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CONFERENCE AND LANGUAGE SERVICES		

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	6 SIDES
CONTENT OF ENVELOPE	
1) PRINT OUT	✓
2) NOTES	✓
3) TAPES	✓
4) COMPUTER DISK	✓

PLEASE NOTE

On the B side of Tape 5 is Tape 7. This only consists of three pages, but the title merely says Tape 5 whereas it should read: Tapes 5 & 7.

CC Subcommittee - 5 March 1996

Tape 1

NOTES

0608:

Who is speaker?

1413:

Is it Mr Chibane?

1573:

But with this ??? this meeting and given the ??? especially that some of the parties they are in time, ??? are not here

2463:

Presumably it is Prof. Cheadle speaking?

2542:

Who is speaker?

3125:

Is it Senator Andrew?

3199:

Who is speaker?

3400:

??? there.

Who is speaker?

3801:

Who is lady speaker? Is it Mrs Sheila Camerer.

4128:

Is it Ms Smuts?

4345:

passive ??? clause

4377:

horizontal ???

5099:

Is it Senator Andrew?

5926:
Senator who? Sounds like Surchie?

6712:
Is it Mrs Smuts?

7939:
It is not the ???

CC Subcommittee - 5 March 1996

Tape 1

note:
chibane is in
fact chabane

Chairman

...but they were informed that it was not possible. They have now gone to other meetings to have those adjourned so that they can return back to this meeting. Some of them will be joining us soon, hence the delay in starting. Our agenda today is one item. Where's the agenda? The Bill of Rights. We are hoping that we will be able to record a lot of progress today. There are some of those rights that we have never really discussed. I initially thought that we should start with those, but I am persuaded to believe that starting at the beginning again should not do any harm with the hope and knowledge that we will be able to make a great deal of progress through the Bill as it stands. So, I would like to propose, if you agree, Mr Wessels, that we start with and go right through the entire Bill. This being the cornerstone of the Constitution, we have to spend quite a lot of time on it, on a repeated basis, until we can find agreement amongst us all. Much as it might be a bit tedious, it is necessary that we should undertake this task so I want to lead us all through every right, from the beginning to the end. I hope you find that satisfactory. Thank you. Number 7.

???

Could I just say something, Chairperson? I think that a lot of the members have been caught very much unawares today by various committees that have been called for Parliament. We have had to adjourn a Justice Committee of the Senate; there's a Human Rights Commission Committee Meeting at 11 o'clock and, I think, if it could be once more be brought to the authorities' attention, it would be much

appreciated. This is an impossible situation. I understand that the ACDP have gone to the Speaker to complain and it's very difficult for us in these circumstances to operate.

Chairperson

Mr Ebrahim informs and assures me that notice was given to authorities in this Parliament, the leader of the House, the presiding officers and everybody in G26. And Mr Wessels, the Deputy Chairperson of the Constitution Assembly of South Africa, wants to say something to us.

Mr Wessels

whips

I am willing to give testimony now, like I did on Thursday in G26 to the ~~works~~, but I must, however, draw attention to the fact that this is Tuesday. It is not Monday or Friday and in that respect our work does not have precedence like they have on Mondays and Fridays and I guess it's a matter today of who is the most committed to their work and who maybe exercises the most power and who coerces the best and I think that is what we ought to do. If we want to finish our business, we really have to ask our members to let our work have precedence, even outside of the days which are not allocated to us.

Chairperson

Ms Myakayaka?

Ms Myakayaka

Chairperson, I think with this meeting there is a problem. I think we all have agreed that we are going to give precedence to the work of the CA as members of the Subcommittee, but this meeting was initially scheduled for 14h00 and it was only on Friday that we received notices and people had already agreed to some other commitments for the morning of Tuesday and I think that's why we are encountering problems.

Chairperson

You concede the point? I think the point is conceded by Mr Ebrahim and Mr Wessels. They accept that they are entirely to blame (laughter). They changed it from 2 o'clock to 10 o'clock. Now I was not aware of this. Had I been aware of this, I can assure you that things would have been done a bit differently, as you know! Mr Chibane???

Mr Chibane

Chairperson, I think there are two issues here. One is the general problem of the availability of time and co-ordination with Parliament. And the second issue is related to this meeting specifically. And I think for the first one probably the Management Committee may need to reflect more deeply and look into the programme from now until probably the time when we can go home to finish the business of the constitution-making process. And try to make provision for more time, if possible, at least for the subcommittee; the small committees which are supposed to be meeting from time to time. But with this ??? this meeting and given the ??? especially that some of the parties they are in time, ??? are not here. Problem is mainly to take a quick decision as to what do we do. Do we wait for a moment? Is there any indication that they may be here before 11? And so on. That will assist us to take a decision as to whether to continue or not.

Chairperson

Thank you, Mr Chibane. Mr Chibane proposes, well he asks the question whether we need to either wait for those parties or see whether they are going to be here at any stage. The Democratic Party, yes, it is here, the ACDP is not here. The Freedom Front is not here. And the PAC is not here. And naturally, the IFP is not here. So four parties are not here. Mrs Pandor?

Ms Pandor

Thank you, Chairperson. I think essentially what we are going to be doing today is tabling a report on progress, or lack of it – Mr Ebrahim you are nodding very happily there, but I need to caution – and it seems to be that we actually could proceed given that some members have rearranged their timetables in order to be here. The other option would be to council until 14h00 because Parliament has in fact accommodated the request of the CA and arranged it's programme as extended public committees in order to address the quorum question. So, either we proceed now and give what would be a report without much discussion, or we adjourn until 2 o'clock.

Chairperson

Right, there's a proposal. We could either proceed and see that we really are just tabling a report – maybe even those who are not here might not lose out terribly much – or adjourn until 2 o'clock.

(off mike comment)

Same here, you know. Same here. I mean I am supposed to be in the Justice Committee, Human Rights... Which other one do I belong to?! (laughter) OK. Let us proceed. Thank you very much. Your concerns have been noted and we will make sure that we give notice in advance, ahead of time so that people don't get into any problems. Can we then proceed? Number 7. Three new words have been added: "the state must respect, protect and promote and fulfil the rights in this Bill of Rights". Now, the footnote says: "this is from public submissions and this is accepted international wording in respect of the state obligations. Can somebody explain all this? Do you want to explain, Mrs Pandor?"

Ms Pandor

I don't have an explanation, Chairperson, but in speaking to

the experts we have been told that it would be quite proper for us at the ANC to table our requests that we get a full motivation as to the incorporation of this particular phrase and it is important in terms of the section. No such motivation has been available to us and I understand the experts can actually provide one.

Chairperson Well, that is what I was expecting. Professor Cheadle, Professor Rautenbach and Miss Liebenberg, is this your work? It is not?

Prof. Cheadle??? It is a public submission, submission from the public that this should be included and we were more than willing to prepare a document, or a memorandum.

Chairperson To prepare a document?

Prof. Cheadle OK. To draft a memorandum and to distribute the memorandum.

Chairperson This shouldn't be difficult to explain?

(off mike comments)

??? It is based on international precedent. These are the four elements of the state's duty in respect of rights: to respect, to protect, to promote and fulfil. If you look at them, they... I suppose 'respect' is the first level, 'promote' is the next, 'protect and fulfil'. It really goes stronger and stronger through. So, there are some rights you need to respect and other ones you have to actually fulfil and give effect to. So, it just gives you the full range of what constitutes the state's duty and this is the language used in the writing on international jurisprudence and the likeness of the four

elements of the duty.

Chairperson Is that it? OK? That's it. That's the motivation. Senator Surty?

Sen. Surty Mr Chairperson, if you look at the four words, I think they have special significance in terms of the positive duty on the part of the state, especially the addition. 'Respect' is the recognition of the right itself, the 'protection' is to ensure that when the right is violated, it is protected, the 'promotion' of it, is to ensure that there is a positive duty on the part of the state to ensure that it promotes the particular right, e.g. the right to equality must be promoted. The state must take positive steps to ensure that this in fact occurs. The 'fulfilment' applies particularly to socio-economic rights. It must endeavour to fulfil those rights or those promises that are set out in the Bill of Rights. So, my understanding of the four words being utilised in the context is in terms of the kind of duty, whether... It goes beyond a negative duty; in other words, it also embraces a positive duty on the part of state to ensure that there is fulfilment of these rights and that is the reason why the two words have been added, also in the international document. That's my understanding.

Chairperson So, you are very happy with this addition. You are happy with it? You are supporting it so enthusiastically! Professor Cheadle?

Prof. Cheadle I just want to add to the example 'fulfilled'. You will see that in some of the agreements that have been struck across the floor to get the Bill of Rights completed, is the

duty, for instance, to pass laws, to give effect dictated by mental rights and to these other laws. Now, there is a perfect example of fulfilment: you have a duty to pass legislation to give effect to various rights and the word 'fulfil' there has that... requires the state to fulfil that particular duty. And 'promote' – obviously some of the socio-economic rights can be fulfilled, they have got to be progressively fulfilled, but clearly the state has a duty then to promote those rights. So, from our side, we would support the inclusion of those. It has resonance in the academic writing and the jurisprudence arising out of public international law around rights issues and accordingly, we would certainly recommend its inclusion.

Chairperson Thank you, Professor Cheadle. Senator Andrew???

Sen. Andrew I was just going to say I appreciate very much the expert opinion we got from Senator Surty! However, I am inclined to go along with the ANC and the DP in suggesting that we get a very short little memorandum motivating the use of the two extra words, just for final satisfaction so that we don't just take it at face value.

??? It doesn't have to be 200 pages, Jean.

Chairperson That should be 200 pages?!

??? It does not have to be.

Chairperson You people love memoranda. You really do. All right. Let us get the memorandum. Such is the history of this, we provide the wording and everything, just laid on! Give

precedence, country after country! (laughter) Do we really need a memo. for this? But anyway, that is the decision. We will get a memorandum. You can even make it available on 10th May, no problem! We will have adopted the Bill of Rights! OK. Equality. Welcome, Sheila. That's all right, we knew. Welcome, Corné. Equality. How far have we gone with this one? ??? there.

???

Chairperson, just to report on the discussions that we have had. I think that in 8.1 and 8.2 there is agreement at this stage; when it comes to 8.3, there are two issues of dispute. The National Party has indicated that they are prepared to drop the words 'and affiliation' provided that the words 'or any other grounds' remain in. I think we are still unhappy with that because we believe that has been dealt with extensively in the memoranda we have had so far. But that remains an issue of contention. In the first line there is agreement that the brackets around 'unfairly' should be removed and that 'unfairly' should be in. Then the last issue, the second issue, that there is contention about are the words 'nor any person'. Now, as reflected in footnote 3, you will be aware that both the NP and the DP have proposed that private discrimination should not be dealt with in this clause and that there should be separate clause making it compulsory for the state to legislate to outlaw private discrimination. I think the NP has also indicated that it may be, or is I think, prepared to consider using the passive as is used in the present Constitution in this clause. We also believe that it may be a matter on which the panel of experts has been looking further and may have another formulation. I am not sure. But I think essentially there is still a dispute around that and that the

ANC would like it to be made clear here that it is a right that applies vertically and horizontally. And that the state has a positive right rather than has the negative right. So, I think those are essentially the two issues that remain in dispute in this subclause.

Chairperson OK. Sheila?

Ms Camerer??? Chairperson, in our discussions with the ANC we understood that there was a passive form being drafted by the panel of experts. I don't know if they have actually done so. There has been a lot of talk about this possible passive form, but I don't... We don't have anything before us at this point. The second point I want to make is that we would not be very happy to drop an affiliation, but if... or any other grounds is included, we would consider dropping it because we believe that, that could then be – if it was necessary in the future – added or it could be considered as a ground although I suppose the presumption under 4 wouldn't necessary apply, but we accept that. But we... for any other further grounds. But we wouldn't like it to disappear just suddenly.

Chairperson Completely?

Mrs Camerer Ja. Chairperson, sorry, just to get the minutes sort of sorted out. You know, we've been nursing our reservation about 'nor any person' for a long time, but the brackets just never appear around 'nor any person'. And we have been making the point for quite a few meetings that we feel the brackets ought to appear around 'nor any person' because we don't agree with that at this point. We want, you know, obviously

it is to a extent dependent on a passive form or other wording, but perhaps the minutes could now reflect that we wouldn't like it, the brackets should appear.

Chairperson

It's also the case of the minutes. Even the note says: words in brackets are still in contention. There are no brackets, that's true. So there must be brackets. The brackets must be put there. It's only fair, it stays there. Ms Smuts???

Ms Smuts???

Allow me to respond firstly to something which used to be and is clearly developed from a bilateral between the ANC and the NP and to say, from our side, that we would greatly welcome at the end of the clause the idea of including 'any other grounds' and we would suggest to the National Party that losing the affiliation would be worth doing in order to get the 'any other grounds', which is something we have long argued for. So, our felicitations and congratulations if that's the direction in which it is moving. But, Chairperson, more importantly, we had an extremely interesting discussion around this whole clause and I would just like to note that we too find the idea of reverting to the passive form, as in the Interim Constitution, together with a clause obliging the state to pass by the discrimination legislation, that would be a very satisfactory solution. However, I think that the experts indicated last time that they were working on some sort of a definition that might fit inside the clause as it's presently phrased, just to avoid the absurd results or unmanageable aspects that underlie our suggestion in the first place, to take a new look at this. And if the experts can advise us. If they are going to be able to produce such a thing, it would be extremely useful next time round to look at the two possibilities and to see whether under the

positive phrasing, with an extra definition, whether that's the most desirable way to achieve the horizontality here, which we too want or whether it is better to have the passive ??? clause obliging the state to pass private discrimination legislation. So, could we ask the experts whether... It's a matter of the best way of achieving your horizontal ???. Professor van der Westhuizen?

Pr.v.d.Westhuizen Yes, Chairperson, just as a matter of clarity regarding the role of the panel and the experts and so on. After the bilateral or the multilateral on Friday the 23rd, and acting on the instructions coming from this meeting, there was a meeting the next week between some of the panel members and some of the members of the Technical Committee. We considered a number of issues of which this clause was one and this achievement, others can add to this, but quite a number of hours of debate went into this and if I remember correctly, the different options were the following: to leave this in the active as it is, with the word 'unfairly' in it; another alternative was to try to change it to the passive and perhaps drop the word 'unfairly' and perhaps consider the addition of a reference to anti-discrimination legislation. We discussed all those possibilities. It did not seem as if simply reverting to the passive would really solve the problem because then the applicability, the horizontality of this clause would still be open for discussion; it would be linked to the eventual application clause etc. So, what we then explained to those parties who we saw last Wednesday after they had been invited by the Administration, is that for the moment we thought it best to leave it in the active, to leave the word 'unfairly' in, but if some parties think that one should still

pursue a possible formulation in the passive, then one could look at it. However, I think then we would ask to make the mandate a little bit wider and perhaps consider another way to do it and maybe add some definitional element because simply reverting to the passive does not seem to solve the problem. We thought under the circumstances for the moment this remained the best, but as you know, not all of us are entirely happy with the word 'unfairly' any way. So, if parties want to, we could look, together with the experts, at the possibility of the passive or another formulation for this one.

Chairperson

Professor?

Prof. Rabie

Mr Chairman, just a reminder that the second sentence in 8.2 provides a very good example of the effect of putting in the words in 7, 'promote and fulfil' because now it is actually contradicted. The second sentence says: to promote the achievement of. It could just as well read: to promote the fulfilment of. Now, already in 7 it says the state must 'promote and fulfil'. And here it... And 8.2...

Chairperson

No. No, no, no. Where are you now, Professor?

Prof. Rabie

Wrong clause?

Chairperson

Terribly wrong. Try next door, please!

Prof. Rabie

No, I don't try next door.

Chairperson

Wrong time, wrong meeting, wrong issue. (laughter) I'm sorry, but you're taking us back now. We are now on 8,

and even then we are on 8(g). Yes. 8.1 agreed, 8.2 agreed. Now you are taking us back. Next door they might be doing 7. Ms Pandor?

Ms Pandor

Thank you, Chairperson. I suppose, Chairperson, that we really should agree that we would look at what the experts come up with in terms of a passive or negative formulation. We certainly, from our side, would not be happy to support such a formulation. Secondly, we are not persuaded in any way, 'or any other grounds' would make a useful addition to 8.3. In fact, we can't believe that it renders it meaningless. And therefore we would be very concerned. But I think for the sake of progress it may be best to ask the experts to come up with a formulation reflecting the range of views that has been presented thus far, the formulations.

Chairperson

Sorry, just repeat that last part, sorry.

Ms Pandor

Chairperson, I am saying that from Professor van der Westhuizen's input it is clear that there is a range of formulations that could be proposed to address the number of concerns that have been raised by parties here, including in fact the current formulation of 8.3. And once we look at that range, then perhaps we could come back to this meeting to discuss it, but we certainly wouldn't be happy with a no-one phraseology. We also do not support the incorporation of the phrase 'or any other grounds'.

Chairperson

Yes. All right. Senator Andrew???

Sen. Andrew

Thank you, Chair. Just two comments I wish to make and

the first is that this clause is also partially dependent on the wording of the application clause. I think that is very important and if the experts can just bear that in mind. As to the phraseology and the wording of the application clause, that will to a large extent determine not only what finally is acceptable in this clause on equality, but on several other of the fundamental human rights. Secondly, on the question of 'or any other grounds' we still are clearly of the opinion that it is not absolutely certain that this is not an exhaustive list without such a qualification and we feel that it is not tautologous. We could perhaps ask the experts also to look at the possibility of – and I know they've looked at it several times – perhaps phrasing it 'against anyone on the grounds of race, gender, etcetera or any other grounds'. That may eliminate any understanding of it. I think what is confusing it is when one has the phrase 'one or more grounds including..' and then go on and then say 'on other grounds' as well. I think on that basis we may be able to get somewhere.

Chairperson

OK. Thank you. Mrs Manzini?

Mrs Manzini

Chairperson, I think here I feel that we are running around in circles and actually not saying exactly what is the problem on 3. Because what I guess is what Senator Rabie has said right now that they wouldn't like to see the equality clause applied horizontally. I would like to hear. No, no, let me finish. And they are actually saying that they would like to see the issue of private discrimination catered for somewhere and not in this clause. I don't know where. If they could help us with that, I think it will actually also be assisting the technical experts because from what I hear

from the technical experts is that they've looked at this issue and they've also linked it with the question of application and they haven't been able to reformulate anything and maybe if they could guide us, the National Party, which is not happy with this 'nor any other person' as to whether they would like to see private discrimination which is back-door apartheid catered for in another way and not here on this clause. Because I thought our Constitution actually hinges on the question of equality. There is no way we can have the equality clause not applying to private persons and thus if I could get that clearly I think we will be able, and will assist also in the formulation and have them open discussion because ...

Chairperson Mrs Manzini...

Mrs Manzini on most of the issues we cannot agree.

Chairperson Mrs Manzini...

Mrs Manzini And then the second one.

Chairperson Hold on. Is it necessary to go on when the consensus has now emerged, supported by your party too. Hm? A speaker from your party said: Let us get a number of formulations from the experts.

Mrs Manzini Chairperson, we can have a number of formulations, but if in principle the problem is in their horizontal application, I don't know what formulation we are going to get.

Chairperson But now you are contradicting what somebody from your

own party has said.

Mrs Manzini

No, no. I am saying that you must identify what is the problem and if we can get the problem then whatever formulation will come to us will assess it on the basis of what the problem which we are trying to resolve will be. Right now I don't get exactly what is the problem.

Chairperson

OK. What is the problem, Mrs Camerer?

Mrs Camerer

Chairperson, if I could just respond. Every time we get to clause 8.3 Mrs Manzini brings up this hoary old political accusation about private apartheid and I must bring out my hoary old denial. I mean, the point is that we've had this argument umpteen times. It is just not the case. We have a totally different argument which we have aired thoroughly in the multilateral last week and that is that we are worried about a total free-for-all and we actually had opinions from the experts to the effect that we would have a bit of a free-for-all on a horizontal application. We want a structured horizontal application when it comes to the equality clause. Now, we actually did ask the experts. I understood – and it was understood yesterday I thought in our discussions – that the experts would be asked to draft an alternative also in the passive form also dealing with the whole question of unfair discrimination. We have an open mind. We would like to see an alternative formulation. So, perhaps we could really get an alternative formulation this time. In addition, Chairperson, we have raised the matter several times that we would like a formulation based on clause 35(iv) to actually be brought in here for consideration. I think the Democratic Party's asked for it, we've asked for it,

something along the lines that everyone has the right to legislation designed to prevent or prohibit unfair discrimination in the positive form, so that we can also look at that draft in relation to alternative drafts for Clause 8.3. It can be in brackets, Chairperson, we did ask for it last time and we would really appreciate having a draft along those lines, based on 35(iv) before us, when we come to discuss 8.3 next time so that we can look at that in relation to the right to I think we called it in shorthand 'civil rights legislation'. And I would appeal to Mrs Manzini not to... Her accusation is just not correct.

Chairperson

OK. Senator ???

???

Thank you, Comrade Chair. I would like the experts to focus more sharply on these two aspects that I am going to raise now. I am not proposing anything new. The one is, and we've discussed it at the multi-lateral, the issue of affiliation. In our discussions it became very clear that affiliation is a very wide and vague term. It's straddled across almost every aspect. You can have sexual affiliation, marital affiliation, ethnic affiliation, sexual affiliation, disability, religion, you could be affiliated to any particular aspect whether it's the sporting ground, whether it's a political thing. So, it has no particular place because it doesn't have a defined or a narrow specific meaning. It doesn't have any historical basis in terms whereof it could be introduced under Section 8.3. So, I would like the experts to look at that particular aspect when they comment on the introduction of the word 'affiliation'. The second thing that I would like to raise and which I would like the experts to focus sharply on, is the addition of the

words 'and any other ground'. One must bear in mind that 8, sub. 3, has to be read with 8, sub. 4. Sub. 4 introduces the burden of proof and by having any other grounds, it simply means that you cannot exclude presumption or the onus for any other ground as long as they raise an issue of discrimination, whatever it may be. That means that 8.4 becomes tautologous, but the argument of the NP and the DP does not seem to say that 8.4 should be removed. They are saying: Well, we are quite happy with 8.4 provided you put 'any other grounds'. My submission here is that it doesn't make sense to have any other ground here particularly because 8.4 deals specifically with the grounds that have been listed here and I would like the experts to look at those two particular issues. I am not going to enter into the debate of the horizontal application...

Chairperson

Please!

???

...as I anticipate you would not want me to do so.

Chairperson

I don't want you to do so. I really don't. Mr Hofmeyr.

Mr Hofmeyr

Chairperson, I support my colleague on the information of views that he wanted from the panel, but I think for me there appears to be a crisp issue here. The National Party and the DP say that they do not want in the Constitution to deal with the issue of private discrimination, they want to have legislation dealing with it. But they are in principle agreed that there should be a right dealing with private discrimination, if I understand them correctly. What I sense is the fear from the National Party and the DP, is they are saying because we are dealing with a vertical and horizontal

application in one sentence here, or in one place, somehow that means that the courts are going to apply the anti-discrimination clause in the same way when it applies to private individuals and when it applies to the state. Now, I think our view is quite clearly that will not be the case. In each case the courts will decide what is appropriate and what is not appropriate or whatever words we may use in the clause at the end. But clearly in each case the right against discrimination is going to be balanced against the other rights such as privacy in the Bill of Rights and the courts are going to find that balance and I think that what would be useful for us is if we can get a view in addressing this issue, if the panel can tell us if there is a real fear here that somehow this clause is going to be applied in this notion of a free-for-all that somehow it is going to be applied in the same way against private individuals as it would be applied against the state. And I think that our advice is quite clearly that the courts will distinguish because when it is applied against the state it may be balanced only against a very few rights, but when it is applied against private individuals it will need to be balanced against a range of very important rights in this Constitution. I mean, that really was the gist of what the DP's proposal was at this one stage in the general clause, but about this fear of private autonomy. I mean, clearly when the courts apply this horizontally, they are going to balance it against the privacy clause and the right to freedom of association and so on. I think it would be useful for us to know if there is a real fear, I mean, a real factual basis to the fear, that is being expressed here or not. I think if there is not a real factual basis, perhaps that may help us to get a bit closer to agreement.

Chairperson Thank you, Mr Hofmeyr. Professor v.d. Westhuizen.

Pr.v.d.Westhuizen Chairperson, it's not another contribution to the debate. Maybe we can make it short from our side by saying that we will give it a try to draft one or more alternative formulations, together then with whatever motivation is necessary, addressing most of the concerns mentioned here, or all the concerns mentioned here, as we understand it. And we'll do it together with the experts from that committee. If that is satisfactory.

Chairperson Professor Cheadle, do you agree to that?

Prof. Cheadle Yes, just that we get clarity here so that there is no disagreement about the minutes; we've had a few contretemps over those issues. What I understand people saying across the board here is that there is no opposition in principle to the horizontal application of this clause. The concerns are around – what I think Mr Hofmeyr spelt out – that this might lead to free-for-all, it might lead to these kinds of difficulties. Now, does the clause have that effect? Does other wording of the clause address the kinds of concerns that have been raised? But if we work from the basis that in principle horizontality isn't opposed, it is just the manner in which it is drafted, to ensure that it doesn't operate in an unstructured way, which I think is the word used by the National Party representative, then we know what we have to do.

Chairperson That was my understanding too. Mrs Smuts???

Mrs Smuts That was my understanding also. I think that it is desirable

because I think we are breaking new ground here constitutionally, internationally speaking, so it is desirable to look at that. May I add one little item? My proposal to move the private discrimination legislation clause up here to 8. It's an old proposal from my side, dated 31 January, in fact. One of the reasons for that, and I just want to draw it to the experts' attention, Chairperson... The reason why we have that clause at all at present in 35 in the limitations clause, is, as I understand it, part of the compromise at Kempton Park. It was because horizontalisation couldn't be agreed upon at Kempton Park with the result that the courts are not bound in the interim with the result that you have seepage under 39.3 and, as I understand it, this little clause in the limitation was part of that compromise so that there wasn't an obligation at least to pass legislation on private discrimination. It therefore means that in a new Bill of Rights where we are properly grappling with horizontalisation, there isn't really a *raison d'être* for that little clause anymore, there really isn't. So the first logical thing to do is to move it up here, if we decide we need it. Strictly speaking, you ought not to need it, but the fact of the matter is we ought to have had that civil rights legislation by now. We don't have it. Strictly speaking, you don't need it here, you don't need it under information, you don't need it anywhere because what's in the Bill of Rights should trigger legislation by government to make appeals more easily manageable. Why should the citizens have to go to the court, why should the courts on a case-by-case basis have to develop this anti-discrimination stuff. So, that to me is just the background of this.

Chairperson

Thank you. I think it is agreed then that the experts will

draft something for us. Thank you very much. Mrs Pandor?

Mrs Pandor

Chairperson, then it would be in fact very unwise of us to carry on with the beliefs that we are writing this particular Bill of Rights with in mind a population or a nation that has access to the courts and can immediately approach the courts when their rights are infringed. We hope our country will get to that point, but the majority of the people of this country do not have such access and therefore that lack strains the kind of document that we wish to produce. One that indicates clearly to people who do not enjoy a range of rights: here you are, you are protected. It is not the ???, this free-for-all that was being talked about. In fact I can't imagine that happening because those who will suffer discrimination and lack of human rights access do not have access to courts.

Chairperson

Thank you, Mrs Pandor. Even my learned friend here, on my left-hand side agrees to that. He is about to become a lawyer again. He agrees that what you say is absolutely true. To his detriment, there will not be a free-for-all. Human dignity, there is no problem. 11. Freedom...

(end of tape 1)

**CC Subcommittee- 5 March 1996
Tape 2**

NOTES

0697:
Who is speaker?

1460:
Who is speaker?

0944:
Who is speaker?

1823:
no difference ??? the body

1900:
that bit then ???

1929:
Who is speaker?

2349:
'arbitrary' ??? ??? and so forth

2938:
is it TRT?

3050:
it doesn't change ??? here

3564:
the ??? community

4738:
Who is speaker?

4856:
Who is speaker?

5088:
Who is speaker?

5643:
pretend to ??? on this basis

5879:
is it Sonn?

6006:
is it Mocke???

6250:
the little Prague/Prarg?? spring

6279:
want Judge Sepinker's??? R vs Butler??? judgement

6629:
Who is speaker?

6707:
Who is speaker?

Ms Camerer ...stated that the National Party would be against any wording in the Constitution which would constitutionalise the right to abortion on demand and we believe that this wording suggested by the ANC goes much further than any agreement that South Africa has been party to on this issue, either in Cairo or Beijing and so we would... In fact, I think the memorandum furnished to us by the experts indicates clearly that the word 'reproduction' was used. So, we are still having to take 2(c) as it stands there, Chairperson, but I think in the light of the previous decision or opinion that has been delivered by the panel and other submissions and opinions that have been delivered to the CA in reaction to the published clauses of the Draft Constitution, would really indicate that this goes too far, Chairperson. So, we are prepared to take the present wording, or the wording that appears in the document under 2(c), back to our committee, but we would certainly not be able to accept the wording suggested by the ANC now.

Chairperson Mr Hofmeyr, Miss Camerer does not like what you are saying.

Mr Hofmeyr I don't think that it is that she does not like it, I think what she... The National Party's view is that our proposed wording would tilt the balance more strongly in favour of a liberalisation of abortion laws than their proposed wording. I think maybe that is a crisp question that could be referred to the panel, whether it does or does not. I think that our concern is that the question of decisions regarding one's

body does go considerably further than just decisions about reproduction and it would cover a whole range of other areas like organ transplants etc. etc. that are not explicitly dealt with, experimentation and so on. So, I am not sure, but if we do get a view from the panel that our wording does not tilt the balance more than the National Party's wording, I don't know if the National Party would then still have an objection. Perhaps we could ask them that question else there may not be much purpose in referring the matter to the panel.

Chairperson

Does this tilt the balance?

???

Chairperson, others must come in here. Previously we had to give an opinion on whether the words 'control of one's body' tilted the balance and there was... I think, if I remember correctly, the opinion was then that it wouldn't necessarily tilt the balance, but it would be something to be taken into account. And therefore one of the instructions from the Chair was to find a kind of a compromise word and I think that is where the concept of decisions regarding one's body came in. That was regarded as less of a tilting factor than 'control of the body'. Then the word 'reproduction' got added here, which is a different story. So I think, just speaking for myself and we haven't sat down to consider specifically decisions of the body, but it tilts it less than the original 'control of one's body'. 'Decisions about one's body' was the most sort of neutral one that some members of the technical committee and some panel members could find during that one- or two-week period between two of the meetings. I think perhaps Ms Liebenberg wants to add to it.

Chairperson

Professor Rautenbach?

???

Chair, I think what we would like, if possible, because we keep on referring these things to the panel for views, and I think we would like a proper view, but we keep on referring these things to the panel for views and then when people don't like the views, they just discard them. I think if... No, we've had this on this 'including' and 'other grounds' and so on repeatedly. What I think we should ask the National Party before we elicit the views of the panel is: Are they agreed that we could go for the other formulation if we do get the view that it does not tilt the balance more than their wording. If they are not agreed, I don't think there is any purchase in referring the matter to the panel whatsoever. Then we can go on having a political fight about it. But I think that we do need to get an answer to that question.

Chairperson

Not necessarily something you want in writing, is it? Verbally? I thought you wanted it in writing. If it doesn't tilt the balance is the question; it's a fair question. If it doesn't tilt the balance, would you be fairly satisfied? I know this is a very difficult question to you...

Ms Camerer

Chairperson, can I just say...

Chairperson

It's just like... I mean if you are a young man, if you are told that if you meet a young, beautiful woman, will you marry her? It doesn't go like that, does it? Ja?

Ms Camerer

Chairperson, are you trying to drive me into a corner. I can take it.

Chairperson I realise that. But assume you are not being driven into a corner, this is something that you would consider seriously, isn't it?

Ms Camerer Chairperson, but I would have to take it back because the last opinion that was delivered by the panel certainly convinced us that... It did open the door, I must say, I am quite surprised at the reading of it by the ...

Chairperson Mr Hofmeyr, do you want to leave it to the Chair? I think we as the Chair will deal with the matter and will be able to get the National Party to do the right thing. It's going to be extremely difficult for them to agree that if it is like that, yes, we will agree to it. It's going to be difficult. And we have integrity. I mean like any party, integrity...

??? Sometimes the NP is like an eel, Chairperson, they just slip out at the last moment.

Chairperson Let us get the view... Professor Rautenbach wanted to say something. Then we will see how we resolve it.

Prof. Rautenbach Maybe this could help to resolve it, I don't know. Between 'bodily' and 'physical integrity' in the opening phrase there is such a slight difference that I don't think that would tilt the balance dramatically. 'Reproduction' is actually going further than 'their bodies', I think. But then I want to emphasise, and that was clear from the panel's opinion, that even if these specific words tilted this way or that way slightly, the matter is ultimately to be decided in terms of the general limitations clause. That is actually the factor that will have to be considered when the abortion issue is

to be decided sometime by the courts. These words could make a slight difference, but the ultimate factor would be the application of the limitations clause, not these words. that I think was the gist of the opinion of the panel.

Chairperson That seems to be real expert advice: that in the end it is that limitations clause. I too agree to that.

Ms Camerer Chairperson, if that's the end of the advice, then I will try and take it back on that basis. It's no further advice, in my opinion.

Chairperson Can we agree that the NP... Sheila Camerer can take it back, but in the end it is the general limitations clause. It makes no difference ???(furniture being pushed about) body. It could also be bodies or whatever. Can you take that back and come back to us? Mrs Pandor, are you covered? OK. That will now be taken back. That one's resolved, and I am sure we are going to resolve this one, once that is resolved that bit, then ???. 11. Privacy. 13.

??? Chairperson, I think it is a matter that we raised at the multilateral, but does not seem to appear in the subsequent draft, but we did consider a memorandum submitted by Professor Nico Steytler who is one of our experts elsewhere in the CA, but is also an expert on criminal law and procedure and I think the view that he submitted in his memorandum is that when you look at other constitutions and the international instruments, the right not to have one's property searched and possessions seized is one that is quite a lot more limited than we have it here. The suggestion that we want to put forward is that the word

'arbitrary' should be used to qualify 'search' and 'seize' in those clauses from (a) to (c). You know, I think the motivation is essentially contained in his memorandum, but the right in many jurisdictions is in fact simply not to have an unlawful search or seizure of your property in this context. So, what we have here would still go considerably beyond that. But I think that the concern that he was raising is that with this clause, a search with a warrant, for example, would already be a limitation on the right here. If you then have certain circumstances where you have a search authorised without a warrant, as we do have in our law, that would be a further limitation on the limitations and you may start running into problems with the courts on that. So, I think we do not have exact wording to propose, but essentially... I think he had suggested including the word 'reasonable' here, but we thought that we could go for something like 'arbitrary' which would be a little bit stronger than 'reasonable', but that then there does appear the need for some qualification.

Chairperson

There's a proposal. 'Arbitrary' ??? ??? and so forth. Ms Smuts?

Ms Smuts

Chairperson, just to say from my side, I don't look at his argument. In the first place, his proposal of the word 'reasonable' seems to me just completely wrong. Also the argument about a limitation on a limitation. Surely, that... I am looking for response from the experts, really. Surely that's nonsense. I mean, you've applied limitations in certain cases when they are justifiable under the usual proportionality tests and so on and whatever is needed by way of limitation, can be justified under the limitations

clause, I don't understand the layers of limitation. Then the example that he uses of the roadblocks, for example. That surely falls under security of the person, it was in fact dealt with by our experts in the big memorandum, the first one. If you remember, the right to security of the person, that has a... The scope of the Act is abridged there by the words 'arbitrary and just cause', the idea being that if you have to restrict people's liberties for mental health or immigration, that those things would be taken care of by the arbitrariness and the just cause, which also means that they are reviewable by a court. And that other matters, like roadblocks, you deal with under the limitations clause. So, I wasn't particularly convinced by Professor Steytler's memorandum at all and it seemed to me what was being suggested was unnecessary, but I would be interested to hear from the experts whether they can see a good reason for introducing the concept of arbitrariness. You would be addressing the scope of the rights, wouldn't you? Yes. And is there really a need for that?

Chairperson

Ms Liebenberg.

Ms Liebenberg

Yes, Chairperson, I think Ms Smuts is quite correct when she said it could be dealt with and it will be dealt if it's left as it is in terms of the limitation clause, but I think, from reading Professor Steytler's memo., the concern is that in the normal circumstances, you don't have an unqualified right against search and the Criminal Procedure Act says that you can be searched with a warrant and in certain exceptional circumstances where, for example, the evidence will be destroyed, or the person will flee, then you can go and search without a warrant. So, the actual scope of the

right is the right against non-arbitrary or non-unreasonable search. But I think ultimately it probably in the end won't matter that much. I mean the Canadians have a qualification of unreasonable search procedure and they have the limitations clause to do with that for exactly the reasons that Nico's memo. deals with. So, you know, it's more sort of, more accurately and neatly defining the scope of the rights so that you say: Look, in normal circumstances, you can be searched with a warrant. If the police have a warrant, they can search your property and that is to define it more clearly.

Chairperson Thank you, Ms Liebenberg. How does this sound, Ms Smuts? Ms Camerer? Ja, sure.

Ms Camerer I see from the minutes that the panel was going to... I mean that's the TRT??? was going to have a look at 'arbitrary' and give us an opinion as to what extent this affects the rights of the person whose home is being searched. Now, I mean, I hear what Sally Liebenberg's saying, but surely... I mean, the burden is more on the home owner than on the occupier, than on the thief. I mean, as you have indicated, they can... I mean it's up to the person whose home is being searched to enquire if this is arbitrary. I mean the thieves are in a much stronger position than and the rights of the person being searched and seized are weaker, or am I reading it incorrectly from the way you are putting it?

Ms Liebenberg No, it doesn't change ??? here. I don't think it changes the burden of proof at all. You know, that is still caught up. In Canada, it certainly doesn't and the normal rules of who bears the burden, in terms of what must the justification

occur are reversed for exceptional cases, when you can go in without a search warrant.

Chairperson Professor Murray?

Prof. Murray Thank you. I think the panel and the advisors to Theme Committee 4 were going to discuss this matter. And what I certainly would appreciate, and I think my colleagues, is a chance to come back to you after we have been able to think about it a bit more carefully. I, like other people here, have read Professor Steytler's memo., but haven't really paid enough attention to it.

Chairperson OK. Could we allow that to happen and when you do come back and you are persuaded that it needs to be changed, let's have a formulation which would add 'arbitrary'. OK. TRT to consider and come back with formulation. Thank you. Then there is 14. Can we do 14 quickly? Mr Hofmeyr?

Mr Hofmeyr Chairperson, in 14(ii)(a) we have proposed in our discussions with the National Party that the inclusion of the word 'public' so that it would be 'an appropriate public authority'. I think our agreement there was that we would try and get some advice on the scope of what this meant and also the National Party wanted to go to some of the interest groups involved in this issue to get their views. I think there is a suggestion that we should include the word 'public' here and perhaps that should just be noted while we are looking at it further.

Chairperson All right. Ms Camerer?

Ms Camerer

Thank you, Chairperson. We did indicate that we might submit alternative wording, revised wording which we could give you verbally. I wouldn't like the minutes to miss this, Chairperson. I am not sure... I could write... I haven't had a chance to get it typed this morning because we got back late, but I could verbally suggest an alternative. In other words, 2(a) would read: 'those observances follow rules made by the authority in immediate control of that institution' as a possibility, but we would like to... I am not sure how this should be approached, Chair, whether we should take it upon ourselves to go to the communities that we feel may be worried about this sort of change or whether the CA would approach, for instance, the ??? community or the Hindu/Muslim community who get particularly concerned about this sort of thing. We are happy to consult on our own, but I am just wondering whether it would be something for the CA.

Chairperson

No, no, no, please. We already have enough to do. You do it and you will let us know what they think. Seriously. OK? Senator Surty?

Sen. Surty

Thank you. Just a response to the suggestion here. I think the reason why the suggestion of 'appropriate public authority' is being inserted is that there can be some form of uniformity by a properly delegated public authority. What could occur if you are going to have immediate control, you could have five institutions in a particular locality which would have five different approaches to a particular, you know, to the religious observances in a particular institution. So for purposes of cohesion and integration and uniformity, it is preferable that a public authority makes this particular

decision. Now, to address the concern of Sheila, one should possibly look at (b) and (c). (b) says clearly, 2(b), 'they are conducted on an equitable basis' and (c) says 'attendance if free and voluntary'. So, under any circumstances, those attendances for those particular observances will be free and voluntary and would be done on an equitable basis, in other words, it would take into account certainly the population composition or the religious composition of the particular... of the people, that institution. And I think, under these circumstances, and purely objectively, that 'public authority' would be a much more preferred term than 'under the immediate control of an institution'.

Chairperson

Sheila?

Ms Camerer

Chairperson, I must say the motivation given by Senator Surty is beginning to alarm me because...

Chairperson

Allow you or alarm you?

Ms Camerer

Alarm. It seems to... some intimation of the ANC to bring religious observances under central control, is surely very undesirable because religious observances are very much a private affair and those institutions conducting them would presumably want to organise themselves along their own rules and I think that the case is met by the equitable basis and the free and voluntary attendance. Any concern that, you know, it wouldn't be well or properly done. So, I must say I was less worried about public or... Actually, can I just get clarity on the wording. Is it 'an appropriate public authority' or 'a public authority'? Appropriate public authority.

Chairperson Is there a problem with that?

Ms Camerer Chairperson, I think we may have a problem with that.

Chairperson Really? What is the problem?

Ms Camerer Well, I have indicated that I would have thought that it would be up to the institution to organise its own religious observances according to the rule that, that particular religion follows and I would think that to sort of have a public body organising them is something that many of them may find very undesirable, Chairperson.

Chairperson But isn't that body also public?

Ms Camerer Chairperson, that's why we suggested this alternative wording, which I hope the minute-takers have got down, but I would certainly write it out if they would like, that it's the body in immediate control of the institution that would surely want to regulate the observances; and the rules for a particular religious observance would surely be most appropriately laid down by that body.

Chairperson OK. Professor Rautenbach?

Prof. Rautenbach Chairperson, just a short remark. Even in the Interim Constitution I think this could have hardly been interpreted otherwise than being a public authority. If this was simply a case of the religious authority or grouping deciding these rules, it wouldn't have been necessary to include it here because that would be an incident of their autonomy. That's why this has a specific limitation clause, it was

necessary. So, I think the intention in any case was, even in the Interim Constitution, that it should refer to public authority. And the reason that there is difference of opinion now makes it necessary to make this perhaps clear and to decide the issue.

Chairperson To make it clear by doing what?

Prof. Rautenbach By inserting 'public' because I doubt it whether it could have been the intention that it was simply the authority.

Chairperson 'Public' is not used in the Interim Constitution, but is it to make it abundantly clear if you could add 'public authority'? I think I don't see any problem, but I sometimes am blind. Mr Hofmeyr?

Mr Hofmeyr Yes, Chair, I think that there is obviously... I mean the National Party seems to be now moving to the view that only those who are in immediate control of their institution should make the decisions. I don't think that, that has ever been the view. Obviously at the national level certain guidelines would be made, at the provincial level certain guidelines would be made and within those guidelines the institutions would themselves practically organise when and where and how these things are going to happen. This does not apply only to schools, for example, it applies to the defence force. I mean there are religious observances in the defence force. Now we can't possibly say that each commander of each defence force base is going to have complete control about how religious observances happen in that place. Obviously there is a need for some sort of uniform approach to how these things are dealt with. You

know, I think Professor Rautenbach is quite right when he says that this is in a sense a limitation and the limitation is to say that the religious institutions can have the use of state facilities to promote their religion essentially, but they have to follow the rules that are made and I think there was never, could never have been, an intention that the word 'authorities' meant anything other than a public authority.

Chairperson

Ms Camerer isn't the word 'appropriate'... He and I have just been conferring... Isn't the word 'appropriate' the operative word? That it is the appropriate authority at whichever level it will be. It could even be right there at the school. It could be at the districts, it could be at the region, at the province or whatever, but it is the appropriate authority. And somewhere, somebody is going to decide who the appropriate authority will be. It could even be at the command level or at the regional command, national command, but somebody will agree that this is the appropriate level and the decision should be made there.

Ms Camerer

Chairperson, we are perfectly happy with the wording as it stands, we were perfectly happy with the wording in the present Constitution, we are not quibbling with it. But here is a new issue being raised by the ANC. We took it to our advisers yesterday and they advised us not to agree and to suggest this alternative wording which I have now put to you. But we can always take this back. It is a pity that the ANC has introduced this further element because I think that everybody was perfectly happy with the old wording and everybody more or less understood what we were getting it.

Chairperson I think the real purpose of going through this is to see how we can make this better and all this. I mean your suggested wording, you now want to take this back. I think we should allow that. That should be allowed. Further explanations have been given. Let us allow the NP to take this back and then we will revisit it again. That seems to deal then with 14.

??? Sorry, Chairperson. Just at the end of 14(iii)(b) there is a suggestion – I think we would like some technical advice on it as well – that we should remove the words ‘the Bill of Rights’ and replace it with ‘provisions of the Constitution’. I think the concern is that there are other places in the Constitution where we are dealing with traditional authorities and traditional law, for instance, and that in the process we should not lose the consistency with those provisions. But I think it is something that we would just like to get a view from the experts on. I think the National Party did not seem to have any in principle problem with that, but we would, I think, like to have a technical view on that.

Chairperson What is our view on that?

??? On the face of it, it seems to me that the colleagues around me here are quite happy with doing that.

Chairperson They are quite happy to...?

??? They are quite happy to change it as proposed. I don't know what the view from the committee there is.

Chairperson They all nodded. Everybody is nodding today. Wonderful. Shall we change it? Everybody smiling? Wonderful. OK. Freedom of expression. (c) and (d). Reformulated. No problem. Sheila?

Ms Camerer Chairperson, we just want to be sure, so we want to flag (c) and (d) that they apply to juristic persons. So long as we are satisfied with that, then I think we could possibly go along with the wording as it stands.

Chairperson OK. You just want to flag it to make sure that they apply to juristic persons. As we go through the Bill of Rights some of these things become clearer, they fall into place and the scales on our eyes are removed, they fall down and we see the truth. So we don't need to fight over this, we are just flagging it. Please, Mr Hofmeyr.

Mr Hofmeyr It took the National Party 48 years for the scales to fall down, Chair.

Chairperson Nonetheless, they have fallen. So we flag this one just for that.

??? Our eyes are open now!

Chairperson Yes. And at last you see the light. OK. Is there any other issue on... (c) is still in brackets, why is that so? Not any more. The brackets are still there. 2(c). No, no 2(c) sorry. 2(c). Mr Hofmeyr?

Mr Hofmeyr Chairperson, on 2(c) there is still in dispute... We are proposing a new formulation that we hope will address

some of the issues raised by the Democratic Party specifically who wanted some sort of harms test to be built in there. So, we are proposing deletion of the word 'discrimination' at the end of the sentence and to replace that with 'cause harm'. So it would be 'constitutes incitement to cause harm'. That may not be very good grammatically, but 'that causes harm' or something like that may be better. We would leave that to the technicians. I can just add that from our discussions with the NP, they are prepared to look at this clause, the basis for them looking at it would be that they would like 2(a) to have the same qualification added. In other words, they would like 2(a) to read 'the propaganda for war that constitutes incitement to cause harm' or 'that causes harm', I am not quite sure what exactly they are proposing. Then in relation to (c), they would like to think about the way that broadens (c) further to also extend some protection against things like child pornography and so on. So, they are suggesting the inclusion of the word 'degradation' at some point or other. I don't know if they have come up with an exact wording, but I think it would both increase the scope of hatred as well as increasing the bases on that. I don't think that we have agreement on any of those issues at the moment, but discussions are continuing. Sheila?

Ms Camerer

Chairperson, we basically have a position that we would prefer not to see any limitation on freedom of expression built into the clause. As a specific limitation, we would prefer the general limitations clause to operate, but we hear the ANC and we are fully sympathetic to their position on hate speech based on race and ethnicity and also gender. So, I mean although we believe it could be accommodated

in specific legislation, we can understand their concern because if you look at the evidence that has been given before the committee that is dealing with the revised Publications Act, there seems to be very strong evidence that the legislation isn't addressing the issue of child pornography. The attorney general of the Cape gave evidence to that effect. So, if there is not going to be sufficient protection in legislation for children against such things, then perhaps we should look at the Constitution. I mean, if we are going to... I mean, to me, I don't believe that hate speech based on race is a worse offence than child pornography. I think they're on all fours, they're all just as bad as each other. Now, if we are going to deal with the really bad things that can be said in this Constitution, then perhaps we should think about what they are, perhaps the experts could have a look at it, and outlaw them in the Constitution, if the legislation isn't going to cope with this, Chairperson. So, I am addressing it more on a matter of principle than on details to go into the clause and I wouldn't pretend to offer ??? on this basis. The reason why we waived the issue in relation to 2(a) with propaganda for war, is really in line with the concerns expressed by the Democratic Party that the demonstrable harm that will be caused by this sort of talk. So, we feel that there could be loose talk in relation to propaganda for war which wouldn't really cause harm whereas, you know, to fall foul of the Constitution, it should be as serious as to cause demonstrable harm as well. But it is just an idea that we would like to submit to the panel. You know, if we are going to have to live with 15.2 altogether, then perhaps it should be couched in a way that we would find acceptable.

Chairperson

Thank you, Mrs Camerer. Has anybody taken the trouble – Professor Cheadle is with us now – to go through submissions from the conference of editors? I haven't read it. It is very long. But if somebody had taken the trouble obviously you will tell us that we've taken into account what a reputable member of the public sector has said in the form of the conscience of editors, whether they support or do not support what we have there. So, I am satisfied if somebody has gone through it because we need to take into account what the public is also proposing in this regard. Professor Cheadle, do you want to say something?

Prof. Cheadle

I just wanted to say that we have been given the brief by Mr Sonn(???) to go through the submissions and we are hoping to prepare a memorandum for submission to the subcommittee next week which will highlight those submissions that should be taken into account. Of course, the parties have received the list of the submissions received and they are going to receive a summary of the submissions and then we have been given the task to go through those submissions, isolate those submissions that we should take into account and then, in respect of many of them, and in particular the conference of the editors, deal with the submissions made there for presentation to the subcommittee.

Chairperson

OK. Ms Smuts?

Ms Smuts

If I may just respond to the ANC and then to the NP. From our point of view, and it's a strong point of view, we would certainly still prefer no immunisation of the freedom of expression to exist because, as Gilbert Mocke??? has

argued it, if you pass a law under the present phrasing and say that any advocacy of hatred based on race etc. that constitutes incitement to discrimination shall be punishable by 15 000 or 6 months in goal, then someone like Tony Yengeni, for example, and I am not using the example facetiously, if Tony got charged under such a law, and they're always phrased...

Chairperson Tony Leon.

Ms Smuts Tony Yengeni.

Chairperson It could be Tony Leon.

Ms Smuts Tony Yengeni. Tony Yengeni was the one who made the racist remark. And you see we would passionately uphold Tony Yengeni's right to do that. We think it is better for our society to hear what we think and for us to respond. That is the essence of the argument. And someone like Tony Yengeni should then have the right in a court of law, if you are charged under that Act, to say: But I have my right to freedom of expression. And therefore all the rights are then in balance. His rights to freedom of expression are then balanced against the rights of dignity in this case of white people. That's the way it ought to be. That's the way we would like to see it. Nevertheless we appreciate what is coming from the ANC. It is an idea I had earlier indicated we would be prepared to look at, for the precise reason that we have already ratified at least two conventions that require this government to pass race hate, we recognise that we are required to pass race hate legislation. Since that is the case, there is considerable safeguard to be had in

defining this most closely and the harm base is something that is based on an objective test and that is why it could arguably be a good thing to write in here and I would be extremely happy to take this back to my party, but cannot indicate acceptance until I have done so. Chairperson, on the National Party suggestions may I just register my strongest dissent because your problem with introducing degradation is, unlike the harms test, precisely because it is broad and subjective, and I can tell you now, that if we introduce that, you will have censorship back on a broad scale in six months' flat. The little ??? spring will be over and already this week we had Frank Kahn's office arguing very strongly for race and gender censorship. In other words, what they want is what prevails in Canada. They want Judge Sepinker's??? R vs Butler??? judgement which said quite simply that once you concede that there is harm flowing from degradation and victimisation it is not enough to argue that you can just restrict publication or movies, then you must in fact ban. Once you take that kind of decision. So we would have censorship in no time at all and though it might suit my political agenda to ban pornography hard or soft, I detest the stuff, it's precisely because it shouldn't suit anybody's political agenda that we shouldn't be banning the stuff. We wouldn't agree with the degradation idea, but we will certainly look at the harm test.

Chairperson

Thank you, Ms Smuts. They tell me the tea is ready. If you want to continue deliberating what Tony Yengeni does and what Tony Leon does, the tea will be cold. Can we take a break and have some tea and come back?

(break for tea)

Chairperson

Sheila Camerer?

Ms Camerer Thank you, Chairperson. Just on this issue of the word 'degradation'. It certainly was not the word I used, it is the word Willie used, but I talked on a matter of principle that possibly the panel could look... If we are going to start restricting the freedom of speech, maybe we should deal with everything we need to mention here. I am not wedded to any particular concept and certainly not the word, but I just want to reiterate that the National Party's position is that we really don't think it is necessary to have 15.2, we would prefer an unfettered freedom of speech that is limited only in terms of the general limitation clause, namely through statutes that are passed by Parliament.

Chairperson Thank you. Senator?

Sen. ??? The contribution that I would like to make is simply that the ANC took into account the position with regard to the national documents. I refer here particularly to the international covenant, civil and political rights, which encapsulates subparagraph 15.2 the proposal now to cause of harm is the result of discussions and contributions that have been made, particularly by the DP. So, what we have done really, is try to abide as closely as possible to the covenant in so far as construction of this particular clause is concerned, just to mention that.

Chairperson OK.

??? Perhaps just to mention that in terms of degradation, perhaps Ms Camerer can look at...

Ms Camerer I am not...

???

Oh, sorry.

Chairperson

OK. Thank you. A proposal has been put forward. The proposal is that at the end there should be 'cause harm' and the DP said they are quite willing to take back proposed amendment from the ANC to their own party.

Ms Smuts

My party may nevertheless decide to dig in on our position that there should be no immunisation, but I am certainly prepared to take it back.

Chairperson

They may come back and say they are proposing that what they put forward is correct. You must dig in because if you dig in you can't dig out, you know. Your party may change its mind. On the other hand, the National Party through Sheila Camerer has proposed particular wording which you read out which I trust the Administration has recorded. On the previous one? Indeed, yes. Yes, it was... No, you haven't proposed. No, my apologies. Now to 'cause harm' can then be looked at by the DP and they will come back to this. We are quite close to finalising this one. Then we go to 16.

Mr Hofmeyr

Chair, we go to 15.3.

Chairperson

Oh, I thought what we had to do was quite clear there. What do you say on 15.3?

Mr Hofmeyr

Chair, I think the footnote 9 indicates that there is in principle an agreement that we would move this to 15.3. A tentative formulation that we have discussed with the National Party is the following. I don't have it in writing

unfortunately, and it is really one just for the purposes of discussion, but it's the state must establish an independent authority to regulate broadcast/electronic media to ensure that they are fair and represent a diversity of opinions. As far as I understand the National Party's fairly happy with that wording, but they do want to add to this the notion that citizen-type newspapers as they have experimented with

(end of tape 2)

**CC Subcommittee- 5 March 1996
Tape 3**

NOTES

1484:

I am coming to you ???

3423:

Who is speaker? Senator??? (sounds like Radu)

3871:

Senator (as above, sounds like Radu)?

3936:

??? do tell me something

4816:

OK. Senator ???

5205:

Who is speaker?

5496:

isn't it, Senator Radu???

5833:

Who is speaker?

6067:

who is speaker?

Mr Hofmeyr ... Chair, I think footnote 9 indicates that there is in principle an agreement that we would include this 2.15(c). A tentative formulation that we have discussed with the National Party is the following. I don't have it in writing unfortunately and it's really one just for the purposes of discussion, but it would say: "The state must establish an independent authority to regulate broadcast/electronic media to ensure that they are fair and represent a diversity of opinions." As far as I understand, the National Party is fairly happy with that wording, but they do want to add to this the notion that citizen type newspapers, as they have experimented with in the past, should come within the ambit of this clause.

Chairperson Which was community type newspapers?

Mr Hofmeyr No, it's citizen type newspapers.

Chairperson What are those?

Mr Hofmeyr State funded. When the state surreptitiously intervenes in the newspaper market.

Chairperson Oh, a newspaper called the Citizen!

Mr Hofmeyr The Citizen, ja.

Chairperson Oh, I thought you meant community newspapers.

Mr Hofmeyr Now, at the moment, we have indicated to them that the formulations proposed thus far have not covered, been adequate to cover that and we've really had great difficulty coming up with a formulation that would deal with that. So, I think they have undertaken to table some formulation that would take account of that. The experts have commented further that they feel that if it is to be included in Chapter 7, we actually should establish a specific institution. I think our feeling is that we really do not need to go that far and we would like them to think about a way that it can be incorporated in Chapter 7, just as a fairly bland statement of principle such as it is at the moment.

Chairperson OK. Mrs Camerer?

Ms Camerer Chairperson, I must say Willie Hofmeyr seems to be putting words in my mouth a good deal today. If you will permit me.

Chairperson You two seem to spend a lot of time together!

Ms Camerer If we could just adjust some of the wording. Can I just register the National Party would... Our first preference is to have a right in the Bill of Rights and we are not prepared to give up that position unless we know exactly what we are going to have instead. And at this stage the suggestions seem to be extremely vague. I just want to point out that when it was raised with the people who are busy negotiating the Chapter 7, the structures of government supporting democracy, that yet another commission, or body, was on its way. There were groans all round and I think you commented yourself, Chairperson, that the

expense was something one had to look at. But, I mean, the fact is that if it is not going to go into the Bill of Rights, it must go into a satisfactory place. Now, possibly the panel could suggest something to us in this regard. The third point I want to make is that we would like... The points about the Citizen is something that I have raised, and the fact is that we wouldn't like this to happen in the future and we would like to make sure that the state has to ensure that where it finances media of any kind – we are not talking only about the broadcast media – or controls it, then there must... diversity of opinion must be reflected. So, if perhaps the panel could think of how the question of newspapers could be addressed, perhaps as distinguished from pamphlets brought out by government departments, which presumably would want to reflect the policy of that department and I don't suppose we are talking about that. We are talking about media that's available to the public which the public believes is impartial. I don't quite know how we address this, but perhaps the panel could assist us.

Chairperson

Thank you. Professor van der Westhuizen?

Pr.v.d.Westhuizen

Chairperson, yes, we could certainly try to find words, but I think we need a little bit more guidance as to this issue of moving into Chapter 7 or not moving into Chapter 7. I think what footnote 9 indicates is the following: that Chapter 7 as it now stands is the chapter on specific institutions, the public protector of the Electoral Commission, the Human Rights Commission etc. It has a general introduction saying what the aims of all these things are and then the institutions are dealt with one by one. And right at the end there is a general part again about how members are

appointed and so on. What I think, the TRT and the panel and also the members of the Theme Committee, the expert committee, thought that it would be strange, unless we can get a clearer idea as to, you know, the reasons for moving it there, but to have this kind of clause just standing there, it doesn't seem to fit into the structure so maybe if one can hear a little bit more as to why it should, you know... if the kind of wording just proposed by Mr Hofmeyr, and maybe also expanding to also include newspapers or whatever. I don't think we are sure why it should be in Chapter 7 and not here because structurally it will really be difficult to fit it in there. One could look for ways, but the way Chapter 7 is structured at the moment, it doesn't fit in naturally.

Chairperson

Mr Hofmeyr – I am coming to you, Ms ??? – are you able to explain why it would just stand on its own interpretation?

Mr Hofmeyr

Well, Chairperson, I think the fact of the matter is that it fits even more strangely into a Bill of Rights. I mean it is not a right, it is an obligation on the state to establish a specific institution and I wouldn't want to think that there is anything like this in any Bill of Rights that I have ever seen in my life. So I think that perhaps Chapter 7 we have thought would be the most appropriate place because one could end it off with another little section saying 'other institutions' or something like that. But certainly, in terms of what it is proposing to do, it fits into the concept of Chapter 7 or sort of semi-independent institutions that are some brake on the state's authority. It doesn't fit into the concept of a Bill of Rights so I think that is why we have made the general proposal. It just seems to be better to try and fit it into Chapter 7 awkwardly than to fit it into here

awkwardly.

Chairperson

Do we need this? Ms Smuts?

Ms Smuts

...Chairperson, and try to assist. I think grounds on which you could include an IBA under the institutions are, but it's one of the main functions of the IBA anyway to ensure a diversity of voices. You could argue that, that's democratic. However, we ought already to have had, and will soon have also the ITA, which is the telecommunications authority, which is supposed to do the technical stuff in the first place, all of this resting upon the scarcity doctrine. So, I think you can make an argument that before you know where you are, you are going to be into the ITA as well. So, that might be difficult for 7. The argument for keeping something here – and there is precedent in the European Convention and there is reference in the German Constitution to broadcasting – I am trying to look at this from all sides, Willie – the argument here is that you are infringing freedom of expression if you start licensing people and therefore what's missing from your formulation is the licensing aspect. I tabled a formulation a while ago which reads not dissimilarly from yours. It said the state must provide for the independent regulation and licensing of broadcasters to ensure a diversity of voices. There's a reference in the footnote although the wording isn't there. So, I mean the theory is that you address it, Chair, because you are actually infringing a little on complete freedom of expression of the kind that you would have in the newspaper industry, which is why you wouldn't in fact address things like the Citizen; the newspaper industry is an industry, there is no scarcity of resource, it is not the

business of the state or a Constitution to try to... All the Constitution can do is to ensure their freedom of expression and the only exception I can think of to try to meet the NP, Chairperson, is that in places like Sweden, and arguably in South Africa in future, a government may wish to subsidise a new newspaper, precisely to increase the diversity of voices and if you are going to subsidise on the Swedish model, then maybe it's not such a bad idea to say that there should then be a diversity of voices. Those are the kinds of parameters of the debate. I think you can make an argument for including something here. I think you can make an argument for including under Chapter 7. None of them are clear cut, but I see the difficulties about Chapter 7 now that Professor van der Westhuizen has spoken about them.

Chairperson

OK. Professor van der Westhuizen?

Pr.v.d.Westhuizen

Chairperson, I think actually the question you asked is one that one must also look at clearly and that is the reason why it is necessary in the first place and I know that there may have been a long debate on this. The reason for something like this in the Interim Constitution I think was slightly different at the time historically in view of the history. I think that has a lot to do with the history of the South African Broadcasting Corporation at the time and the election, but I think people must make it perhaps a little bit clearer, if you'll excuse me from saying so, what exactly it is that one wants to target because there are quite a number of complicated concepts in this thing. For example – and this is a personal opinion of mine, I am not representing the panel – when is something really controlled

by the state? When is something really financed by the state? What exactly does diversity mean? All these things are relatively complicated in media law and I am sure that one could come up with wording that will work, but maybe we must be a little bit clearer as to exactly what is the mischief that one is trying to address and then we can perhaps look more clearly for the right wording.

Chairperson Professor Cheadle. Do we need this? Please explain to us why do we need this. Professor Rautenbach, while Professor Cheadle is gathering his thoughts.

Prof. Rautenbach I could try. I am inclined kind of to agree with Ms Smuts that in the Interim Constitution from this particular clause it is clear that the state may control the public media, some of it. All the difficulties Professor van der Westhuizen mentioned are inherent. When does it control? When does it finance? That's inherent in it, but it makes it clear that the state can control it and then set certain conditions. So, to a certain extent one could regard this as a kind of limitation clause, more or less akin to the prohibition on the establishment of religion in the religious clause for which we also have a specific in the new 14.3 that religious marriages may be recognised. So I think it's a kind of perhaps necessary limitation clause.

Chairperson OK. Possibly let's have... Professor Cheadle, why do we need this? I am coming to you, Senator.

Prof. Cheadle Are you asking me a policy question or a legal question, Mr Chairperson?

Chairperson I asked you a question. You answer the question! Don't ask me a question! (laughter)

Prof. Cheadle Well if you don't have it, then the state, I would assume, would be able to finance and a media and do so without restriction other than a general law of limitation under the right of freedom of expression. So, I think the effect, and I think I would then agree with Professor Rautenbach, is that without it, the only limitation that we place upon the state would be a limitation, a general law of application on the right to freedom of expression. I think Subsection 3 goes further, it imposes obligations that would go beyond what would normally be acceptable limitation to the right to freedom of expression. In other words, if you put a newspaper controlled or financed, take the Citizen as it was, by the state and another newspaper that wasn't, it would generally be considered an unacceptable limitation to require a newspaper to have a diversity of opinion in everything it writes and that it necessarily be impartial. That would be an unacceptable limitation and then if you didn't have Subsection 3, then the same test I think would apply to a state owned newspaper and a privately owned newspaper. So, what is the need for 3, which is ultimately a policy question? That if the state is to finance or control media, and it's using taxpayers' money to do that, and accordingly it would have greater strictures placed upon it than would other press media. But that, of course, is a policy issue. Should state owned press be treated the same as the other press or should it have additional burdens placed upon it? So, if you go for the second option, then it's necessary. If you go for the first option, then it's not necessary.

Chairperson Thank you, Professor. Very clear.

Ms Smuts Can I possibly give you another more legal type one. Arguably, now with digital technology, now there's no longer a scarcity of airwaves, what if consortia of potential private broadcasters, of which right now there are half a dozen in this country losing money by the hundreds of thousands a day because the IBA doesn't get round to issuing them licences, what if one of those took the government to court or Mr Tony Sanderson's Gold FM? He too is losing money because the IBA doesn't get around to issuing private licences. There are reasons why they don't get around to it. But these people may argue that their economic rights are being infringed and they are losing money and so on. They could take the government to court so how can you go around taking unto yourself the power to issue licences and regulate these frequencies which are now not scarce anymore? All I need to do is to buy myself some space on the television. There's nothing to stop me beaming into your country. I am going to go ahead. So, you would then need a provision which says that the state can in fact regulate. That is the point, that the state is allowed, despite the freedom of expression, to regulate and to license. That really is the point.

Sen. Surty In fact I would very much like to sit next to Dene now.

Chairperson Hold on, you could do that right away. You want to sit next to Dene? Do so. Let me allow Senator ??? to speak first and then you will then sit next to Dene.

Sen.? Thank you, Chairperson. I think it is quite clear that at least

three of our experts here have spoken in favour of some limitation on the state where it in fact finances or controls media of any sort and that's our position as National Party. We have not changed our position in that regard. We have been consistently in favour of some restriction being recorded in the Bill of Rights and we still stand by that. We are not terribly impressed I think. We have thought long and hard and long about it, of establishing yet another body in Chapter 7. We already have legislation which covers the IBA, that body is already regulating the media in the outside world and it is only to cover the position where the state in fact finances or controls media, including broadcasters, that we would like to see some limitation and perhaps it could be reformulated by the panel.

Chairperson

OK. Senator Surty.

Sen. Surty

Thank you, Chair. What I would like to say is, firstly, I am indebted to Dene for her contribution because I would really like to build on what she said. I think what we have got to look at are two fundamental aspects. One is the principal that is enshrined in this media clause. My submission here is it certainly does not have... The Bill of Rights is not the appropriate place, there is no international precedent, other than municipal constitutions, for this particular clause, so it would have to be relocated elsewhere. Now if you look at Chapter 11 which deals with public administration, it deals with principles and it also deals with regulations, public administration. I feel that Chapter 7 would be the ideal place, but the approach for this particular... for purposes of drafting would be two. One is to encapsulate the principle and secondly to make provision for legislation which would

regulate this particular area. Now I say Chapter 7 for the reason that it falls within the public domain, like the public protector and so forth. It would affect public interests, and therefore without having to create a mechanism, it would appropriately be located in Chapter 7, but it should have the principles as are captured in Chapter 11, which deals with public administration, particularly Section 152 (i) and (iii) as a guideline towards how to formulate it. This is a proposal on my side to carry the process further. Thank you.

Chairperson How do we respond to that proposal? Senator ??? what do you think about that proposal? Do you want to look at it?

Sen. ??? I still think that we should possibly allow the experts to formulate some sort of right. We still feel that we should have some protection in the Bill of Rights.

Chairperson ??? do tell me something. Senator ??? says we do need merely to formulate some rights. Where else do we find this? You know, many of you have been carrying all these literate books with rights from here to Siberia and all these places. You must now be able to tell us where else we find this one. Please. Mr Hofmeyr?

Mr Hofmeyr Chairperson, where I agree with Dene is that you do find it an instrument, but not as a right, but as a limitation on the freedom of expression, allowing the state to regulate, not only state media, but private media.

Chairperson Just hold it, hold it there. Here it is. He's not an official expert. So it comes in as a limitation. Just hold it there, Mr Hofmeyr. Sally Liebenberg.

Ms Liebenberg Mr Chairperson, I mean just to back that up, and I'm sorry to bring out the little Human Rights book, but article 10 of the European Convention has a specific limitation in it which says: "this article, i.e. freedom of speech, shall not prevent states from requiring the licensing of broadcasting television or cinema enterprises" which really relates more to the point that Dene Smuts was dealing with.

Chairperson Thank you. Mr Hofmeyr continue.

Mr Hofmeyr I think we are not unsympathetic if there is a need for the freedom of expression to be limited in this way, to include that aspect in the Bill of Rights, but I think our view was that if you do elsewhere in the Constitution establish an institution that is authorised to regulate for these purposes, then it would be quite clear that it does fall within the general limitations. I don't think you are going to run into legal problems. I think we are prepared to sort of take advice on that. But, you know, we thought that would meet that concern and not really make it necessary to repeat that issue under the Bill of Rights. But I think the point that we are trying to make is that in other Bills of Rights this clause is there as a limitation on the freedom of expression, not to confer a right on persons or on broadcasters, but to allow the state to interfere more in regulating broadcasters in particular.

Chairperson Professor van der Westhuizen?

Pr.v.d.Westhuizen Perhaps one could propose the following then, Chairperson, that we try to formulate two possibilities. The one is then to formulate one in the Bill of Rights, but then as a

limitation, not as a 'the state must regulate' kind of clause, but as a limitation as explained here 'the state may regulate'. To formulate that and see how it comes out. And then as an alternative to take up what Mr Hofmeyr and Senator Surty said and try to formulate something as a kind of a general principle for Chapter 7 saying something about an institution and then one can have a look again as to which one looks the best, which is closest to what one is trying to achieve and which one also fits in the best in the structure.

Chairperson

Can we proceed in that direction? OK. Formulate it first as limitation, freedom of expression, and then also see whether it can fit into 7 when formulated. OK. There is quite a lot of progress there, I think. 16. Any problem with 16? Mr Hofmeyr?

Mr Hofmeyr

Chairperson, we have proposed that we should add the word 'picket' after 'demonstrate'. We do not think that it necessarily adds anything that is not covered already, but we... I think there is a strong feeling that it is one of those rights that people in this country have struggled for, for quite a long time and the unions particularly have made strong representations that this right should be mentioned explicitly and for that reason we would like to include that. I don't think that the National Party is in agreement with us on that one. And the bosses party, I doubt that the DP is.
(laughter)

(off mike banter)

Chairperson

You stand for the under-employers. Or unemployed.

(off mike comments by Ms Dene Smuts)

We used to have a union called something National Union

of the Unemployed something. Have you ever...

Ms Smuts Do you have a telephone number for them?
(laughter)
(off mike comments by Ms Dene Smuts)

Chairperson OK. Senator ???

??? Colleague Willie was asking and more or less suggesting that the National Party wouldn't agree with the question of inserting 'to picket'. He is quite right. We are honestly of the opinion that 'to assemble' and 'to demonstrate' already cover quite sufficiently the right to picket and that it is not necessary to put it in. At this stage we will reserve our position on it and I would like to consult with my principles.

Chairperson OK. Right to reserve. Dene, do you want to say anything? You'll do the same? OK. DP and NP to come back. Are you covered?

Ms Pandor I think, well, Mr Chairman, we would accept, you know, the DP coming back and the others, but we are aware, as Mr Hofmeyr indicated, that the other concert views in this particular section do appear to incorporate the right to picket, but that there is a strong call from the representatives of workers that we include the right to picket specifically. Chairperson, just to add, as we have repeated time and time again, the shape of our Constitution often is dictated by the context and conditions in which the people of a particular nation have found themselves and I think these demands rightly arise, from my experiences, and therefore the call to include this right.

Chairperson Right. DP and NP will come back. 17. No problem. 18. Any problem? Mr Hofmeyr?

Mr Hofmeyr Chairperson, on 18, I think there is broadly agreement. The only suggestion that we have agreed to with the National Party is their proposal that we should consider moving 18(ii)(b) to become 18(iii)(b) essentially so that the word 'adult' would qualify, it does seem to be more logical. But I think, apart from that, there are no differences. Sorry, I think there has previously been agreement that the age of franchise or something, that would be dealt with under a specific franchise clause.

Chairperson OK? ???

??? The National Party would just like to obtain the advice of the experts in regard to the term 'in terms of' which qualifies the Constitution or the legislative bodies established. Our concern is, and this is acting on advice of our own legal advisers, that those words 'in terms of' should perhaps more correctly be replaced by 'in accordance with'. The suggestion is – and this is where we seek clarification – that if we leave it 'in terms of' that it will then only apply to any legislative body established already in terms of the Constitution. Could you elucidate a little bit on that? Are we covered?

Chairperson Professor Rautenbach?

Prof. Rautenbach Chairperson, I think 'in accordance with' will be safer because I think the idea is certainly not to cover only bodies constituted in terms of the Constitution, but also others. 'In

accordance with' would indeed be better.

Chairperson Thank you. Professor Murray?

Prof. Murray I wonder whether we shouldn't consult Mr Grové on this issue? My understanding is that the term 'in accordance with' is one that refers to a procedure whereas the term 'in terms of' is one that refers to both procedural and substantive requirements and that's why the phrase 'in terms of' is used here and similarly consistently through the Constitution. But my experience in this matter is fairly limited and I think probably Professor Rautenbach would agree that we should go to the professional drafters on this one.

Chairperson OK. Should we listen to professional drafters? Other than this, it is agreed as proposed, isn't it, Senator ????. OK. This one is agreed to. No problem save for this clarity that we seek. 20.

Mr Hofmeyr Chairperson, from the side of the ANC, we've raised a specific concern about 20, sub 1, and whether that is in fact a right that one... Elsewhere in 20 we talk about citizens and 21 we talk about everyone. I think we are a little bit concerned about the issue of illegal aliens and we would like our experts to consider either using the word 'citizen' there or perhaps using another term such as 'lawfully in the country' or something like that, but that would qualify that right to some extent. I think we are prepared to hear whether such a qualification is necessary or not, but we are just worried that in the context of elsewhere in the clause talking about 'citizens' that

'everyone' maybe read quite broadly here.

Chairperson

So you are proposing 'every citizen'. Mrs Pandor?

Ms Pandor

I think, Chairperson, Mr Hofmeyr was saying that we are asking the experts to consider whether 'every citizen' would address our concern or whether some other phrase would do so. There is a range of possibilities. For example, there are internal limitations within the Canadian formulation of this right and we are just asking that it be looked at.

Chairperson

Thank you. Advocate Yacoob?

Adv. Yacoob

Thank you, Chairperson. Speaking for myself, there is no need to qualify 21 at all. As I understand it here, it is that there may be a problem if, for example, a law is passed, say, limiting these rights in respect of people who are not lawfully within the country. My own thinking would be that, that would be perfectly justifiable in terms of the limitations clause, whether you have unlawfully or not. In terms of the limitations clause, it will be possible to deal in a particularly restrictive way with people who are unlawfully in the country.

Chairperson

Surely that's right. It's what Ms Smuts says, the limitations clause will deal with that. You want to?

???

We had one reservation about making 21 merely applicable to citizens. What will the effect be on foreigners, tourists and so on? Is the implication that if we put in 'every citizen' that equally every non-citizen will not have the right to freedom of movement in our country? I would like some

clarification on that aspect. That is all we are worried about.

Chairperson

Mrs Pandor?

Ms Pandor

Thank you, Chairperson. Chairperson, I think we have made it quite clear that we are not advocating that we insert 'every citizen', we are saying: would this be a means of addressing the problem that we have been alerted to. And I really don't wish to differ with our learned experts over there except to say that in fact in Canada there is a provision providing for this right and there are limitations with Senate that have been used, even with the existence of the limitations clause, to test access to these rights. So, we are saying it is possible to in fact look at defining this in a more appropriate way, without curtailing the very necessary access of tourists to our country.

Chairperson

I think Mrs Pandor has explained it well. We don't need to go to Canada to check this one. I think we can just examine it and then we can get a report. We need a break? Right now? Why?

???

To go to Canada!

Chairperson

Oh! OK. This will be looked into. TRT will let us know about how we can have that one reworded. It's one o'clock now. It's probably an appropriate time to stop. Can we resume at 2? At 2 o'clock we have to resume in room M46, which is across the road near the President's office, in the old President's Council building. Oh, Marks Building. Why didn't you say so?! But why don't we go and have lunch there. I am told we have lunch here and after that we go to M46.

M46, Marks Building, what floor is that? Ground floor.
Please don't make a mistake, ground floor.

(end of tape 3)

**CC Subcommittee- 5 March 1996
Tape 4**

NOTES

0140:

Who is the speaker???

2017:

Who is speaker? Sounds like Oom Ray/André/Omré???

2116:

Who is speaker?

2215:

Who is speaker? (I think same as above - 2116)

2550:

in respect of each ???

2655:

right to ??? private persons

2894 & 2961:

common law rules of ???

3283:

who is speaker?

3614:

Who is speaker?

3682:

it's a question of rights??? ???

3742:

extent do we ??? with the

3750:

and I think ??? should be

3774:

slot ??? in general as we ???

3910:

Is it Radu?

4550:
international and ???

4860:
have before us contains a ???

4979:
Who is speaker?

5327:
who is speaker? Oom who???

5796:
is it Mr Rabie?

5806:
??? this question

5943:
that it was team/seventeen??? of the experts addressed this specific points ???

6011:
Who is speaker?

6125:
???, do you want to add?

6294:
and the Swedish ???

6356:
comfortable to public ???

6383:
parastatal ???ing privatised

6824:
Who is speaker

6970:
we have ??? it again