict speech that it operates as a trigger to immanent or immediate lawlessness and danger. So it comes from a very-very narrow to a much wider test in terms of allowing free expression.

And that's what we want to promote that's behind our thinking ja. Not saying that the ideas saying shouldn't have hate speech, of course we shouldn't - that we shouldn't have speech which promotes the degradation of woman or expression. But once you try and codify that in a

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Constitution we think you're asking for trouble because it might not be the intention of persons here or even representors in the current Government but there will come a time when that will start being used as a club or a weapon against people who hold descending viewpoints in society.

That to us is the greatest danger to avoid. It's not saying that society is defenceless or the Government is defenceless, in the case you indicate. The limitations clause in our view as it - even to a approximate wording of the coded one, will cater for exactly the situation which you are referring to. But if you start building the limitation into the right which is as I understand the ANC's proposal, then you actually diluting the right to free expression and not just in the grounds of the extreme case which you present which I think everyone certainly I do, agree needs to be - needs to be prevented that kind of speech and that kind of so-called free expression.

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**CHAIRPERSON:**

Senator ...

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**UNKNOWN:**

Just two points, the first one is in connection with the

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remark made about the one man or one woman's freedom fighters and other man's of woman's terrorist.

I think history has always proved that where the one time one man's terrorist ultimately ends up everybody's freedom fighter. I think you should learn that from history. Not only - not only in Africa not only in South Africa but even inn Europe I mean. The way we reach the currency to actually when we talk about the Western democracy. All those people who brought about Western democracy we 10  
tourist one time or another. So the historical I think we need to have a historical perspective rather than ...

MR LEON:

Can I just clarify what I was saying so that we don't misunderstand each other (inaudible) ...

I am using the illustration about the dangers of trying to curb hate speech because I am saying I consider a freedom fighter and you consider a terrorist can very well differ from person to person. In other words what you say is hate 20  
speech I might regard as the speech of liberation.

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Now that's the problem when you use terms and you try and give them constitutional protection, that so gorilla vs terrorist is just an instance of - is a particular example to try and say the difference between hate speech and free speech.

What is hate speech, who determines what hate speech is, your version of hate speech might be to me liberation speech, that's what I am trying to say.

UNKNOWN:

I think here you are not taking it into context because I think we are saying that we've got other rights which have to be considered when we look into another right for instance there is no way in reach, for instance take the current Constitution. Which I think is very strong on the outlawing of race and gender.

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And so that even when you evoke the limitation clause you are going to evoke it within the context of other rights, within a free depend - equality, democracy and open society etcetera, etcetera. So that our - I think the problem is the way your illustration is not related to other rights which might be in existence.

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CHAIRPERSON: Thank you, I think the senator has yet another question.

UNKNOWN: Ja, I had a second point, I was wondering since South Africa I mean racism and a gender discrimination of the institution allows for a number of decades if not centuries whether if we - we only talk about the (inaudible) ... of information formation with regard to the State only. Will not end up actually privatising apartheid and gender discrimination.

Whether in fact we do not need and constitutional mechanism to address this - this phenomenon which lies in our (inaudible) ... 10

If I may illustrate for instance I mean we you talked about borrowing money but I mean looking for a job for instance in South Africa you still have some situations where you cannot get a job because you are a woman because you are black etcetera or you are disabled or you can again find that you don't gain access to certain - say into a hotel or into some parks and so on and so on. We still find such things. 20

Now are we going to leave these things to private individuals

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to resolve or do we if we really want to democratise not only the State but society such as help to find some way of addressing this matter constitutionally.

MR LEON:

I - I agree - I think it should be looked at particularly by the technical experts to look at this question see what it's implications and consequences are. I would only say that if the equality clause on the Constitution which specifically prohibits discrimination on grounds of gender, race amongst others is given a horizontal application then a lot of the issues which you've raised here and I think a who is of legitimate concern will actually be taken care of in that section of the Constitution.

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You won't actually have to rely on the freedom of information clause, it will not be possible to discriminate on grounds and that would include discriminations in the employment field or in the accommodation field.

And it might also be that we need a civil rights act as an companion piece to the Constitution. So I am not for a moment saying that these issues shouldn't be addressed, I

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think they should be, I think they should be clear to investigated by us or by our experts. The only question is do you fit in best under the freedom of information or does the equality clause cover it in any event and you give that proper horizontal application.

CHAIRPERSON: Any further questions to Mr Leon - Doctor Max.

DR COLEMAN: Ja, one more, I'd like to come back to the question of freedom of expression under 15(2) which your party supports .

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You know I've got not problem with the fact that media under the control of the State should be regulated to ensure impartiality and diversity of opinion. But shouldn't the same conditions apply to all media why only to State media. For example if one has a newspaper which is now embarking upon vendetta not necessarily using hate speech or any extreme forms, but carrying on a continuous champagne shall we say. Which tends to towards - to partiality in fact and actually doesn't express a diversity of opinion.

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What do you do about that?

CHAIRPERSON: Mr Leon?

MR LEON: Yes let me respond I mean I often feel personally or politically that I am the victim of a venditio and Mr Ken Owen in the Sunday Times never seizes to use an occasion to have a go at me on one ground or another.

Two years ago it was because our Bill of Rights the DP's Bill of Rights was deeply disappointing because it made too many concessions to equality and not enough to promote liberty.

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Two weeks ago he accused me of leading a party of property owning Tories or something like that. Now you know I feel aggrieved by his remarks I think they're unfair, they might not necessarily have balance or impartiality what can I do about it. I suppose I could write a letter to his newspaper. Should he have the right - should he be under some duty not to ever write a column or not to use his newspaper as an engine of propaganda for a particular viewpoint, I would

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say he should never be under that duty and I'll give you - I'll tell you when we start trying to get newspapers or radio's which - stations which are owned by private or run by private concerns or by particular interest groups to provide for this right, we on a slippery slope towards actually stultifying freedom of expression diversity. With I think dangerous consequences.

However, you know political hurt I might feel by certain vendettas carried out as I perceive it by certain newspapers against my party or myself. My abrea for example and understanding, organ of the ANC, sorry - my abrea - well I mean it's an ANC propaganda sheet or well that's what was set up to do and it happens to be sold in the CNA and available to the public. But it gives the ANC a viewpoint.

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Now you going to make that subject to a - to a requirement to be impartial and to have a diversity of opinion. I think you get into a hopeless situation. I really think that a newspapers do have diverse opinions and they are often partial in their editorial views. I think so be it.

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But I really believe and this is fundamental that when the State with its control over the public broadcast which it has and will continue to have because it's subsidised by the tax payer, and by people's money. I think there is a different consideration, in so far as the State controls the media. I mean if the State seizes to have anything to do with any media then this doesn't apply. But that is our viewpoint and I don't see how ever tempting it is and, I have a lot of sympathy, if you got to do it on any other basis.

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**CHAIRPERSON:**

I am really enjoying this very aridity discussion but there are a number of other parties that still have to get going, so I would urge members now without curbing any debate whatsoever whether there are any other questions to Mr Leon arising out of the DP papers?

**UNKNOWN:**

Just one questions.

**CHAIRPERSON:**

Yes certainly Webster.

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**MR MFEBE:**

Let me give a practical example comrade chair. In Welkom the first day I stepped my foot funny, I was the first person

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to realise that, came across a place newly opened called Fun City, it's advertised people can come. There it is written in bold well mannered whites only, how would the DP deal with that situation.

MR LEON:

Ja, I would - I would personally take strong exception to that, I would secondly use the anti discrimination provisions of the equality clause to deal with that. I certainly wouldn't think that the freedom of expression or information is actually going to assist you one job to get into Fun City.

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But I am not sure I qualify on myself all though I a white, I don't know if I meet the (inaudible) ... requirements of that particular prohibition.

CHAIRPERSON:

Right if there no more questions, I think Webster very much for that lighter moment in today's proceedings. We throw the chair back to sir.

CHAIRPERSON:

Thank you very much Chairperson - it's been suggested by the secretariat that we take a short break now for tea if tea is ready. The issue I have before me as well is that the

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Freedom Front, Doctor Mulder has had to leave the meeting, he might try and be back but he might not be here in which case immediately afterwards the - the ACDP is now here so if we could get your summary of your submission afterwards and then the National Party and then we've got to discuss certain administrative procedures about the way ahead for the next meetings.

Thank you, so we'll break until half past ten.

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**ADJOURN FOR TEA**

**ON RESUMPTION:**

**CHAIRPERSON:**

... if we can recommence proceedings. The Freedom Front is still absent and they won't be making a submission unless they arrive shortly but Doctor Mulder said will we please their submission and we will do that if he doesn't arrive back.

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The ACDP has now joined us and their submission is in the second document additional it's headed, late submission.



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On freedom of expression and information which - it's a very - it's quite lengthy it's a total of about twenty pages, could we ask Mr Green if he could just summarise the submission and rather than read it out because it might then encourage debate.

MR GREEN: Ja.

CHAIRPERSON: Thank you.

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MR GREEN: Thank you chairperson I just wish to make an apology again to yourself and the meeting for not being on time this morning. I had some other party duties to perform. We have to make submissions to all the six Theme Committees and we not sitting on all of them, so that's the work we have to do.

Now I am going to summarise, what I am going to do, I am just going to highlight the ideas I think I can actually do it in a page and a half, the entire 16 - 20 pages.

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In terms of freedom of expression the first page is just a

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viewpoint that the ACDP has and that is merely introduction. On page no 2 I think the important idea there is, is the second paragraph we saying that democracy is built on the desires of the people for righteous and moral justice and we emphasise the issue of moral justice. Responsible civic duty as well as the realisation that limitations exist.

Now we say the reason why we want an limitation on this right is especially on the recognition that human beings are sinful and we believe that this right can be abused and we would like to have limitations on it.

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In the third paragraph we saying that issues like pornography has as it's object the enforcing of blatant economism, sex cells and the more we reduce the God in doubt value of intimacy to materialistic level. We dehumanise people of their (inaudible) ... elevation of money. I think that is our main objective and our main problem with the freedom of expression.

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We fear that the freedom of expression could be and is being abused by people who wants to - who are materialistic

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and in fact abuses that right and we feel that our society and our people needs to be protected against that.

On the last paragraph the end on page 2 we say the question is not whether we should have censorship for the some - for some kind of censorship is inevitable. So we believe as a party we believe in the issue of censorship.

On page no 3 we say the real question is what kind of censorship should be applied. I think that is what we want to debate. What are the principles that we must use to apply censorship, now we need a censorship that is based up biblical values, that is what we as the ACDP believe. Where the rules are laid down for civil law and Government is based on Christian morality and that is our approach.

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In the third paragraph we say we in the ACDP believes that freedom of expression should also include the right of censorship. No nation can remain free once moral norms have been eroded. It is when obscenity, promiscuity degeneracy, homosexuality and lesbianism are allowed to be represented to the public as healthy and normal phenomena.

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A moral vacuum is created.

And Chairperson I think that is our major concern that with the - with the freedom of expression we fear that - that pornography will be - will be - will be presented to the public as something which is normal and which is healthy and we feel that, that is wrong.

So we need censorship. Now the second last paragraph on page 3 the ACDP is of the believe that the exercise of these freedoms carry with them duties and responsibilities and involves the application of restrictions and limitations.

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We adhere to the principle that the right freely to create speak, write and publish sentiments or expressions on all subjects shall not be infringed. So in principle we then agree with the right.

But on page 4 we say we, however, deemed as (inaudible) ... those expressions that can be classed as defamatory obscene or profane and which by it's very nature is an abuse of the right of expression. So that is the crux of our

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argument is that we feel that we should give that right, but we - we want to limit the abuse of the right of expression.

We imitate our create of our very talents through artistic freedom of speech and the written medium in that we have been supplied with the necessary physical pre requests of creation.

That which is obscene profane and defamatory is the distorted application of this right. And because of it's implicit polemic orientation should be subject to civil redress.

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Now I think the crux of our paper is actually on page 4, where we introduce where we would like to add to section 15 and maybe we should debate this point. We are saying at the bottom page no 4 the freedom of expression should be restated as the expression of freedom and not the freedom of expression. The expression of freedom in this sense freedom will be understood as the value birth in discipline and in struggle and expression as the responsible ethic emanating to protect the value of freedom.

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The ACDP wishes to add Section 15 of the Interim Constitution a paragraph which will state the following. The right is proscriptive to the extent to which it brings into jeopardy the interest of national security, territorial integrity or public safety. For the prevention of disorder or crime for the protection of health or morals, for the protection of the reputation of rights of others for preventing the disclosure of information received in confidence. And we would like to add this sub section to Section 15.

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And we've actually taken it - Article 10(2) of the European convention for the protection of Human Rights.

On page 5 the important thing there is 2.3 should the right under discussion impose a constitutional duty on actors other than the State. We say yes, although the right is more creatively exercised by natural persons or members of society and juristic persons, shall exercise this right with the proviso that the fundamental right to dignity is respected.

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On page 6 the question is asked who should be the bearers of the right, we say both natural and juristic persons.

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Should the right under discussion be capable of limitation, of course the ACDP is against abuse of freedom of expression. Whether it is hate, speech, immoral acts or obscenity in which ever form. No example of obscenity has such a clear impact on the fibre of society as has pornography.

Now chairperson all the other pages is - we are just quoting a lot of research that has been done and documents that we have - that we've actually gone through with reference to this right. So page - from page 7 right up till we would say page 11 actually is just for our argument is actually just being defended in those pages.

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But now on page 12 I think there is an important paragraph that I want to highlight, which is paragraph 3 the well known argument is that one cannot legislate morality and that's the point I want to make. This has been so frequently and smugly repeated that it has almost taken on the cloak of natural law. The counter to this surely must be that all laws have a moral content and we want to emphasize this if one considers theft, fraud, liable, rape incests or murder to be

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illegal, one does so because of one's sense of morality.

So if people say that we shouldn't legislate morality then we should actually look at all the other laws and we simply say that laws simply codifies moral values.

Now in conclusion chairperson I actually want to refer you to page 15, the second last page is that the ACDP opposes the undemocratic and irresponsible method of approaching this right, evidence by Doctor Buthelezi. We feel that the statement which we - which he has made and he said that no-one in this country will ever again decide what other intelligent and racial being may read, hear or look at. When he appointed a task group to revue South African censorship legislation.

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Now why make a statement like that if you ask a task group to investigate legislation and contrast this was just a few of the large number of submissions received by the Constitutional Assembly.

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Now we have gone through all the submissions, public



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submissions made by the public and we've quoted some of the submissions made by the public as far as the - the issue of this right of freedom of expression is concerned and we can just bring it to your attention that there is a huge volume of people that actually wants this right to be limited.

In conclusion the last paragraph the ACDP takes a clear stand and state that it will accept clear moral boundaries of limitation of this right. In that it must be exercised, responsibly and not in manners and ways, harmful to the family and the attending and normal values of monogamy and marriage to one partner for life. Thank you Chairperson.

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**CHAIRPERSON:**

(inaudible) ... could you also at the same time address our paper on freedom - on access to information please.

**MR GREEN:**

With reference to access of information on page no 1 we say in Section 23 of the Interim Constitution the unique feature of this right in our Constitution underlines our commitment to democracy. In the third paragraph the ACDP believes that transparency and accountably are biblical principles and

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this right is therefor to be entrenched as a hallmark of responsible Government.

At the end of this first page we say as far as the right remains beneficial for the persons involved the required information should be made readily available.

On page 2 the ACDP wishes to stress that unless the duties and responsibilities are clearly spelled out as foundational values to the application of fundamental rights. The right under discussion will suffer abuse and give rise to State control and authoritarianism.

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As far as the application of the right is concerned the duty to be opposed - imposed on the State. Now we know that South African Government of the past is notorious for not observing accountability to it's citizens. The inclusion of this right is endorsed especially during the period of transition.

We know that the past tendency was to obscure immoral and unethical practises behind undefined State interest. And it is submitted that citizens will only benefit from

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having easier access to operations and direct impact on individual lives.

As far as 2.3 is concerned, the Constitutional duty on actors other than the State we say no this right should be vertical in application only.

As far as 2.4 is concerned the bearers of the right, we feel that the natural persons should be the bearers of the right and not juristic persons. We believe that juristic persons have access to information through established processes of law and the individual does not have the leverage to obtain information and the individual is most likely to have this right denied that is why we would rather give it to the natural person, the individual.

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And 2.5 should the right under discussion be capable of limitation the ACDP holds the view that the rights should be capable of limitation as with any other right and here we just referring to the previous Government, State security, State of emergency and so on, was used in the past and we feel that, that should be avoided.

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The public there should be public structures so that there is openness, accessibility and accountability to the community at large. Thank you chair.

CHAIRPERSON:

Thank you mr Green, any questions to the ACDP on their submissions on these two issues, yes.

UNKNOWN:

Mr Green, on that last paragraph on page - page 13 is it, no - no page 16. We - I am speaking here from - not on the ANC viewpoint but from a specific religious viewpoint, we agree with the ACDP's contention on immorality, we - you know and the kind - the kind of moral values that we have to uphold, we completely agree with that.

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But in your last paragraph you say that the normal values of monogamy, now we have a slight problem with that. So I think what is normal for one group of people doesn't necessarily have to be normal for another group of people.

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And as far as the Muslims are concerned, polygamy is allowed where under certain conditions and with certain

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criteria and that is a normal value in our value system.

So I - I am not quite happy with this and I'd like to say that to you.

MR GREEN:

Ja - thank you Chairperson, I think I understand my colleagues concern with regards to marriage laws. We also note and we also understand the past Government's discrimination particularly against the Muslim community as far as marriage laws are concerned.

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I think as far as the ACDP - I think every Government has to make a choice when it comes to the legitimization and the acknowledgement of marriages.

If our Government is based on Islamic law naturally the Government of course will have to accept marriage of more than just one person or what. But I think from a Christian point of view we actually have a problem with that. The first problem that we have and maybe I should express this here is in some of the religious laws you find that, that men has the right to marry more woman, but woman doesn't

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have the same concerning right and we feel that is not right. We feel - we feel that if we have to treat woman equally - that is discrimination, then we shouldn't give any right to men which we don't give to woman.

UNKNOWN:

I'd like to say first of all the Islamic marriage and I said with criteria and conditions it was put in the - became part of Koranic law for a reason that during the wars a lot of men had died and there were a lot of widows and the Islamic society at that time felt that, that would be one way of giving shelter and dignity to woman and children, widows that were left behind.

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And this also does not necessary only apply to the - to Muslim marriages but also African customary law. And - and I think it is problematic when it's put in this way that it is a normal value, this is what I am objecting, because it makes everybody else abnormal.

CHAIRPERSON:

Sorry, I think we should try and deal with the main thrust of this meeting.

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MR GREEN:

Ja I want to - then I - then I want to - that is our understanding of normal, but if it offends my colleague then I am quite prepared to take that word out of our submission and just represent it as the ACDP view.

It is a contentious issue but that is our understanding of a - a normal relationship. I understand that as far as the Islamic view is concerned and I also do not wish to say that I disrespect what the person is saying because I think that a view is important.

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But the Christian basic view is monogamist marriage and maybe I just want to make that point.

CHAIRPERSON:

... the other forum as well when we look at this sort of institution of marriage and family life and so on when we actually discuss it, religion tomorrow, that might be if we can develop the argument. Any other views, freedom of expression, freedom of information, questions the ACDP, there being no further questions to the ACDP.

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We now move on to the National Parties submissions which

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appear on page - start on page 16 of your - of the first volume and in fact the freedom of expression ones begin on page 21, perhaps Senator are you doing the submission, you could start with freedom of expression then move backwards to the right of access to information.

MR RADUE:

Thank you, I am indebted to you Mr Chair, the National Parties viewpoint is that in respect of the content of the right, the freedom of expression is a very broad concept, it goes beyond speech, it deals with all forms of communication and it even includes the right to remain silent.

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6 and 15(1) of the Constitution extends the freedom to the press and of the media to artistic creativity and scientific research. And 15((2) make specific provision that in regard to State subsidised media the Constitution requires that impartiality and the diversity of opinion should be reflected in the exercise of freedom of expression, through that media.

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In regard to controversial issues, we do not believe that the



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Bill of Rights should or could provide expressly for every controversial issue that might come up. And that is why we support the broad and inclusive approach included in the drafting of the present Constitution. And we think that the present - the present clauses covering the freedom of expression are sufficient and should remain as they are.

In regard to the nature of the duty on the State, the freedom of expression is in fact a corner stone of democracy and therefor the State has a very special duty not to interfere with the freedom of expression.

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The State is also a further duty to regulate any conflict which may arise when an individual or a juristic person exercises this right to the prejudice of other persons rights such as privacy or human dignity.

And the State fulfils that duty through the regulation of the rules of law governing defamation. I think that, that is something that the DP stressed and I think it's extremely important that we in this country have a very sophisticated law of defamation which to a large extend does regulate the

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situation in regard to the freedom of expression.

The application of the - of the right itself. The constitutional freedom really applies vertically and in principle private persons should not really be constitutionally bound by the right. As their relationship with other individuals, natural or juristic is regulated by strict laws of deformation executed through the courts.

However, that is not to say that there can't be any horizontal application and the courts in applying private law may well find themselves wanting to refer to the spirit purport and objects of the Bill of Rights as provided for in Section 35 and to the extent that the Bill may be applied by the courts in this regard, certainly there is horizontal application.

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Bearers of the rights, we believe that the natural and juristic persons should be bearers of the rights.

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In regard to the limitation of the rights, the freedom of expression should be limited in certain circumstances,

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circumstances such as hate speech, obscene speech and so on. And here we slightly differ from the DP in that as crucial as the freedom of expression is in an open and free democracy, the right can come into conflict with other rights for example human dignity or privacy, the right to a fair trial. Abusive children, property and so on.

Here the freedom of expression must heal to limitation in terms of the limitation clause. Not because it is necessary so much, but because it is in fact reasonable and justifiable.

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When the freedom of expression relates to free and fair political activist then as Mr Leon our chairman today, pointed out that clause in fact created an additional category where in the light of the Interim Constitution and the negotiations certain additional test were applied and restricted limitations would also apply. It's provided for in Section 33(1)(bb) was the exercise of a right to freedom of expression in those circumstances also necessary. The question is asked.

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The wording should stay the same, I think that's about a

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clear summary of our position in regard to the right to freedom of expression.

If I can move on to the right to access to information. This right is primarily directed at obtaining information held by any State body and that includes any State body at any level of Government. Every person should have the ability to inform himself or herself on all matter affecting his or her rights. So as to effectively take part in the democratic processes ... (inaudible)... now the present Constitution in Section 23 limits the access to information, it actually has a clause in which qualifies the right to access to information. Which quote is required for the exercise or protection of any other right and we really question whether this limitation is now necessary.

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Certain Government information clearly relates to State security which may not in any way affect the individuals rights. And here not duty should be on the State to divulge. However, as long as the right is qualified in the Constitution the onus is always on the individual to prove the necessity to exercise or protect his or her rights.

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Now we think that is to an extent unfair on the individual. It gives the State an unfair advantage and therefore we think that the right to access should be unqualified in the actual Constitution. Thereby shifting the onus back to the State to prove the criteria laid down in the limitations clause. And that's how we feel on that aspect.

The nature of the duty of the State, the State should be under a duty to furnish all relevant information as extensively and as widely as possible. Should it refuse to do so, its refusal should be tested by the limitations clause.

10

And I cannot but come back to the thought that was expressed earlier today that probably one of the most important clauses in the Bill of Rights is that limitation clause and we will really have to make sure that, that limitation clause is - is almost could I say perfect in the final constitutional text.

Can other actors be bound, every individual is entitled to protect his or her right to privacy and where information relating to one individual is in the hands of another, the

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former should in fact have the right of access to that information. However, there are other rights to information such as for instance trade secrets unfair competition, and these come into play and the horizontal application in this respect of the right will have to be applied in such a way that we maintain a balance between the competing interests.

The bearers of the rights natural and juristic persons and the limitation. The limitation of a right all sensitive information relating to State security, should be protected but always the limitation must be subject to the criteria laid down in the limitations clause.

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In regard to the wordings we have a specific recommendation on page 20 at the top. The wording of the present Section 23 of the transitional constitution could be retained with the deletion of the phrase in so far as such information is required for the exercise and protection of any of his or her rights. This would remove the onus from the individual and place it back on the State.

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Now simultaneous with that preferably simultaneously with

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that, we should have legislation. Special laws dealing extensively with access to information exist in a number of other countries. And we believe that such legislation is needed in South Africa as well not only to supplement the relevant rights and the Bill of Rights, but inter alia to determine the precise relationship between the right of access to information and the right to privacy.

So we think there should be legislation to cover the position if the words in paragraph 3 on page 4 of 20 are deleted.  
Thank you.

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CHAIRPERSON:

Thank you Senator - are there any questions, to the National Party on freedom of expression the right of access information and their submissions? There no question to the National Party we can then proceed, thank you. Sorry Mr Mfebe.

MR MFEBE:

I am not convinced about the reason for suggesting that you should delete the phrase that is in the existing formation in so far as such information is required for the exercise of protection of any of his or her rights and to opening it

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widely for abuse where one can just claim anything even if it is not relevant for the protection or exercise of his or her own right.

CHAIRPERSON:

As I've already indicated we think that there is definitely legislation necessary in our country to regulate the relationship between the right to privacy and the right of access to information. And we honestly believe that if that legislation is put in place, even prior to the new Constitution being approved, then the requirement that there should be such information - such a qualification in the existing Interim Constitution would fall away.

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MR MFEBE:

Just a follow up Senator, I think you would agree with me that the Constitution is the supreme law of the land and therefor it would have a president or supremacy over any other if one evokes, his or her constitutional right to access to information as wide as it would be without that phrase you are suggesting it should be removed. The one that create a crisis in terms of interpretation.

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MR RADUE:

(inaudible) ... in respond. I wish to draw the honourable



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member's attention, also the fact that there is a limitations clause which always applies. And that, that limitations clause must be applied in the circumstances to the right. So there is always a limitation on the right in terms of Section 33.

We are happy with the present qualifications built into Section 33.

CHAIRPERSON:

Thank you Senator, we now go back to the agenda if you will just haul it out again. Now we've got to first, the - just - we got some housekeeping matters to deal with here, I'd like to read you the following circular. There are no CA activities next week at all. You can go and register municipal voters. The next meeting of our Theme Committee as such as a Theme Committee will be on the 8th of May, but we have a meeting tomorrow so I anticipate, but anyway in the next period.

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There is a meeting scheduled for tomorrow now it is proposed subject to your agreement that we meet in the morning and not the afternoon. I am also advised by the

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secretariat there will not be enough work currently in progress for us to meet on Friday, we should dispose of it tomorrow.

You have a problem tomorrow morning.

**MR RADUE:** We do have a problem, we have a normal caucus meeting tomorrow.

**CHAIRPERSON:** Yes, if all the parties can't reach agreement on it, then we must stick to the schedule, to the meeting as scheduled. 10

**UNKNOWN:** (inaudible) ...

**CHAIRPERSON:** No - no it was a suggestion.

**MS CAMERER:** My information is that, that might be changed but I mean that's very recent and we haven't had confirmation so I don't know if we can still adjust to accommodate the others, it's a bit late now for that. 20

**CHAIRPERSON:** (inaudible) ... just have to if you could - if all parties cannot

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be here tomorrow morning then we must meet tomorrow afternoon and we must leave it at that. Okay would you just - okay so there will be a meeting afternoon now just let me deal with the agenda if you look at - it's on page towards the back of today's document.

Only two parties and I regret to say mine is not amongst them, due a communication failure, have made submissions on the matters for discussion, freedom of religion, believe and opinion.

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Only the National Party and the ANC - not the ACDP doesn't have a view on freedom of religion. Freedom of association and freedom of demonstration. Well those are the subject matters for tomorrow and possibly Friday, although at this stage it doesn't look like the - that Friday will be proceeding as a Theme Committee and we will try and wrap it up tomorrow.

So I don't know what we can do including I speak for my own organisation. Yes we will try and purport to make - to have a documentation at the meeting tomorrow. Well we

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can - if we meeting tomorrow only - only tomorrow afternoon, if we - if the parties who are in default could give it to you by tomorrow morning nine o'clock.

Could those parties who have not made a submission, that - but they aren't here unfortunately the Freedom Front and the ACDP is in the "deepies" here. All right you got your submissions so it's really the two of us, the three - PAC who are a bit behind on the other presentations as well, to please get their submissions to the secretariat by 9:00 and they will be printed for the meeting tomorrow afternoon. And you will just have to read them there.

10

We don't need to discuss the other meetings because that really will be the subject matter of the Core Group meeting which will meet afterwards briefly. So I think we stand adjourned unless there are any points under general that persons wish to raise.

All right, well we will meet again tomorrow afternoon, please take note that the meeting will start at 14:00 in the old Assembly Chamber, the House of Assembly not here,

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thank you.

UNKNOWN:

Comrade Chair you must remember that freedom of expression means amongst other things a right to remain silent if the National Party is silent on submissions they have a right to do so.

MR RADUE:

It is sometimes better to remain silent then to have a lot to say.

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[ END ]

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**THE CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 4**

**19 APRIL 1995**

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**THEME COMMITTEE 4**

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2/4/4/5/11

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CHAIRPERSON:

Good afternoon ladies and gentleman welcome to this Theme Committee 4 meeting. I've been thrust into the chair unexpectedly this afternoon. Apologies from Mr Mdladlalana, our colleague who is unable to be with us this afternoon, so I will take the chair for you.

Are there any apologies, I know there is an apology from Mr Bakker, who is unable to be here, so Rev Vinetti is in his place.

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UNKNOWN:

(inaudible) ... and Professor Kader Asmal is on sick leave.

CHAIRPERSON:

Thank you. I understand Doctor Mulder will be with us a little while later. All right then we can move on to item 3 there are no minutes for circulation or approval this afternoon, so we can go straight on to party submissions. And if I could request the ACDP, all the party's submissions are submitted in the documents so I trust that each one of you have picked up a copy of it for your information and use.

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The first submission is that of freedom of religion, believe



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and opinion. I propose if I may with your permission to follow the course that was set yesterday by chairman Tony Leon who in fact suggested that the party makes submissions on all three, yesterday all two submissions which were before the committee for consideration.

So I am going to ask the ACDP to do just that, to deal with freedom of religion first, then freedom of association and the right of assembly. And we will give you an opportunity to ask questions if any after each particular freedom has been dealt with.

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Mr Green are you ready to proceed sir.

MR GREEN:

Yes thank you chairperson. With reference to the freedom of religion, believe of and opinion the ACDP is in full agreement with the Interim Constitution regarding this fundamental right. We are of the opinion that the State represents the will of the people and that the people represents a large interest in religion.

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Our South African society consist usually of religious people and we therefor believe that South Africa cannot be defined

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as a secular estate because of this important fact.

We believe that the secular state by its very nature will hold the following dangerous implications. Firstly we think it would be an attempt to erase the belief that God is present in the intricacy between the human and the State spheres. When we say this, we do not say that the State has - the church has the right to interfere with the State. We in fact believe that there should be a complete separation between church and the State.

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But in terms of the principles, religious principles that undergrid a society we believe that, that becomes part of the ethos, that becomes part of a spirit of a Constitution and in that sense we cannot really separate these principles from the Constitution making process.

We also think of the danger that it stands outside of the limitation of God's authority. If we say that we should completely separate the principles which religious people hold dearly, then of course the State will stand outside the authority of God and we believe that as an instrument of society, this State cannot stand outside the authority of God.

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We believe a secular State is a distortion of the meaning of human society and society is made up of a collective unit of people, each with a spirit nature that invest in the State it's spiritual character. So the character of a South African State will reflect the religious character believes of the - all the people of South Africa.

On page 2 in the second paragraph we say we further believe that the strength of the sovereignty of the Constitution will lay in it's recognition of God as sovereign over the State be reflected in the preamble of the Constitution that states we are a nation under the authority of God.

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Now chairperson I just want to bring this to the houses attention that we - we have received several letters and several public submissions on this issue of the preamble, in fact there are persons who in fact feel that the whole idea of a deity should be removed from the preamble.

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We believe that, that could not reflect the collective of society which is religiously inclined and that in fact believes in a deity or in a God as we understand it. So therefor we

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believe that should become part of our preamble.

UNKNOWN: I (inaudible) ...

MR LEON: Mr Chairman, on a point of order, could we not confine the discussion to the subject matter before us?

CHAIRPERSON: I think with respect Mr Leon that he is just fleshing out a little bit the motivation. But I'll ask members to stay within the ambit of their submissions.

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MR LEON: There is another Theme Committee dealing with the preambles.

CHAIRPERSON: I realise that. Thank you I think he is entitled and his party is entitled to make the point.

MR GREEN: Okay - ja okay chair I'll stick to the submission. As South Africa is blessed with a multitude of facts and religion such a preamble will of course provide a great deal of religious tolerance.

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As freedom of religion holds great advantages for the

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regular function of the State with regards to responsibility, lawfulness, productivity and tolerance it is of equal right that religious observances should be tolerated in State and State aided institutions for example in schools, in Government institutions and others.

On page 3 the bottom paragraph the ACDP is against any type of authoritarianism or despotism but we will oppose any believe system that includes in it's practice activities such as murder, rituals, cult practises witchcraft or any form of repressive acts so there is a riding terms of tolerance, if I could explain that Chairperson.

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That all though we believe in religious freedom we say that there shouldn't be entirely carte blanche when it comes to murder rituals or sacrificing of human beings and so on. There should be some kind of restriction in terms of that.

Now on page 3 top of page 3 Government is instituted to uphold justice and moral integrity and in instances where there is principles are perverted there should be prosecuted against.

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The ACDP believes that any believe system that stray from Godly morality and perform murderous rituals should be seen as evil doers and such system should be prohibited. We further oppose any State interference in the normal functions of religious practices or reject the idea of a State religious ministry that regulates religious affairs.

We also believe that no rules should be made to prohibit members of the clergy from holding public office in so far as the role of the State and church is not confused.

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And then on - at the bottom of page 3 the ACDP would want to make - propose and authorization to Section 14 of the Constitution. Section 14(1) and (2) and we would like to make the following changes.

We say here that every person shall have the right to freedom of conscious, religion, thought, believe and opinion. But we want to add which are consonant with public order and Godly morality. And we want that to be the determining factor which shall include freedom in institutions of higher learning. So we would like to include that.

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And (2) without derogating from the generality of (1) religions observances maybe conducted at State or State aided institutions and we actually want to remove under rules established by a appropriate authority for that purpose. And then just conclude on the basis and attendance at them is free and voluntary.

As far as the application of the right, the ACDP of course imposes it's duty upon the State to ensure that religious practises uphold public order and Godly morals. And I think I have covered the Section 14(2) and the application to customary and common law the right should apply to common laws and (inaudible) ... law.

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We also believe in both the horizontal and vertical application of this right and we believe all natural persons as well as juristic persons like churches, academic institutions should lay claim to this right.

And then in conclusion we believe religious believes that manifest themselves through ritual murders and forced bigamy, cultic expressions or violence explicitly promoting public immorality should have limitations imposed upon

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them.

CHAIRPERSON: Thank you.

MR GREEN: Just briefly chair the freedom of association Section 17 ...

CHAIRPERSON: I - I would just like to at this stage to give the other members an opportunity to impose any questions on that particular standpoint of the ACDP. Are there any questions relating to the standpoint of the ACDP?

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There being none then I think you are free to continue with freedom of association.

MR GREEN: Yes, Chairperson in terms of freedom of association we also accept Section 17 of the Interim Constitution. We believe that the inclusion of this right is constitutionally correct. But all though it is political - politically controversial and we will explain why it is so.

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It is dependant upon the character of our nation to allow this right as long as the rights of others are not infringed, or the stability of society tested. But freedom of association or



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disassociation is a democratic right that caters for the respect of individual privacy and for institutional cohesiveness and freedom. As regards all rights responsibility and the collective value to uphold the goodwill of all people are the corner stones for effective exercise and manifestation of fundamental rights.

The founding of voluntary and statutory associations rest on the assumption that individual and community rights are protected and that the fundamental rules that hold these diverse sectors together, are the basic human values of love, respect, honesty, truthfulness, accountability and a divine spiritual bond. Society demands that the laws which encourage justice, transparency, peace, morality and social upliftment should be maintained.

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These are requirements for social stability and neighbourliness. The right of freedom of association should be limited to these.

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**CHAIRPERSON:**

Thank you. Any questions of the ACDP in regard to this freedom - seems not. Could you proceed then to the last one, freedom of demonstration and petition.

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MR GREEN:

Chair, in conclusion as follows demonstration is concerned we propose Section 16 of the Constitution to remain as it states there. We believe that the right as where it promotes a healthy and peaceful protest with the least amount of injury to the demonstrator and history has actually shown us the amount of injury that is done to peaceful protest and we - we reject that from the State and we say that as far as the authorities are required they dignified response in handing the right in questions, not the beating up of people and the brutalising of people.

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It is imperative that as much assistance is given to protest this by the State in order that the right of peaceful demonstration and petition be made possible. To give an example chairperson the person hasn't applied to march and so on and it would in fact disrupt them by sending - telling them that the march is illegal. It's in the interest of the State rather to allow the march to take place instead of declaring it illegal and causing a lot of disruption and a lot of harm.

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The ACDP is of the opinion that the dignity of the person is protected through the needs of this right. If a

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demonstration intends to be provocative or induce violence or hatred where the security of the State and lives of the community is threatened then we feel that the right should be withdrawn.

The right to assembly or to have public meetings is also subject to such stringent measures with regards to the prohibition of arms or any type of weapon. So in the case of people displaying arms and cultural weapons and stuff like that, those are the kinds of demonstrations we believe would not be conducive to promoting this right.

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In conclusion chair on page 2 and 3 any form of strike action or demonstration that reach to violence should be penalised and the cost of damages incurred by such action should be paid for by those responsible for the creation thereof. And any strike action or picketing that has - as it's arm the breakdown of political stability or to bring the economy to it's knees, should be deemed as undermining State security and should be classified as illegal.

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However, State security cannot be used as an instrument against us where flavourant corruptions or digitorial

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relationship are the order of the day. So I think we are actually putting a balance here between the security of the State and the right of the person to picket or to demonstrate.

The ACDP proposes that resources of an independent public protector system or similar persons be made available to mediate on issues relating demonstrations and petitions. If we cannot find out whether they are in fact or have the legal right or they transgressed the public (inaudible) ... we say that the public protector would be able to - to be able to determine whether the right is exercised correctly or not.

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Not as far as the application of the right, common law, it should apply to common customary law and as far as the constitutional duty on other actors, other than the State we say no. The right to freedom of choice is an - the right to freedom of petition in fact is an individual responsibility and that the right is constitutional - it strengthens the democratic principles upon which our society is based.

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The rights should apply to both individuals and juristic persons. And in conclusion a no right is absolute nor can it

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be arbitrary exercised, the right as it is worded provides it's own specific limitation as being peaceful and unarmed and should be imposed as such. I thank you chairperson.

**CHAIRPERSON:**

Thank you Mr Green. Any questions arising out of the paper submitted by the ACDP on freedom of demonstration and petition? There appear to be none, it seems to me like we've got a fairly uncontroversial afternoon ahead of us, I hope so. We'd now like to move on to the ANC, can you tell me who will be leading - Naledi - Ms Pandor.

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**MS PANDOR:**

Thank you.

**CHAIRPERSON:**

Welcome.

**MS PANDOR:**

Thank you Chairperson, on freedom of religion, believe and opinion the ANC's view reads thus. These rights are part of a cluster of core rights dealing with freedom of expression, association, language, culture and information. Some of which we will deal with later but it is a core.

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At the epicentre of the rights dealt with under Section 14(1) of the Interim Constitution is the right we dealing with at

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this moment. It is our believe that the right to freedom of opinion, an academic freedom are best dealt with elsewhere, we've stated here freedom of expression, but we believe that in revising our preliminary submission we probably would look at this particular aspect being dealt with under others of the rights that we will look at.

The ANC believes that there shall be freedom of worship and tolerance of all religions. Places association with religious observers shall be respected and none shall be barred from entering them on grounds or grace. Inherited these rights is the recognition and acceptance of diverse believes.

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We propose the following formulation, every one shall have the right to freedom of conscience, religion, thought or believe. We have no objections to the provisions as set out in Sections 14(2) and 14(3) of the Interim Constitution.

Under application of the right we believe that there would be a positive duty on the part of the State to ensure that the rights are protected where violation occurs.

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Freedom of religion, believe and thought invariably do impact on customary and religious rights and on the laws related to these as they apply to such customs and traditions.

We believe that the rights should bind all individuals, institutions and structures, therefor they should apply vertically and horizontally. The bearers of the rights would be natural persons, and under 2.5 which deals with limitations we have stated that the holding of a believe or thought - religious or otherwise cannot be limited, however, the manifestation of the believe or thought, can under reasonable circumstances be limited in an open and democratic society.

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Such limitations may be permissible in order to give effect to other rights in the Constitution particularly at times the right of equality. And the freedom of association we put our view thus.

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The right of freedom of association ...

CHAIRPERSON:

Could I - could I just stop you at that stage and just ask if

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there are any queries or questions on the ANC's standpoint in this regard. There are none, thank you could you proceed Ms Pandor.

MS PANDOR:

Right on freedom of association, the right of freedom of association includes the right to join religious, social, cultural, political bodies and to join trade unions and to form and participate in non-Governmental organisations.

This core of rights protects free and fair political activity and impacts in our view directly on labour law. Article 20 of the universal declaration of Human Rights and Article 22 of the international covenant on civil and political rights, specifically deal with this particular right.

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Given South Africa's history, there has been concern raised that the fact that the right to freedom of association can be used as a shield that protects privatised apartheid or gender discrimination. In our view a strongly quality clause and a provision similar to Section 33(4) in the Interim Constitution which specifically deals with the virility of laws designed to prohibit discrimination by private clubs, associations or individuals, is adequate to counter such treats.

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The right in our view may be formulated as follows. Every person shall have the right to freedom of association.

**CHAIRPERSON:** Thank you.

**MS PANDOR:** In terms of which is in fact very similar to what appears in the Interim Constitution. In terms of the application, we believe the State shall have a duty to protect the right against violation. We believe the right includes the rights of association with religious customary or cultural institutions. It does impact on these structures and thirdly that it should bind private institutions, individuals and social structures.

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That natural persons or natural persons as a group or collected for example church organisations, labour unions etcetera should be holders of these rights.

In terms of limitations we have said the usual criteria in an open and democratic society would have to apply, however, where the association is of a political nature, we believe the limitation should occur under much stricter conditions. In addition we believe a provision similar to 22(4) in the Interim Constitution could perhaps be a specific

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constitutionally permitted provision dealing with the limitation in this particular right.

I pause there.

**CHAIRPERSON:**

Right, any questions in that regard to the ANC - it seems not, please proceed. Right to assemble, demonstrate and to petition.

**MS PANDOR:**

Within this third right, we believe these rights are inter related with freedom of expression, free and fair political activity and other similar rights.

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All men and woman shall have the right to assemble peacefully and without arms. And to submit petitions for the readdress of grievances and injustices.

The exercise of the right occurs with due and proper consideration for the peace, safety and security of other people, hence the qualifications of peaceful and unarmed assembly or demonstration. This right also finds expression in Article 21 of the UN declaration of Human Rights.

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The presentation and receiving of petitions has been frequently used in organised political activity in the past and continues to be an effective mechanism to articulate grievance or express support or opposition.

In terms of the application of the right, we believe that it does impose a positive duty on the State to protect the right. We believe the right should apply at all levels of civil society. And that all persons, institutions and structures should be bound by the rights.

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We believe that natural persons should be the bearers of the right and in terms of limitation I refer you to 2.5 which I dealt with earlier. And we've added a 2.6 there in which we say that suspension under state of emergency under judicially controlled circumstances might occur.

We believe a formulation of the right as it appears in the Interim Constitution is one that we accept.

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**CHAIRPERSON:**

Thank you very much. Any comment on that submission by the ANC? None, then that concludes their contribution, thank you very much indeed. I'd like to move on to the DP,

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the Democratic Party. Mr Leon could you lead us?

MR LEON:

Thank you Mr Chairperson just to make two preliminary points, the first of personal explanation I unfortunately would have to leave after my presentation and if my apologies could be noted with the remain of the meeting, I am in no discourtesy to the remaining parties to participate but unfortunately that sometimes happens.

The second I am not going to read out our - I'll save you the torture of listening to our whole opinion being read out, it is in front of the committee.

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I just want to make a number of points generally, we obviously agree with all three of the rights under discussion and subject to a number of stylistic and positional changes we believe that they should be retained.

What we would propose instead of the current formulation and this is a point made by a number of other parties as well in different ways is it really - I think from a point of view a good constitutional health scooping we need to rearrange where these rights appear. For example the

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existing clause 14 lumps together freedom of conscience and religion together with academic freedom for example.

Now academic freedom to us is absolutely fundamental and it needs constitutional protection. We deal with that later but we not quite sure that this is the right place in which to place it.

We also think that to use the ANC's expression of a core of rights that exists and to promote liberty and freedom that this core really does include freedom of conscious and religion, freedom of speech and everything we discussed yesterday. And that freedom of the peaceful and unarmed assembly and freedom of association.

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Well we propose to composite right dealing with all those topics and I am on page 18 of the preen document which we call a right to fundamental freedom. So this is not something one is going to die and ditch over, but it is to us a more practical and logical way of arranging these constitutional rights.

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Having said that of dealing with the - dealing with the issues

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before us we believe that the freedom of religion and conscience clause can be broadly expressed. We don't think it requires all the qualifications and hedges which the current Constitution have being built around it because it should be a free standing right and the interpretation which exist there about the State dealing with various marriages and types of marriages and access can really be dealt with under the existing limitations clause or just by simply having the existing right and then using that as a guide to future legislation or executive acts.

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At the top of page 19 we make the point that and in fact there is a misprint there in the haste to produce this document as regards to the right it says to education, in fact it should be to freedom of religious, religion and believe, South Africa does obviously have a multitude of faiths and believes and one of the fortunate aspects of our history is that there has been actually a strong presence of religious tolerance in this country. Though it wasn't in many other spheres there seem to be in respect of religion.

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And we believe a broad general formulation should allow the courts to give practical affect and content to the right as

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it involves.

Now the other aspect of this right as currently constituted under Section 14 is of course the academic freedom provision which we think is very important. We have proposed the foot of page 18 an academic freedom clause which probably belongs but this is not absolutely clear together with the rights to education contained in Section 32 of the Constitution. That's probably a logical place but that it should be there - a right to academic freedom we have no doubt and we would propose one which reads the freedom to study, learn and teach shall be guaranteed.

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The State shall not try to shape educational, cultural and accordance to any particular political or ideological commitment and the academic freedom of every university and other or similar institution of higher learning shall be guaranteed.

We believe that in view of the past history the assault on academic freedom at the independent universities of South Africa really is something that needs constitutional protection against because we are to avoid those temptations

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in the future.

We also believe that true learning is independent of political control and acts as a greatest board walk against tyranny. Now no doubt it is clear that the authors of apartheid twisted education into a means of repression. We do not believe that should be permitted again and we also believe that true persuasion can only take place in a culture with respect to learning and if you don't have learning then you don't have democracy.

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So we think that the Bill of Rights should seek to guarantee the freedom and independence of learning because obviously you not going to go into the whole question here of education as such and what right - what it means in terms of the State's obligations, because we are dealing here only with that aspect which refers to academic freedom. There is another discussion schedule on educational and other rights.

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Right now on the application of the right to religion and believe etcetera obviously is imposed to beauty is imposed on the State in the first point, not to interfere with either



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believe or religious freedom of others and on other actors, this would be an appropriate clause or horizontal applications subject to suitable limitation in the normal way.

(inaudible) ... a meaningful right to religious practise and freedom then it shouldn't just be empowering of the ordinary citizens, but obviously juristic persons, the institutions which give elective expression to religious expression, churches, synagogues, mosques, temples in the like should also be the bearers of this right. And likewise since we dealing with it here, academic freedom is no good empowering an individual citizen, you must also empower the institutions which in fact are the bearers of that right, such as Technikons and university.

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Limitations obviously the normal limitations apply that's our submission on religious and related freedoms chairperson.

CHAIRPERSON:

Thank you very much indeed. Do we have any questions of the DP in regard to this commission? None then would you - Mr Fairbank?

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MR FAIRBANK:

I'd just like to know the DP's view on satanism as a form of

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religion.

MR LEON: Satanism.

MR FAIRBANK: Yes and would you tolerate it and why?

MR LEON: Ja, well you - well I am going to have to give you an off the cuff response on this, I have actually in the previous Parliament asked a whole series of questions on satanism because it was brought to my attention by a number of concerned citizens in Cape Town and a number of police officers that very-very negative criminal things were associated with the practise of satanism.

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However, we say this, you got to separate the two, satanism per se is a believe or devil worship. If you are going to have a democratic State in which all opinions, viewpoints and religions and never mind religions, aspect of conscience are respected, then if you cannot proscribe satanism as such. But what you certainly must do is to separate satanism as a religious or let's not even grace it with the word religion.

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CHAIRPERSON: Believe.

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MR LEON:

As - as a believe which people can propagate from the criminal aspects with which it is usually associated and I refer here to incest, with which it is apparently associated, rape which is also alleged in respect of satanistic practises. Statutory rape in respect of persons under age indulging in sexual intercourse, and kidnapping and a whole range of other practises.

No in so far as you could make that separation in my view the separation should be made. What would then exist of the practise of satanism outside or absent of that, I don't know. We could of course also say but I wouldn't like to say this. I am a legislator I am a politician like the Constitutional Court to look at it.

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You could also say in fact that the practise of satanism is so diabolical that it actually negates the fundamental clauses in this Constitution such as the right of free religion because it actually impacts directly and in a very negative way on the practise of the Christian religion.

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Now that certainly could be an argument, I don't know enough about the non-criminal aspect of satanism to actually

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pass an informed judgement on that. What I do know is that, that could certainly be conserved, in other words could you limited it in terms of the limitations.

Well I think that is a matter for the courts to do so. But that is a - perhaps a superficial response.

**CHAIRPERSON:**

Thank you, any further questions? None then I would like you to proceed please.

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**MR LEON:**

Chairperson we agree with obviously freedom of association we regard this as a completely uncontroversial right and also an necessary right for the establishment of a democracy. We also believe that the wording is uncontroversial in the Interim Constitution and could be repeated subject I think to our early remarks about your order things, under which headings. But that's all a later stage for debate.

The only aspect which is vaguely controversial should perhaps be put beyond any doubt is whether freedom of association could theoretically give racist or discriminators a shield of how in which to hide in order to privatise or use association to escape other obligations in terms of the Bill

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of Rights.

It's our view and that of our legal advisors that in fact the equality clause as such is going to directly impact on the freedom of association clause and you really don't have to anything else. But to put this issue to bed as it were you could specifically make the freedom association clause subject to equality clause that might have an unfortunate and unintended consequences in other rights. Because once you highlight one you going to then ask questions about the others.

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So in our view it's probably not necessary but the point should be clearly made in the commentary or wherever. As regards to the freedom of association to whom it applies. There is a positive duty imposed on the State it certainly should affect other actors, particularly in the real as far as we understand the customary law, freedom of association exist in one area of society it shouldn't be complied to State action, it should create an obligation on other actors, but the common and customary law level.

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Now obviously once again the bearers of the right would in

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the main be natural persons, but clearly this is not a case where juristic persons should be the holders of the right because after all if you have freedom to associate once you've created the association the association itself should or must be the possessor of the right.

Of course this is all perhaps unnecessarily commentary because the current wording I think of Section 7 does give the wide ranging locus tandi any way so you probably don't need to even answer this question in respect of each of these rights and perhaps the experts and (inaudible) ... could guide on that whether in fact the answer of each of these questions who should be the bearers of rights, is strictly speaking necessary, surely we should fix up a proper locus tandi clause and that might take of that. That's freedom of association.

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**CHAIRPERSON:**

Thank you, any questions - everybody is nodding and saying - they - it looks like they agree with you. Could you proceed to the last one.

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**MR LEON:**

Yes chairperson freedom of demonstration well Section 16 covers this area. We believe as well that there - that is it

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correctly expressed subject only to positioning, we particularly believe that a special qualifications or limitations of unarmed and peaceful assembly being the direct limitations imposed in the right itself, are necessary in our circumstances and in our country. They are also (inaudible) ... with many other international human rights instruments and we think that there should be - that subject to that limitation, in the rights itself, that the right obviously should appear in the Constitution and of course it would what we said in respect of freedom of association, in terms of the bearers of the right being collectivised - election of individuals should apply as well.

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The only remaining question is whether it should have an application outside of the public law domain under common law and customary law and we believe that it should so appear.

**CHAIRPERSON:** Thank you, any questions - all happy. And that's fine.

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**MR LEON:** Thank you chairperson.

**CHAIRPERSON:** Mr Leon since you requested to be excused you certainly

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excused.

MR LEON: Thank you.

CHAIRPERSON: Thank you very much for your contribution. I understand the ACDP also wishes to leave at this stage - we will make an apology on your behalf as well - thank you.

The Freedom Front isn't available just at the moment they have filled their documentation. I understand doctor Mulder may be back a little later so we'll just have his matter stand down and give the National Party an opportunity. I am must just make one point on behalf of the NP and that is that in regard to freedom of demonstration, documents have now been filled but they were not circulated in the batch. But we will ask Ms Camerer just to deal with the various freedoms, stating with the freedom of religion. Ms Camerer.

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MS CAMERER: Thank you chairperson, the National Party believes that the right to freedom of conscience, religion, thought, believe and opinion should be retained in the final Constitution as well as the most fundamental rights of an individual.

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The purpose of the right is of course inter alia to prevent the State from interfering in the personal beliefs of people and from favouring certain beliefs over others. There is obviously an intention between freedom of religion and the right to practise it in schools.

We believe that this has been successfully defuse by the inclusion of Section 14(2) which reflects the South African attitude to the matter and is very similar as we say on page 2, German approach and we propose that it be retained in its present form.

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We spent some time addressing the inclusion of academic freedom in this clause and we believe that there is no compelling reason why it should be included under this right. It was included at the last minute as a result of representations at the World Trade Centre as was Section 14(3) the elements of that.

And perhaps it should be reassessed our basic position is that it should be dealt with in a separate clause which we do offer here and we say that the right of academic freedom would include the right of institutional autonomy. Which

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isn't made all that clear as it stands and that's one of the reasons why we would suggest that a separate clause be included. And we give you the wording of that on - under (3) on page 6 of our submission.

And I don't think I want to go to any more detail about that here unless people have questions. Ja, I think that as far as the assistance of religious community's the inclusion of Section 14(3) is concerned that was also included at the last minute as a result of representations and (inaudible) ... can be created in this regard by way of legislation.

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We believe it should not lead to the preservation of practices otherwise prohibited by the equality tools and the right to children and the rights of others relating to for instance human dignity, life and so on should not be impinged on by such religious practises.

These were specifically geared to be anxieties expressed by the Muslim community about Muslim marriages and of course the question of Jewish divorces came into it as well. I think we are all aware that legislation is being prepared and is in the pipeline to deal with those aspects.

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And I perhaps in that light these clauses could be reconsidered in the light of whether they are necessary to be retained. As far as the duty on the State is concerned, the State we believe have the duty to refrain but also a duty to provide opportunity and scope for the exercise of religions and then principle, the right should apply to common law and customary law.

We believe that the right of academic freedom would by mistake by the State as well as individuals. In respect of other aspects of the right it would in our view appear that only the State would be bound. It follows from our submission that the natural as well as juristic persons can be the bearers of the right of academic freedom.

10

In respect of religion of course a church would also be able to act against the State and so we not entirely in accord with the NC where they put the position matter to the (inaudible) ... the right should only be (inaudible) ... by natural persons, we believe juristic persons could also be the bearers of this right.

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That's nearly all as far as our party is concerned.

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**CHAIRPERSON:** Thank you, any questions to the National Party? No questions, then I'll ask Ms Camerer to proceed with freedom of association.

**MS CAMERER:** We put our provision as follows that the right covers all forms of association, although specific rights with regard to political activities and parties, trade unions and employers organisations and educational institutions based on common language, culture and religion, are provided for in the transitional Constitution. And I think one should have reference also to Principle 12 in this regard.

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As far as we mention the controversial issue of private discrimination and the question as whether the State may limit the ground on which the individual or a private institution may refuse to associate with another and whether the individual institution may be allowed to disassociate on any rational or irrational grounds for instance men's clubs, political party's refusing membership on the basis of language or culture.

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We believe these questions are sensitive ones and that of course was the reason for the inclusion of Section 33(4) of

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the Constitution which provides for legislation prohibiting private discrimination.

Trade union arrangements we feel are dealt - should be dealt with separately. As far as the application of the right is concerned, the State must respect the individuals freedom of association and must refrain from restricting the rights on grounds not covered in the limitations clause.

In principle other actors are not bound in terms of this right in terms of the transitional Constitution private individuals and institutions will be bound only in so far as specific legislation prohibiting private discrimination applies to them. In other words in terms of 33(4) and we feel that the rights should apply to natural as well as juristic persons.

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The limitation clause follows I think.

CHAIRPERSON:

Thank you, any questions - no questions.

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MS CAMERER:

Now I don't know what I want to do with freedom (inaudible) ...

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**CHAIRPERSON:** Ms Pandor she just has a question on freedom of association.

**MS PANDOR:** Thank you Chairperson I just would like to go back to Ms Camerer's comment with relation to the freedom of religion portion of your presentation where you indicated that you are different in your view, the National Party's view from an ANC expressed view that natural persons should be holders of this right.

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And I would just like to in fact correct that and say we in fact have made mention of ...

**MS CAMERER:** Have I misread it, I am sorry - maybe I am mistaken, then I do retract that chair.

**MS PANDOR:** Thank you.

**CHAIRPERSON:** I think you indicated groups of - groups of individuals.

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**MS CAMERER:** Okay I accept that sorry.

**CHAIRPERSON:** Thank you, clarified - right the third freedom that of

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assembly, demonstration and petition, unfortunately the members did not have a copy of the National Party document before them. It is very short ...

MS CAMERER: Do you want me to read it chair.

CHAIRPERSON: I - perhaps I think that - yes if you would just read it and it will be filled on record. it has in fact been handed to the secretariat but unfortunately is not included in the existing.

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May I just add that the PAC have not filled any documentation nor have the IFP at this stage in regard to these freedoms. The PAC have undertaken to let us have the documentation by Monday and that will be circulated by the secretariat in regard to the IFP that remains to be seen what happens.

Do I have the - do I have the members permission then just to allow Ms Camerer quickly to summarise what is in the National Party paper in regard to assembly or would you prefer to see it first and deal with it later - go ahead thank you, would you then ...

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and unarmed demonstration. It's also a duty bound to receive petitions from individual persons assembled with others.

On the other hand the State is under a duty to protect and secure the lives and property of those affected by the demonstration whether they are participants, onlookers or members of the local community.

We believe the right should be applied to common law and customary law, as far as other actors are concerned clearly - historically the right of - to demonstrate and assemble applied primarily between individuals and the State vertically however, by it's nature the application of the right may involve actors other than the State in other words employees against management, students against staff etcetera.

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Natural persons are the bearers of this right as far as assembly is concerned within addition and to the extend that the nature of the right permits juristic persons are also bearers of the rights for instance where presentation of petitions - and you can imagine that a juristic person could be involved.

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MS CAMERER: Okay chairperson.

CHAIRPERSON: Thank you.

MS CAMERER: We say the right of freedom of assembly, demonstration and petition is embodied in Section 16 and this provision accords with the universal declaration of Human Rights which provides that everyone had the right to freedom of peaceful assembly and association.

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And that everyone shall only be subject to such limitations as give due recognition and respect to the rights and freedoms of others which is the foundation of how we approach this.

The essential content of the right is therefore that every person should be constitutionally entitled to assemble with others peacefully and unarmed for the purpose of demonstration and should further have the right to present petitions to their authority.

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As far as the nature of the duty imposed on the State is concerned it has a duty not to interfere with the peaceful

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As far as limitation is concerned to be extend that the State is under a duty to protect and secure the lives and property of natural and juristic persons and the State - and the State during demonstration. It is obliged to regulate the right to demonstrate final legislation however, such legislation must be subject to the criteria in the limitations clause and we would suggest that the wording remain unaltered in the Constitution of Section 16 excuse me.

CHAIRPERSON:

Clear - thank you very much, no further questions and that completes the National Party's submission. I think that takes us virtually to the end of the program in so far as submissions are concerned for today. If you have a look at - if we can move on to item 4 then, public submissions, there is a synopsis of submissions, paragraphs 3.1 to 3.33 above.

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It's in respect of those rights that we have dealt with this afternoon, public submissions and have been analyses and you have a complete breakdown prepared by our panellists in regard to those submissions.

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I assume that in the - that you would agree that in the preparation of our report in regard to these freedoms that

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due cognisance of those submissions from the public must be taken into account in the preparation of that report and we would ask the panel to do that with your permission.

All agreed - fine. Yes Webster.

MR WEBSTER: (inaudible) ...

CHAIRPERSON: Oh! No, I just said that in regard to public submissions we have a synopsis of what those public submissions are in regard to the freedoms we've dealt with today and I've just suggested that in preparation of the report of this committee by the panel of experts that we have, that they also take these public submissions into account and that if there is anything of substance which is not being dealt with in the party's submissions that we include it in the report.

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Which will in any case come to this committee for scrutinisation and approval, okay. Fine is there any other business? As you well know there will be no - no Theme Committee meeting tomorrow or for that matter for the whole of next week and that the next Theme Committee of Theme Committee 4 will actually be on the 8th of May and

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a notification will follow to this effect, 8th of May.

Is there any other business? Would you just make sure that you have all signed the attendance register please, it's rather important just make a point of clearly it with Salyga if you haven't done so.

Anything else - I would just like to ask the Core Group those members who are - are members of the Core Group please just to remain back immediately after this meeting has adjourned. We will just meet for a short while to consider further deadlines for rights.

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There being no further business then I have the pleasure of wishing you a very good luck in the next week with your hard work in regard to the local Government elections. The matter is adjourned.

[ END ]

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**THEME COMMITTEE 4**

**20 APRIL 1995**



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