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FAX TO: Multiparty Negotiations
(011) 397-2211
attn: Melody

For: Technical Committee on Fundamental Rights
Planning Committee

From: Law Reform Project
Lawyers for Human Rights
(012) 21-2135
fax (012) 325-6318
Contacts: Jody Kollapen, Lucrecia Seafield, Sello Ramasala, David Sullivan.

Attached is our revised second submission to the Technical Committee regarding the "interim Bill of Rights." Note that it includes as an attachment a copy of our first submission. Please forward this to all members of the Technical Committee on Fundamental Rights, the Planning Committee, and any other appropriate recipients.

Thank you very much.

Lawyers for Human Rights - Law Reform Project
25 August 1993

Revised Second Submission to the Technical Committee on Fundamental Rights During the Transition, in response to its 29 July 1993 Report

1. Introduction.

This is a substantially revised version of LHR's second submission, which we had prepared in haste and sent to the Technical Committee on the 9th of August. Upon learning that we had additional time, we prepared this revised submission, which is intended to replace the document we submitted on the 9th.

Our first submission, of 30 June (a copy of which is attached), responded to the Technical Committee's Fifth Progress Report, dated 11 June. This document will reiterate some of our previous concerns, amplify or explain others, and introduce additional issues of concern. All of our concerns raised here were provoked by the most recent draft "interim Bill of Rights" (again, the term is ours) contained in the 29 July report.

This report first raises general issues about the document and the drafting process. It next addresses specific provisions of the interim Bill. Finally, it discusses enforcement provisions, which are crucial to any guarantee of rights and which in the committee reports have not received attention commensurate with their importance.

Because we are not sure whether the nature of enforcing agencies falls under the ambit of this Technical Committee (our first submission had recommended that for enforcement a Human Rights Commission and a Constitutional Court should be established by other provisions of the transitional Constitution), this report briefly summarizes our recommendations on a Constitutional Court, a Human Rights Commission, and an Ombud. Those recommendations are outlined more fully in a companion report, which we will forward to the technical committee on constitutional issues as well.

As before, we reserve the right to make additional submissions at a later date, upon further consideration of these issues.

2. General issues.

We initially wish to state our concerns about the development of the document. A bill of rights requires credibility and legitimacy, particularly given this country's history of rights abuses. To establish its credibility and legitimacy, the interim bill must be widely known and discussed.

Based on our personal observations, there is little awareness of the technical committee's important work, and widespread ignorance even about the concept of a bill of rights. Familiarity with the details of the committee's reports seems limited to the legal community. The committee reports are not easily available--a condition which may be acceptable in the cases of other technical committees, but should not be the case for the committee on fundamental rights.

As a human rights organisation, we have learned that protection of human rights requires extensive human rights education. Publicizing the draft interim bill is not the responsibility of the technical committee; rather, the political parties involved in the negotiations must inform their grassroots supporters, the media should publicize contentious issues, and non-governmental organisations must raise awareness among their constituencies. These organisations seem not to be sufficiently doing this right now.

Nevertheless, the technical committee has an important educative role to play. As we suggested in our previous report, it must allow sufficient time; otherwise, the debate will marginalize constituencies who are not well-organized, well-represented or well-informed. The technical committee should encourage broader awareness and expanded debate of its work, in part by making political parties, the media and non-governmental organisations aware of their responsibilities in this regard. It should ensure that the report is made available, not only, as its last report suggested, to the Association of Law Societies and NADEL, but much more broadly. It should publicize the interim bill among the general public, not only "immediately after its final adoption," but *immediately*, before the bill becomes final. The public should thus be more involved in the debate over the bill, and the bill should not be only a top-down imposition on the people.

3. Comments on specific provisions of the draft bill

Section 1(1)(b). "The provision of this chapter shall bind where just and equitable . . ."

The phrase "where just and equitable" could cause several difficulties. Its vagueness smooths over a crucial difference between the negotiating parties: whether or not the rights entrenched should apply "horizontally," between private parties, as well as "vertically," between private parties and government. The present language solves a political disagreement by finessing the difference, but as a compromise solution it is worse than either of the two alternatives. It solves the immediate problem, but would raise serious problems in the longer term.

This wording leaves resolution of the important controversy to the constitutional court, providing as its only guidance "just and equitable"--a phrase whose meaning is open to wide

interpretation. It will serve as an invitation to litigate almost every clause of the interim Bill, over whether its horizontal application is "just and equitable," or why a case at hand deserves to be an exception one way or the other. The open-ended nature of this clause also could allow sweeping and unpredictable changes in the scope of constitutional rights if the composition of the constitutional court changes during the transition.

We recommend that the phrase "where just and equitable" be deleted. Rights should not apply only against the government. Several rights, such as the right to life and the right to respect for one's dignity, become almost empty if they bind only government. In response to a rights claim, the opposing party should be required to prove that a fundamental right is inapplicable in the situation at hand. The Limitation section, on its own, could provide the basis for such a claim and should sufficiently prevent unreasonably overbroad interpretations of rights.

Section 2. Equality.

Our first submission suggested that the importance of equality rights deserves explicit constitutional recognition, particularly in South Africa and especially during the transition. The interim bill should, we recommended, state that its equality section acts as a rule of construction or interpretative principle for its other provisions.

The new "Interpretation" section adequately satisfies our concern, with one caveat. Section 30(1) refers to "the principle of equality," rather than equality rights as defined in section 2. Thus, it leaves undefined the nature of its idea of equality (does it mean equality under the law, or equal opportunity, or equal result?), and particularly the issue of whether it permits affirmative action. One solution would be for Section 2(3) to state "All equality provisions in this Constitution shall permit . . ." rather than "This section shall permit . . ."

A declaration of the central importance of equality principles elsewhere in the interim constitution, which apparently may be included, would contribute to the interpretative weight of this section.

Section 3. Life.

To reiterate our previous submission, we strongly oppose the death penalty. We believe that both interim and permanent Bills of Rights should explicitly prohibit capital punishment. We accept and support the death penalty provisions contained in the Technical Committee's sixth report of 15 July, as a compromise position for the interim period. The more recent draft inadequately protects the right to life.

Whether one considers the death penalty acceptable or unacceptable, as an extreme, controversial, and entirely

irreversible punishment, it should not be carried out under an interim bill of rights while a more permanent resolution of the issue is under debate and negotiation. Moreover, omission of language regarding the death penalty from the interim bill of rights invites extensive constitutional litigation, which would otherwise be avoidable.

Section 8(2). Religious observances at State or State-aided institutions.

This sub-section seems unnecessary. We recommend that it be deleted.

Section 9. Freedom of Expression.

We agree with the technical committee that the inclusion of the "further provision" ensuring diversity in public media is unnecessary and inappropriate.

Section 16. Access to Court.

This provision is problematic for many of the reasons we described in our first submission. It might limit access to court where a "dispute" is not necessarily involved, excluding for example declaratory judgements. It elevates justiciability to a constitutional issue. We prefer the more general language in the committee's sixth report, "Every person shall have the right of access to a court of law or, where appropriate, another independent and impartial forum."

Section 19. Detained, Arrested and Accused Persons

We previously recommended that this section's two right to counsel clauses (in 19(1)(c) and 19(3)(e)) have parallel language. Since then, their language has been made more similar, but is still not exactly the same. To further explain the point we were trying to make, one clause says "where the interests of justice so require," while the other says "where the interests of justice so demand." One gives detainees the right to be informed of their right to consult a lawyer but not of their right to be provided with legal services, where the other gives accused people a right to be informed of both. One says "by the State," where the other says "at State expense." A court could interpret these differences as obviously intentional and somehow significant. Seeing no good reason for the distinction, we repeat our recommendation that the differences between the two clauses be eliminated. If the committee intends some distinction between the two right to counsel clauses, it should make that distinction more explicit.

Again, the combination of their language which we recommend for both provisions is: "a legal practitioner of his or her choice, or, where the interests of justice so require, to be provided with legal representation at State expense, and to be informed of these rights."

Section 21(2)(b). "to be brought before an ordinary court of law as soon as it is reasonably possible, but not later than 48 hours after the arrest or the first court day thereafter, . . ."

Again, the 48 hours/first court day distinction needs clarification. Does "thereafter" refer to after *arrest*, or after *48 hours after arrest*? In either event, the period of detention immediately following arrest is when most human rights violations, such as torture and forced confessions, occur. The "first court day" requirement could allow a period of detention as long as one week in certain cases, such as rural courts that meet weekly. We consider such a long period of pre-trial detention unacceptable, and recommend an absolute maximum time between arrest and court hearing, such as 72 hours.

Section 20. Eviction.

Because eviction without a court order is practised under certain circumstances in this country (despite the Roman-Dutch common law rules against such eviction), Section 20 is necessary for the protection of housing rights. We recommend its retention.

This Section would be improved if it gave more concrete guidance to an interpreting court, such as by replacing the word "may" ("relevant factors, which *may* include . . .") with stronger wording such as "will, where feasible," or "should."

Section 21. Economic Activity.

Again, we recommend that this provision be deleted because of the vagueness and possible unpredictably broad interpretations of 21(1). However, if Section 21 remains, we strongly support the committee's addition of subsection 21(2), which seems sufficiently inclusive to allay some of our concerns--those about an extremely conservative interpretation of 21(1). In fact, the language in 21(2) might be placed elsewhere in the interim bill, to gain broader scope and general applicability.

Section 23. Property.

Given the emotional nature of the land issue and the limits of the technical committee procedure, ideally we think that the committee should defer from defining property rights in an interim bill of rights until broader consultation is possible.

If an interim bill must define property rights, however, we support a definition of property rights which balances the various opposed demands, such as the version of section 23 in the 29 July draft, as long as it includes subsection 23(3).

While we support 23(3), we take one exception to its specific wording. The final phrase, "where such restoration or compensation is feasible," offers an "out," or a way around the right, to an interpreting court. That final phrase unnecessarily weakens the right. We recommend that it be deleted.

Section 27(a). "the right . . . to equal access to educational institutions."

The wording of this clause is problematic in that it could be interpreted to prohibit educational affirmative action programmes. The revision of Section 2(3) which we propose above would solve this problem.

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

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

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

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

Section 30. Interpretation

See our comments about the indefinite nature of the equality principle in Section 30(1), under Section 2 above.

Regarding possible inclusion of the words "liberty and," we agree with the Technical Committee's comment that liberty is included in the notion of "a free, open, and democratic society." Moreover, protection of liberty is an underlying theme of any Bill of Rights, so inclusion of "liberty and" may be unnecessary.

We disagree, however, with the committee's comment that inclusion of "liberty" would *create* tension between liberty and equality; tension is inherent and unavoidable between those two fundamental values. We strongly support recognition of equality as a fundamental interpretative principle, but we see no problem with explicitly elevating liberty to the same level. We therefore recommend inclusion of "liberty and" before "equality."

Conflicts between protected rights will certainly arise, particularly since this bill protects a broad array of rights in extensive detail. Section 30(1) should make explicit that the values articulated in it should be decisive in cases where fundamental rights conflict.

Additional Matters: Family

We agree that family rights deserve protection. However, any values which this clause should protect seem to be sufficiently protected already by individual rights. Moreover, this formulation raises several problems. Does protection for family rights by implication exclude other rights, especially those of other groups? Could the phrasing of this right work in unanticipated ways, for example to block a contested divorce or to prohibit family members' testimony in a child abuse case?

Finally, this provision raises a thorny legal question of how to define the "family" which it protects. We recommend exclusion of family rights as defined here.

4. Brief summary of enforcement recommendations.

Our recommendations on enforcement mechanisms are described more fully in a companion report to this one, which we will submit to the Technical Committee on constitutional issues as well as to this committee.

First, the constitution must specifically allow Parliament to enact legislation to enforce the rights norms. While this bill of rights allows judicial enforcement, many fundamental rights, such as the information and equality rights, will require their details to be spelled out in implementing legislation. Without such legislation, the burden of this bill on the courts will be immense.

Second, the success of an interim bill of rights will depend largely on the effectiveness of the institutions which enforce it. We urge establishment of a Constitutional Court, a Human Rights Commission, and an Ombud. New structures are particularly necessary because the present justice machinery lacks popular credibility--it is associated more with suppressing human rights than with enabling them, and such perceptions will not change overnight under a new government.

A new Constitutional Court, separate from presently existing courts, will gain particular competence in areas of constitutional law which will be new to South African jurisprudence and vital to the transition. Its creation will serve as an important signal, to lawyers and judges as well as to the general public, of the changing nature of rights in South Africa.

Human Rights Commissions enforce human rights norms in many other countries (incidentally, because the term is something of an international standard, we recommend that it be called a "Human Rights Commission," despite the fact that a South African nongovernmental organisation presently uses the same title). Such an institution is necessary to fill several functions which will be new to government under the bill of rights: investigating claims of human rights abuses, adjudicating such claims, enforcing civil rights legislation, monitoring human rights conditions and making appropriate recommendations, advancing law reform, conducting rights education, cooperating with international human rights organisations, and monitoring compliance with international human rights norms.

Essential attributes of a Human Rights Commission are independence and credibility. For this reason, its membership must be apolitical, broadly representative of society and independent from the executive branch of government.

Commissioners should be men and women who have demonstrated a commitment to equality and human rights. They should be chosen by an independent selection committee following a transparent procedure, rather than through a political appointment process.

Although its funding would come from government, the Human Rights Commission must be accountable in terms of fiscal responsibility and auditing only, without government control over its policies or specific appropriation of funds for projects.

The Commission should have a national office, as well as regional and local offices. Its divisions should include separate administrative, investigative and adjudicative divisions.

The investigative division should have its own investigative machinery and powers, separate from the state security apparatus. It should have the responsibility to investigate complaints lodged with it and the power to initiate investigations of its own accord.

The adjudicative division should be entirely separate from the investigative division. It should be a quasi-judicial tribunal with the power to hand down enforceable decisions (although punitive forms of redress should remain in the domain of criminal courts only). Its decisions should be appealable, perhaps first to an appellate forum within the adjudicative division itself, and from the highest adjudicative tribunal within the Human Rights Commission to the Supreme Court.

An Ombud should have expanded powers and responsibilities beyond those of the Ombud in the present government. The function of an Ombud is normally to investigate complaints against all levels of government. The Ombud's office should be empowered to investigate all public officials, public bodies, and public actions. The sphere of its investigations should broadly include allegations of misconduct.

The Ombud's office should have investigative powers, but not enforcement capabilities. Its authority following an investigation should include negotiated settlements, mediation, public reports, public recommendations, and institution of proceedings in appropriate adjudicative tribunals.

Submission to the Technical Committee on Fundamental Rights During the Transition 30 June 1993

LAWYERS FOR HUMAN RIGHTS — LAW REFORM PROJECT
Comments on proposed "transitional Bill of Rights"
(Technical Committee 11 June 1993 document)

1. Introduction and summary

This document is a response from Lawyers for Human Rights to the draft "interim Bill of Rights" (the term we use throughout this report, since the document does not name itself) for South Africa. The draft Bill to which we are responding is included in the 11th of June report of the Technical Committee on Fundamental Rights During the Transition, at pages 4-17.

Our response has been rushed, based on a sense that the Technical Committee is making important decisions and it is important for us to submit our initial reactions to the specific proposed language. As a national human rights organization, our position and experience should qualify us to contribute to the process. We request additional time from the Technical Committee, and we reserve our right to make a more thorough and more carefully considered submission at a later date.

This report initially states our concerns about the document as a whole and the drafting process. We would like to stress the significance of a transitional Bill of Rights. We believe it is essential to get this document right the first time. We recommend that an interim Bill include a more complete set of rights as well as a statement of its non-permanent nature. The Negotiating Council should allow the time to develop a more complete interim Bill than this document.

This report next addresses specific provisions of the interim Bill as drafted. We have closely considered the language of crucial provisions. That language inevitably includes many legal problems and loopholes, which we have sought to identify and address.

While we criticize the document and specific provisions, we appreciate and encourage the work of the Technical Committee, which has effectively and quickly produced a working document which may serve well as the basis for an interim Bill of Rights.

2. Principles behind an interim Bill

We support the idea of an interim Bill, but are concerned about the incomplete nature and quick drafting of this document. Its drafting process has not given human rights groups and other non-governmental organizations sufficient time to contribute to the technical committee's proposals.

We are concerned that the Technical Committee may have exceeded its mandate from the multiparty negotiations which, as we understand it, was to identify fundamental rights deserving of protection during the transition. However, we believe that whether or not the Committee exceeded its mandate and what reaction is appropriate are issues for the Negotiating Council. Lawyers for Human Rights will address the Technical Committee's document as written, under the assumption that the Negotiating Council will consider adopting it as a Chapter of an interim Constitution.

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

The transitional Bill should include a more comprehensive set of rights than does the Technical Committee's draft. Additional rights which it should include are suggested in a list below. We urge that the negotiations allow more time specifically to formulate provisions for these additional fundamental rights.

While the drafters of an interim Bill should strive to create as complete a document as possible, an interim Bill should also acknowledge its non-final nature. It has not been produced by a democratic body, and it should in no way pre-empt the Constituent Assembly's mandate to draw up a permanent Bill of Rights. The document should explicitly state what the Technical Committee reports explain: that it is a transitional Bill, listing a minimal (or "incomplete," if the negotiators expand it substantially beyond the 11th of June draft) set of rights. The interim Bill should declare that it is not intended as the complete body of rights to be included in a permanent Bill. It should state that its effectiveness will terminate when a comprehensive bill of rights has been negotiated and ratified. It should further state that exclusion of any rights from it does not derogate from those rights, or imply that they are less

fundamental or necessary in the permanent South African bill of rights.

Considerations provoked by specific provisions

These are by no means our complete set of concerns, but several issues which deserve mention arose in our discussions of an interim Bill of Rights. The following concerns would not be addressed by amending any specific provision, but are important to any interim Bill.

First, the Constitution should establish a Human Rights Commission and a constitutional court. The interim Bill appropriately leaves these issues unresolved, but its effectiveness could be undermined without the existence of such bodies.

Second, the Constitution should elsewhere allow the legislature to enact enabling laws (such as a Civil Rights Act, for example) to provide civil and criminal penalties for violation of this Chapter.

Third, we generally oppose the concepts of derogation of rights and detention without trial. We find only minor faults, as noted below, with the state of emergency provisions. However, as a human rights organization, those provisions attract our attention and raise a general concern that they might somehow be abused in the future.

Rights and prohibitions which should be included in an interim Bill and are omitted from the Technical Committee's draft

- Explicit prohibition of child labour.
- Additional labour rights which have been won in South Africa and should be guaranteed.
- Explicit prohibition of the death penalty (we recommend its inclusion, although we recognize the controversial nature of this provision and we support the Committee's proposed compromise--with some changes made to its language as noted below).
- Explicit definition of additional groups protected by equality rights (as suggested in our comments on Section 2(2)).
- Strengthened women's rights.
- Strengthened children's rights.
- Extended educational rights.
- Explicit protection of the rights of disabled persons.
- Explicit protection of the rights of gay people.
- Rights to the essentials of life, including shelter and nutrition, and social security rights.
- Marriage & family rights.
- Explicit provision for affirmative action.
- Strengthened environmental rights.
- Rights to the arts, sciences & recreation.
- An expanded notion of standing.

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3. Comments on specific provisions of the Bill as drafted.

Section 1 (1)(b). "The provisions of this Chapter shall . . . bind, where appropriate, . . ."

The phrase "where appropriate" might offer the interpreting judge a possible opt-out in every rights case, with "appropriate" potentially interpreted to include reasons of history, original intent, convenience, practice, etc. This phrase offers a way around the bill of rights, and allows much room for the court's discretion. It would be better to leave the phrase out (which would imply wherever possible).

This clause should include an exception such as "unless the Constitution explicitly states otherwise," so that 1(1)(b) does not override, for example, Section 15's limiting the right to non-deportation to only citizens.

Section 1(3). "Every person who alleges that his or her rights or freedoms . . . guaranteed in this Chapter have been infringed or threatened, . . ."

This clause should also allow standing for class action suits.

Section 1(6). " . . . provided that such enactment does not detract from the essence of any of the rights and freedoms included in this Chapter."

This interim Bill should protect against repeal only a body of nonnegotiable core rights, such as those listed in Sections 30 and 31. Other rights might require future amendment in ways that a court might interpret as "detracting from their essence." However, the amendment process should be difficult and perhaps lengthy, for example requiring 3/4 of the Constituent Assembly and some other demonstration of popular support.

Section 1(7) "this Chapter shall apply to all existing and future legislation."

As written, this would apply the transitional Bill to all laws ever made in South Africa, even after a permanent constitution replaces the transitional one. To prevent this (we assume) misinterpretation of the Chapter's purpose, this provision should be reworded to include only legislation passed before or while it remains in force. Also, the provision should include the common law as well as legislation. We suggest the following wording: "shall apply to all laws in place while this transitional constitution remains effective."

To avoid uncertainty and litigation, the Chapter should state whether it applies to actions pending when it becomes effective. For example, will the State need to provide counsel for trials in progress on the date it becomes effective?

Section 2. Equality.

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This section should weigh heavily in influencing interp[illegible]

or all other provisions of a Bill of Rights. It is particularly important in the South African context. Its position as the Bill's first substantive provision hints at this importance. However, we recommend an explicit statement of its central importance as a statement of the spirit of the entire Bill, such as "(4) The spirit and purposes of this section shall act as governing principles in interpretations of the entire Chapter."

Section 2(2). "No person shall be discriminated against, directly or indirectly, . . ."

This clause must include language defining discrimination as conduct having an adverse effect, in order to constitutionalize an effects test for discrimination. An effects test is one which considers the end result, rather than an actor's intent, to determine discrimination. Otherwise, this clause is too vague.

" . . . on any ground whatsoever . . ."

Presumably, the Limitations section prevents this clause from outlawing legitimate, meritocratic discrimination, such as on the grounds of competence, experience or character. However, this clause would be improved if it stated the most important potential grounds, such as "on inappropriate grounds, which include but are not limited to race, religion, national origin, gender, sexual orientation and disabled status."

Section 2(3).

This weak clause allowing affirmative action (if that is in fact its intention and effect; it seems to support nondiscrimination rather than affirmative action) should be strengthened and reformulated. For clarity under judicial review, it must explicitly include the phrase "affirmative action."

Section 3(3). "No sentence of death shall be carried out until the commencement of a Bill of Rights . . ."

We oppose the death penalty. While we promote abolition of capital punishment in both interim and permanent bills of rights, we recognize the political controversy surrounding this issue, and we support the interim Bill's compromise to delay all death sentences until a future democratic government resolves the issue. However, we object to the wording of this provision, which implies that a permanent Bill of Rights will allow the death penalty. In effect, this language appears to pre-empt a later decision on the death penalty. We urge the Committee to reword this passage, for example as follows: "No sentence of death shall be enforceable for as long as this transition Bill remains in force."

Section 7. "No person shall be subject to servitude . . ."

The ban on "forced labour" causes exceptions to the later definitions of "core" rights in Section 30 and 31(3)(c).

"Exploitative labour practices" on its own should sufficiently include unjust forms of forced labour, such as selling prison labour to farmers, while excluding acceptable practices which are arguably "forced labour," such as requiring prisoners to clean their cells, requiring military conscripts to clean their barracks, or parents requiring their child

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farm. We would therefore suggest that "forced labour" be dropped from this provision, and that the entirety of section 7 become an inalienable "core" right under the terms of sections 30 and 31.

Section 9. "provided that nothing shall preclude the practice of religion in State or State-aided institutions on a free, voluntary and equitable basis."

This clause, the second half of Section 9, should be dropped, for several reasons. It is overly vague, and its effect not quite clear. It is unnecessary, because the freedom of religion includes its apparent intent. Finally, its phrasing as an *exception* to freedom of religion is worrisome.

Section 18. Access to Court. Every person shall have the right to have disputes settled by a court of law."

We strongly support the elevation of court access to a constitutional principle. However, we have several problems with the Bill's guarantee of this right as worded above. This provision as presently worded might actually *limit* access to courts, by not ensuring court access for cases other than "disputes," such as statutory interpretations or declaratory judgments. Second, its language sounds as if it is meant to encourage litigation. Third, this provision elevates justiciability to a constitutional issue, so that every single court case could go to the constitutional court for a determination of whether it is a justiciable "dispute" or not. Fourth, this provision should allow alternative dispute resolution. We recommend rewriting this section as follows: "Every person shall have the right of access to courts of law or alternative dispute resolution mechanisms."

Section 19. "Every person shall have the right of access to all such information . . ."

We agree with the inclusion of a right to information, but its vagueness here raises concerns. This clause could perhaps be interpreted broadly by a Court to cripple some governmental programs.

". . . as is necessary for the protection or exercise of his or her rights."

This clause should say "rights as defined in this chapter" or some other phrase to limit it, perhaps further. Even so, application of this clause to some rights in the interim Bill might cause difficulty. Effects of this clause as applied to the economic rights (to engage in economic activity, and to own

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property) could be unanticipated, although the word "necessary" and the Limitations section probably limit this from applying too broadly.

Section 21. Detained, Arrested and Accused Persons.

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

The clauses in 21(1)(c) and 21(3)(e) should have parallel language after their first phrases, to improve both and to prevent exceptions in one case or the other. We recommend this combination of their language for both provisions: "a legal practitioner of his or her choice, or, where the interests of justice so require, to be provided with legal representation at State expense, and to be informed of these rights."

Section 21 (2)(b) "to be brought before an ordinary court of law within 48 hours of the arrest or the first court day thereafter . . ."

This provision should be reworded to clarify the 48 hours/first court day distinction. Furthermore, the "first court day thereafter" allows an unacceptably long detention in certain cases, such as rural courts which meet weekly and long holiday weekends. We recommend that this clause include the phrase "in absolutely no event more than 72 hours after the arrest."

Section 22 ". . . the lawfulness of the occupation."

This factor is too vague and could be affected by legislation to make a particular occupation lawful or unlawful. "Legitimacy" might be a better word here, although it is not a perfect solution because it poses the same problem to a lesser extent.

Section 23. "Every person should have the freedom to engage in economic activity."

This provision as written is completely vague, and "economic activity" a loaded term which could be interpreted with a broad range of meanings by either an extremely conservative or an extremely progressive court. It should be deleted.

Section 25 (1). "Every person shall have the right to own property."

This provision should also allow for communal ownership.

Section 25 (2). Property.

We recommend adopting the Committee's alternative formulation of subclause (2) and adding a subclause (3) which allows legislation over land in order to redress past injustices, similar to the affirmative action provisions of the Equality section.

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Section 27. Children.

This section should explicitly prohibit child labour.

Section 29(3). " . . . to establish, where practicable, educational institutions based on a common culture, language or religion . . ."

We consider the draft Bill's spelling out of this right to be unnecessary, since the language, religion and other education rights include it.

Section 30. " . . . the rights and freedoms entrenched in this Chapter may be limited by law of general application . . . "

The phrasing of the first section is clumsy and should be absolutely clear. The exceptions should not come first. We do not understand why freedom of religion is an exception to the exception. The phrase "of general application" could raise more problems and has little legal effect. The word "only" should be added to clarify the circumstances of limitation. We would thus reword this section as follows:

"The rights and freedoms entrenched in this chapter may only be limited by law, provided that such limitation - (a) shall not limit the rights and freedoms referred to in Sections 6(2), 7, 9, 21, and 27. (b) shall be permissible only to the extent . . ."

Section 31(2). Declaration of a state of emergency.

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

Section 31(4)(b) " . . . shall be published in the Government Gazette . .."

This language should also specify what qualities the publication deserves, e.g., "shall be published in the Government Gazette so as to be readily available to the press and all members of the public."

Section 31(4)(c) "The detention of a detainee shall be reviewed within ten days of his or her detention"

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

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