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ATTORNEYS, NOTARIES & CONVEYANCERS

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The Technical Committee
Fundamental Rights during the Transition
World Trade Centre
KEMPTON PARK

BY HAND

Dear Sirs / Madam

re: **SUBMISSIONS ON BEHALF OF ASSOCIATION OF LAW SOCIETIES**

Enclosed herewith please find six copies of submissions made on behalf of the Association of Law Societies in regard to the Tenth Progress Report prepared by the Technical Committee.

We thank you for the opportunity to make submissions.

Yours faithfully
CHEADLE THOMPSON & HAYSON

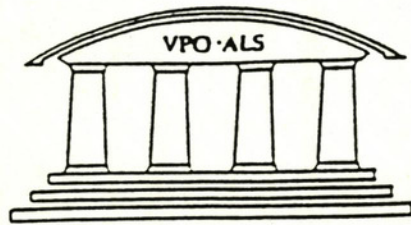


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ASSOCIATION OF LAW SOCIETIES

**SUBMISSIONS TO TECHNICAL COMMITTEE ON
FUNDAMENTAL RIGHTS DURING THE TRANSITION**

RE: TENTH PROGRESS REPORT

1. **INTRODUCTION**

1.1 These submissions are made on behalf of the Association of Law Societies ("the ALS") an association comprised of the various provincial law societies and representing the overwhelming majority of legal practitioners in South Africa.

1.2 The submissions of the ALS are not directed in general at the substance of the Interim Chapter of Fundamental Rights ("the Chapter of Rights") or in regard to the concept of an entrenched and judicially reviewable rights instrument. Indeed, the ALS welcomes the introduction of such an instrument enshrined in the constitution.

1.3 The ALS makes no submissions regarding the general substance of the rights proposed in the Chapter of Rights for the following reasons:

1.3.1 The process of negotiating the general content of a Chapter of Rights is the task of the political parties involved in the negotiating process, and the ALS is not a political party.

1.3.2 The membership of the ALS embraces diverse political views and it is not the task of the ALS to express its members' political aspirations.

1.4 The ALS does however have a legitimate concern in the precise formulation of the Chapter of Rights for the following reasons:

1.4.1 Its members will have to advise on and apply the said Chapter of Rights.

1.4.2 The ALS represents the overwhelming majority of legal practitioners in South Africa which practitioners will have to breathe life into the Chapter of Rights and ensure that the Chapter is consistent with the requirements of legality and certainty.

1.5 The ALS is accordingly concerned to address the proposed formulations in the Tenth Progress Report of the Technical Committee on Fundamental Rights During the Transition with specific reference to the following considerations:

1.5.1 Whether the drafting will have unintended consequences or implications;

1.5.2 Whether the Chapter contains provisions which would give rise to legal uncertainty;

1.5.3 Whether the provisions of the Chapter are capable of enforcement and whether those provisions which deal with procedure are consistent with contemporary standards, and are not unduly and unnecessarily disruptive.

1.6 The ALS is also concerned that the Technical Committee, alternatively the Negotiating Council should have due regard to the concerns and interests of the attorneys' profession itself given the central role this profession will have in applying, interpreting and defending the Chapter of Rights.

2. **CLAUSE 7 (1): APPLICATION**

In order to avoid the sterile debate between state and non-state action,

particularly in regard to the performance of quasi-state functions by non-statutory bodies, the concept "organs of the state" should be amended to include institutions that perform quasi-state functions. Our concern however is that the phrase "all statutory bodies" is ambiguous in that it also carries the meaning that all bodies established by statute, (many of which are private in nature, i.e. the stock exchange and industrial councils), which do not perform a state function, are included. Accordingly we propose that the phrase "statutory bodies" be replaced by the words "state funded institutions" or "institutions performing state functions" or other similar wording.

3. CLAUSE 7 (2): APPLICATION

The drafters intend to include acts performed pursuant to decisions taken before the commencement of the Chapter, by distinguishing between "decisions" and "acts" in this clause whilst using the generic "actions" elsewhere in the Chapter. However this intention is implicit and there is no reason why it should not be made explicit. The following clause is proposed:

"The provisions of this Chapter shall apply to:

- (a) all laws in force, and
- (b) all administrative decisions taken during the period of operation of this Chapter, and
- (c) all administrative acts performed pursuant to administrative decisions taken either before or after the operation of this Chapter."

4. CLAUSE 7 (3): JURISTIC PERSONS

4.1 The wording of 7 (3) of the draft Chapter of the Technical

Committee is the following:

"All juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of these rights permits."

The comment explains that this is derived from the relevant clause in the German constitution or Basic Law, which translated into English, reads as follows:

"The basic rights shall apply also to domestic juristic persons to the extent that the nature of such rights permit."

4.2 There is no doubt that juristic persons in German constitutional law have basic rights and that they can go to court to enforce these rights. However, this is only the case when the nature and activities of these juristic persons are such that it relates to the free exercise of the rights of natural persons or when the activities of the juristic person are such that they amount to a meaningful exercise of individual human freedom. In one of the decisions of the German Federal Constitutional Court the following (very freely translated) was said:

"The value system of the concept of fundamental rights is based on the liberty of the individual as a natural person. The fundamental rights should in the first place protect the sphere of liberty of the individual against interference by the state and ensure for such individual the necessary conditions for the free exercise of these rights within the

community."

In other words, drawing juristic persons into the sphere of protection of fundamental rights is only justified when the activities of such juristic persons embody the freedom of natural persons.

4.3 In regard to the phrase "to the extent that the nature of such rights permits", the German Constitutional Court has ruled that the right to life and the inviolability of the person is not applicable to juristic persons. Nor are rights regarding marriage and family life.

However, the following has been held to be applicable and available to juristic persons:

- 4.3.1 the right to the free development of a personality, insofar as this does not violate the rights of others or offend against the constitutional order or the moral code;
- 4.3.2 freedom of religion and conscience, in the case of religious organisations and other juristic persons whose aims and activities revolve around the promotion of religious activities or the preaching of a certain faith;
- 4.3.3 freedom of the press and freedom to broadcast;
- 4.3.4 the freedom to choose a trade, occupation, profession, place of work, place of training, etc;
- 4.3.5 property and the right of inheritance;

4.3.6 in regard to universities and faculties, the right to freedom of art and science, research and teaching;

4.3.7 equality before the law (as embodied in Article 3 (1) of the German Basic Law).

4.4 However it is possible that Clauses 7 (3) and 8 (1) of the Draft Chapter of Rights could lead to competitive corporate challenges on the grounds that legislation or even an executive act that treats one corporate entity less stringently than another infringes the equality clause. The underlying philosophy concerning fundamental human rights, namely that corporate entities as juristic persons have these rights only insofar as their basic nature and activities embody the free exercise of individual liberty and the spiritual products of natural persons as human beings should be made explicit and competitive corporate challenges in areas of purely commercial activity should be expressly excluded. This can be done by specifying that the Chapter shall apply to juristic persons to the extent that such persons embody or express the freedoms of natural persons.

4.5 It is also clear there is one difference between 19 (3) of the German Basic Law and 7 (3) of the South African draft, namely the fact that the German clause specifically mentions "domestic" juristic persons, whereas this does not occur in the draft Chapter. It is not clear why this is the case and we propose that this addition be made.

5. **CLAUSE 7 (4): STANDING**

5.1 Clause 7 (4) (a) is restrictive in that it is open to the interpretation that only parties alleging an infringement or threat to a right may

seek declaratory relief. This may exclude intervenor or amicus curiae briefs, the purpose of which is to assist the courts in formulating constitutional principles rather than seeking relief. In addition, this constitutes an undue limit on our present common law which empowers parties to a dispute to seek declaratory relief in certain circumstances without having to allege an infringement or threat to a right.

5.2 Clause 7 (4) (b) should refer to a person acting in his/her/its own interest rather than in his/her/its own name, and in the interest of other persons rather than on behalf of other persons. It is the concept of interest that is fundamental to legal standing. An applicant will be cited in its own name even where it is claiming relief in the interest of others. The reference to "on behalf of" is problematic in that it implies the requirement of agency or authority, which means that constitutional actions may be thwarted on purely technical grounds, i.e. the lack of authority.

5.3 It is imperative that associations also be permitted to act in the public interest and bring class action suits, and that the clause be widened to include the right to act in the public interest. This has been accepted in inter alia, Canadian and Indian constitutional jurisprudence.

5.4 A proposed formulation is as follows:

"Applications referred to in paragraph (a) may be brought by:

- (i) a person acting in his or her own interest;
- (ii) an association acting in its own interest or in the interest of its members;

- (iii) a person or association acting in the interest of any other person who is not in a position to bring such application in his or her own name;
- (iv) a person or association acting as a member of or in the interest of a group or class of persons;
- (v) a person or association acting in the public interest."

5.5 In addition to the above, clarity is required, whether in this clause or elsewhere, as to who may act on behalf of applicants in bringing actions referred to herein.

6. **CLAUSE 8: EQUALITY**

6.1 **Clause 8 (2):** We believe that the unrestricted nature of this form of discrimination prohibition will create legal uncertainty. As a via media we propose that provision should be made for the prohibition of discrimination on the grounds enumerated in this subclause, and other similar grounds. Although this might not be ideal in that it leaves it up to the courts to determine what constitutes a ground of similarity, it would to some extent obviate the constitutional dilemma created by competitive corporate litigation for example, in Canada by steel can manufacturers arguing that regulations regarding the recycling of aluminium cans results in discrimination against steel can manufacturers.

6.2 Equality is an intensely personal right and it is essential that it be restricted to natural persons. Insofar as, for example, churches, trade unions or other entities seek to bring equality challenges on the basis of discrimination , the standing clause permits such

actions provided its requirements are satisfied.

7. CLAUSE 11: FREEDOM AND SECURITY OF THE PERSON

7.1 The clause as presently formulated is basically in line with the type of guarantee to be found in international instruments intended for the protection of the freedom and security of the person.

7.2 The most pressing concern arising out of Clause 11 (2) is whether or not the death penalty would constitute a form of cruel, inhuman or degrading treatment or punishment. This is undoubtedly a matter of which is central to the administration of justice and such an important matter should not be left to the judiciary to determine. This comment is equally applicable to the right to life clause.

8. CLAUSE 13: PRIVACY

8.1 We note the comments in regard to the limitations clause in securing the interest of the State to regulate anti-social conduct on private property. We assume that the reference to "persons" is meant to exclude the power of juristic bodies or artificial persons claiming privacy as a ground for evading appropriate inspections or regulations by duly authorised agencies seeking to protect the public health, safety and security. We would however prefer that these considerations receive more explicit recognition.

8.2 We believe that the current formulation of the Clause may lead to confusion and that the right to privacy and the protection against search and seizure powers should be set out in separate clauses.

9. **CLAUSE 15: FREEDOM OF EXPRESSION**

9.1 Clause 15 (1) should end after the word "expression". The remainder of the sentence is superfluous as incorporated and the additional words, far from adding certainty can only give rise to confusion in interpretation. Similarly, the addition of the specific references to "artistic creativity" and "scientific research" are redundant. Secondly, the separation of freedom of expression from the freedoms envisaged in Clause 14 (1) is notionally unsound and leads to unfortunate results as we explain more fully below.

9.2 Clause 15 (2) is an unusual provision to find in a Chapter of Rights. Concerns about the diversity in the state media are legitimate, but are better addressed in subordinate legislation, as has been done in the Independent Broadcasting Authority Act, where these concepts have been:

9.2.1 more adequately defined; and

9.2.2 where specific remedies are available, that would be more appropriate and effective, than giving aggrieved parties a constitutional remedy.

9.3 Secondly, such a clause might inhibit future policy to create media diversity through a system of state subsidies encouraging the development of new media in the broadcasting and print fields. An application of this clause to such media since they might initially be financed by the state, would require their regulation by the state which would clearly be undesirable. We would recommend that Clause 15 (2) be deleted.

Freedom of expression clauses in relation to other clauses in the chapter:

- 9.4 Freedom of expression clauses have created the greatest difficulty for constitutional courts where courts have been required to balance them against other constitutional interests.
- 9.5 Because freedom of expression has been notionally divided, by virtue of the provisions of Clause 14 (1) (dealing with religion, belief and opinion), an anomalous result has occurred in the interpretation of Clause 36 (2) (a), which provides for strict constitutional scrutiny of Clause 14 (1) rights, but not for Clause 15 (1) rights, except insofar as they concern free and "fair political activity".
- 9.6 This means that the same right is subjected to different rules of interpretation depending under which clause it is adjudicated.
- 9.7 Freedom of expression, religion, belief and opinion are not susceptible to arbitrary division and must be accorded equal constitutional protection. Once again the United States First Amendment is the appropriate example, where one clause deals with all these rights.
- 9.8 In general, a freedom of expression clause should be minimalist in construction, so that courts have the flexibility to interpret it more or less restrictively to reflect changing attitudes in society toward freedom of speech. The interim nature of this Chapter may however suggest otherwise.

10. **CLAUSES 18, 19, 20: MOVEMENT, RESIDENCE, CITIZENS' RIGHTS**

Insofar as certain rights are accorded inter alia, to "persons" and others to "citizens", clarity is required as to the definition of "person" in order to resolve potential ambiguity.

11. **CLAUSE 22: ACCESS TO COURT**

We propose that the clause be extended to provide for a litigant to be represented by a legal practitioner of his or her own choice, whether an attorney or an advocate. South Africa appears to be the only country which still maintains the archaic split-bar in its pristine form. Whereas corporate litigants can afford this division of professions, the person on the street cannot.

12. **CLAUSE 23: ACCESS TO INFORMATION**

Whilst the provision of a clause granting freedom of information is to be welcomed, restrictions placed on that right in its current formulation are problematic. A person has a right to information provided that the information required is for the protection or exercise of any of that person's rights. This requirement in Clause 23 should be deleted. The rationale for allowing citizens access to information should not be solely dependent on that information being linked to any "assertive" right needed to be protected or exercised. In practice access to information rights are exercised most frequently by journalists or researchers who may then make such information public. The right to information should mean simply the public's right to "know". However this might be one of the clauses that does not take immediate effect in order to enable Parliament to pass legislation to balance the interests of ordinary, interest-free government on the one hand and transparency on the other.

13. **CLAUSE 24: ADMINISTRATIVE JUSTICE**

13.1 **Clause 24 (b):** Insofar as the existing legitimate expectation doctrine is generally held to create a right to a hearing and not a substantive benefit, this clause is tautologous in that it appears to create a right to a hearing when a legitimate expectation to a hearing is threatened by administrative action.

13.2 It is unclear how a court would interpret subclauses (a) and (b) together, in that they afford a right to lawful action when rights or interests are affected, and a right to a hearing when rights or legitimate expectations are affected.

13.3 It is regrettable that this clause, save for the requirement of the provision of reasons does not go far enough to create a protective and effective system of administrative justice. The history of this clause has shown a steadfast refusal to include reasonableness as a ground of constitutionally protected review. An extension of the clause to include reasonableness is amply justified and it would bring South African administrative law in line with modern systems of administrative law the world over.

14. **CLAUSE 25: DETAINED, ARRESTED AND ACCUSED PERSONS**

14.1 The clause as presently framed, subject to what is said below, conforms with internationally accepted standards. There are, however, certain specific concerns.

14.2 The most obvious failing of the clause as presently formulated is that Clause 25 (1) (c) (dealing with the rights of detained persons) and Clause 25 (3) (e) (dealing with the rights of accused persons) limits the provision of legal representation at State expense only

to cases where "**substantial injustice would otherwise result**". The requirement of "**substantial injustice**" is a more stringent one than appeared in previous drafts. The justification, apparently, is the question of expense.

- 14.3 The starting point is to reiterate the observations of Corbett C.J. in **S v RUDMAN**, 1992 (1) SA 343 (A) at 392F - G where he stated:

"The ideal ... of ... the provision of free legal representation to all indigent persons accused of serious crimes who desire such representation, is unquestionably a most worthy one. Indeed, it is a sine qua non of a complete system of criminal justice; and any system which lacks it is flawed."

- 14.4 While the question of cost cannot be ignored, it would be most unfortunate if a constitutional limitation were placed upon this right. The American experience has been that constitutional rights are capable of incremental development. The question of the provision of legal representation is a prime example of a such incremental development. There is no reason why the same process will not take place in South Africa.

- 14.5 It is further suggested that the question of illegally / unconstitutionally obtained evidence should be squarely addressed in the constitution. We understand that a provision dealing with the issue in an earlier draft has been omitted from the 10th Report. In this regard, the observations of Mr Justice Brandeis in **OLMSTEAD v UNITED STATES**, (1928) 227 US 438 are worthy of repetition:

"Decency, security and liberty alike, demands that Government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a Government of laws the existence of the Government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher, for good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes to secure the conviction of a private criminal - would bring terrible retribution."

14.6 The words "legal practitioner" in this clause should be clarified as referring only to duly admitted attorneys and advocates.

15. **CLAUSE 26: ECONOMIC ACTIVITY**

15.1 The present formulation of the clause is confusing in that it attempts to encompass both a mobility right and a novel right to work provision. It is in the interests of legal clarity that these should be separated.

15.2 There is also an inherent risk in having, in effect, two limitations clauses applying to the area of economic activity. A court may interpret subclause 2, read with the limitations clause, as implying that there is a narrower range of justifications which can support laws which regulate economic activity than laws which restrict other rights and freedoms which do not have specific limiting

clauses attached to them.

15.3 Until this novel right, and the limitations clause have been given meaning by the courts this provision will remain somewhat obscure.

16. **CLAUSE 28: PROPERTY**

16.1 The term "expropriation" of rights excludes the state's policing power, and therefore the power to plan, develop and to seize property in certain circumstances, e.g. after the commission of a crime as evidence. We do not believe that the limitations clause would necessarily encompass a policing power as envisaged in the case law in the USA and Europe.

16.2 Secondly, we would like to point out that as we understand it, the terms just and equitable have been given a specific meaning in international human rights jurisprudence, i.e. market value and it is not clear what constitutes other "relevant factors".

16.3 From the point of view of legal certainty we are not certain what this formula would mean in the absence of any indication of what the relevant factors would be.

16.4 Save for the above we wish to state that this clause concerns a political issue, which is best left for the Negotiating Council to resolve.

17. **CLAUSE 31: LANGUAGE AND CULTURE**

It may be advisable to give greater meaning to the words "language of choice" and whether this would apply to, for example, the right to communicate with the

authorities in exotic languages. The limitations clause is not always of much use in allowing for reasonable regulation of this right.

18. **CLAUSE 32: CUSTOMARY LAW**

18.1 The formulation of the customary law clause is problematic. It is unclear. It does not adequately resolve the tension between the right to equality in the Chapter of Rights and customary law and could even provide, for example, for spouses in the same union to have contradictory regimes applying to them.

18.2 We would prefer that the primary values of society should have universal application, but concede that arrangements must be made to allow for personal choice in matters of tradition and culture. We do not believe this has been resolved in the current formulation. In view of the fact that this matter has been referred for further discussion, we would reserve our more detailed comments until the final draft is available.

19. **CLAUSE 33: EDUCATION**

Clarity is required as to what constitutes "basic education".

20. **CLAUSE 34: LIMITATIONS**

20.1 We merely wish to point out that Subclause 1 (b) derives from European and early Canadian jurisprudence. However the Supreme Court of Canada has moved away from this formulation because it has been argued that it is a concept with limited utility. Subclause 1(b) presumes that rights consist of an essential core and a margin. This will force the courts to engage in a definitional, interpretive exercise which is highly subjective and

may result in rather arbitrary lines being drawn. For example is the right to produce pornography at the essence or core of freedom of expression because of its artistic nature, or is it a marginal right?

20.2 Removing the reference to the essential core of the rights will not necessarily mean that the constitution will be unable to protect people against the most abusive and intrusive violations of their rights. Quite the contrary. Even without any reference to the "essential content of a right" laws which impose substantial limitations on basic aspects of human freedom will be most vulnerable to being struck down unless a very compelling justification can be advanced.

21. **CLAUSE 35: SUSPENSION**

It should be made clear in Clause 35 (2) (c) that only a Constitutional Court has jurisdiction in regard to the validity of a declaration of a state of emergency.

22. **CLAUSE 36: INTERPRETATION**

We would support the submissions made by the Judiciary to the effect that it is inadvisable to lay down any rules for interpretation in the Chapter of Rights. In addition, singling out a certain set of laws for special (strict) scrutiny is almost certainly going to result in all other laws being reviewed much less seriously than they should and much less vigorously than the proportionality principles in Clause 34 would allow.

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The ALS wishes to acknowledge the contribution of the following persons in the

preparation of these submissions:

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