

1/14/2

CONSTITUTIONAL ASSEMBLY

POLITICAL PARTY DISCUSSIONS

BILL OF RIGHTS

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

URGENT

MEMORANDUM

TO: Participants in Political Party Discussions on the Bill of Rights
FROM: Executive Director
DATE: 27 March 1996
RE: Additional Documents on the "Bill of Rights"

To facilitate discussions, we enclose three additional documents relating to the "Bill of Rights." They are:

1. Draft Formulations on the "Bill of Rights," dated 20 March 1996;
 2. Technical Committee Four's "Analysis of Submissions [on the] Bill of Rights;" and
 3. A joint memorandum from the Panel and Technical Committee Four entitled "Limitations Clause (Section 35)."
-

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THE NEW CONSTITUTION

DRAFT - 20 MARCH 1996

Status: For discussion by Constitutional Committee Subcommittee or at Multilaterals. Decisions of 18 March incorporated.

**CHAPTER 2
BILL OF RIGHTS**

State's duties

7. The state must respect, protect, promote, and fulfil the rights in this Bill of Rights.

Equality

8. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures that are designed for the protection and advancement of persons or categories of persons disadvantaged by unfair discrimination may be taken.
- (3) Neither the state [nor any person] may [unfairly] discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth [and affiliation or any other grounds].¹
- (4) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.²

Human dignity

9. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life

10.

Option 1

Everyone has the right to life.

¹ Words in brackets are still in contention. Panel and Technical Committee to provide alternative formulations and to move section 35(3) into this section.

² Agreed. May need to be revisited if "unfair" and "unfairly" fall out.

Option 2

Everyone has the right to life and the death penalty is hereby abolished.

Option 3

Everyone has the right to life, and the right not to be deprived of life except by execution of a court sentence following conviction for a crime for which the death penalty is prescribed by an Act of Parliament.

Freedom and security of the person³

11. (1) Everyone has the right to freedom of the person, including the right not to be -
- (a) deprived of liberty arbitrarily or without just cause; or
 - (b) detained without trial.
- (2) Everyone has the right to security of the person, including the right -
- (a) to be free from all forms of violence;
 - (b) to [bodily / physical] and psychological integrity; and

³ **New formulation proposed by ANC and to be considered by parties:**

11. (1) Everyone has the right to freedom and security of the person, including the right -
- (a) not to be deprived of liberty arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from both public and private sources;
 - (d) not to be tortured in any way; or
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, including the right -
- (a) to make decisions concerning reproduction [free from coercion, discrimination and violence];
 - (b) to security in and control over their body;
 - (c) not to be subjected to medical or scientific experiments without their consent.

- (c) to make decisions concerning [reproduction / their body] free from coercion, discrimination and violence.
- (3) No one may be -
- (a) tortured in any way;
 - (b) treated or punished in a cruel, inhuman or degrading way; or
 - (c) subjected to medical or scientific experiments without that person's consent.

Slavery, servitude and forced labour

12. No one may be subjected to slavery, servitude or forced labour.

Privacy

13. Everyone has the right to privacy, including the right not to have⁴ -

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; and
- (d) the privacy of their communications infringed.

Freedom of religion, belief and opinion

14. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions provided that -
- (a) those observances follow rules made by an appropriate public authority;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.

⁴ Panel/TC4 to liaise with Prof N Steytler on inclusion of "unreasonable".

- (3) (a) This section does not prevent legislation recognising -
- (i) marriages concluded under any tradition or a system of religious, personal or family law; and
 - (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.
- (b) The legislation referred to in paragraph (a) must be consistent with the provisions of the Constitution.

Freedom of expression

15. (1) Everyone has the right to freedom of expression, including -

- (a) freedom of the press and other media;
 - (b) freedom to receive and impart information and ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.⁵
- (2) The right in subsection (1) does not extend to -
- (a) propaganda for war;
 - (b) the incitement of imminent violence; or
 - [(c) advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement to cause harm.]⁶

- (3)⁷ **Option 1**
The state must regulate any media that it finances or controls to ensure that it is impartial and presents a diversity of opinion.

⁵ NP wants to be sure provision applies to juristic persons.

⁶ Section 15(2)(c) still under discussion. See TC4 memo on summary of submissions.

⁷ Panel/TC4 memo (15 March) recommended: no clause to this effect; alternatively, no clause under 15(3) with a new clause in Chapter 7 - see memo for proposed wording.

Option 2

The state must regulate any newspapers and electronic media that it finances or controls to ensure that they are impartial and represent broadly the views of society.

Assembly, demonstration and petition

16. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, [to picket,] or to present petitions.

Freedom of association

17. Everyone has the right to freedom of association.

Political rights

18. (1) Every citizen is free to make political choices, which includes the right -
- (a) to form a political party;
 - (b) to participate in the activities of, or to recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right:
- (a) to vote, in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.

Citizenship

19. No citizen may be deprived of citizenship.

Freedom of movement and residence⁸

20. (1) Everyone has the right to freedom of movement.
- (2) Everyone has the right to leave the Republic.

⁸ New Formulation based on ANC proposal, as agreed on 18.3.96.

- (3) Every citizen has the right to enter, to remain in, and to reside anywhere in the Republic.
- (4) Every citizen has the right to a passport.

Freedom of occupation

[21. Every citizen has the right to choose freely their [trade,] occupation or profession, their place of work and their place of training. [The practice of an occupation may be regulated by law.]⁹

Labour relations¹⁰

22. (1) Everyone has the right to fair labour practices.

(2) Workers have the right -

- (a) to form and join trade unions;
- (b) to participate in the activities and programmes of a trade union; and
- (c) to strike.

(3) Employers have the right -

- (a) to form and join employers' organisations;
- (b) to participate in the activities and programmes of an employers' organisation; and
- [(c) to lock-out.]

(4) Every trade union and every employers' organisation has the right -

- (a) to determine its own administration, programmes and activities;
- (b) to organise;
- (c) to bargain collectively; and
- (d) to form and join a federation.

⁹ Clause under discussion. DP to make information available ~~for consideration.~~

¹⁰ Section 22 still under discussion.

Environment¹¹

23. Everyone has the right -

- (a) to an environment that is not harmful to their health, well-being [and quality of life];
- (b) to have their environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation;
 - (iii) secure the ecologically sustainable [development and] use of natural resources;
 - [(iv) safeguard the environment while promoting justifiable economic development; and
 - (v) secure the ecological integrity of the environment.]

Property

24. (1)

The state must guarantee property [and it must foster conditions which enable people to gain access to property on an equitable basis].

- (2) [The nature, content and limits of property may be determined by law.] No one may be deprived of property except in accordance with a law of general application [but no one may be arbitrarily deprived of property].
- (3) Property may be expropriated only in terms of a law of general application -
 - (a) for public purposes or in the public interest which includes land reform to address the results of past racial discrimination; and
 - (b) subject to the payment of [just and equitable] compensation within a time period and in a manner as agreed or decided by a court.
- (4) When a court decides the amount of compensation, timing or manner by which payment must be made, the court must determine a fair balance between all relevant interests having regard to all the relevant factors, including -

¹¹ New formulation incorporates NP and ANC proposals, as well as previous formulation.

- (a) the current [and intended] use;
- (b) the history of its acquisition;
- (c) its market value;
- (d) [the ability of the state to pay];
- (e) the purpose of expropriation;
- (f) the level and extent of state investment and subsidy;
- (g) [the value of the investment in the property]; and
- (h) [the need for effective land reform].

[(5) This section does not invalidate reasonable legislative and other measures that are designed to bring about land reform to redress the results of past racial discrimination.]

Access to land

24A. [Everyone has the right to have equitable access to land. The state must take reasonable legislative and other measures, within the state's available resources, to facilitate this access.]¹²

Housing

- 25.** (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within the state's available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances and no legislation may permit arbitrary evictions.¹³

¹² Agreed to deal with land in separate clause. Full clause still to be developed. ANC and NP submitted drafts for discussion.

¹³Formulation based on Panel/TC4 memo proposal (14.3.1996).

Health, food, water, and social security

26. (1) Everyone has the right to have access to -
- (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within the state's available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

Children

27. (1) Every child has the right -
- (a) to a name and a nationality from birth;
 - (b) to family care, parental care, or appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services, and social services;
 - (d) to be protected from maltreatment, neglect, abuse, or degradation;
 - (e) to be protected from exploitative labour practices, and not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or that place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development; and
 - (f) not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under sections 11 and 34, the child may be detained only for the shortest period of time and has the right to be -
 - (i) kept separately from other detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age.

- (2) The child's best interest is of paramount importance in every matter concerning the child.
- (3) In this section, "child" means a person under the age of 18 years.

Education

28. Option 1

- (1) Everyone has the right -
 - (a) to a basic education, including adult basic education, in a state or state-aided institution;¹⁴
 - (b) to further education, which the state must take reasonable and progressive legislative and other measures to make generally available and accessible; and
 - (c) to choose instruction in any language where instruction in that language can be reasonably provided at state or state-aided institutions.
- (2) Everyone has the right to establish and maintain, at their own expense, private educational institutions that -
 - (a) do not discriminate on the basis of race;¹⁵
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable state-aided educational institutions.

Option 2

Subsections (1) and (2) above and the following:-

- (3) Everyone has the right to educational institutions based on a common culture, language, or religion, provided that there must be no discrimination on the ground of race and provided further that the state may not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture, or religion.

¹⁴ The wording might be problematic. See TC4 memo to follow later.

¹⁵ References to discrimination may have to be revisited when equality clause is finalized.

Language and culture

30.¹⁶ Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may violate the other rights in the **Bill of Rights**.¹⁷

Access to information¹⁸

31. Option 1

(1) Everyone has the right of access to -

- (a) any information held by the state; and
- (b) any information that is held by another natural or juristic person [and that is required for the exercise or protection of any rights].

[(2) This right must be regulated by national legislation.]¹⁹

Option 2

(1) The State must take legislative measures to provide reasonable access to any information that is -

- (a) required for the exercise and protection of any rights; and

[(b) held by the State or a natural or juristic person.]²⁰

¹⁶ Section 29 (academic freedom) incorporated in Section 15. Clause numbers to be corrected later.

¹⁷ Parties to consider in view of formulation suggested by TC on 18.3.96.

¹⁸ TRT/TC4 to provide new wording.

¹⁹ Section 31 to be reconsidered when horizontality and juristic persons discussed.

²⁰ The words in brackets seem unnecessary.

Just administrative action²¹

32. Option 1

- (1) Everyone has the right to administrative action that is lawful, reasonable [justifiable], and procedurally fair.
- (2) Everyone has the right to be given written reasons for administrative action, unless the reasons have been published.

Option 2

- (1) No one may be adversely affected by administrative action that is unlawful or unreasonable.
- (2) Everyone whose rights are adversely affected by administrative action has the right to fair procedure unless the administrative action is of general application.
- (3) Everyone whose rights or interests have been adversely affected by an administrative action has the right to written reasons.

Access to courts

- 33.** Everyone has the right to have any dispute that can be resolved by law decided in a fair, public hearing in a court of law or, where appropriate or necessary, another independent and impartial forum.

Arrested, detained and accused persons

- 34.** (1) Everyone who is arrested for allegedly committing an offence has the right -

²¹ ANC proposes the following formulation:

- "(1) The State must provide by way of relevant legislation access to just administrative action.*
- (2) The legislation referred to in subsection (1) must -*
 - (a) Provide for the review of administrative action by a court of law or an independent and impartial tribunal;*
 - (b) impose a duty on the state and the organs of state to take lawful, reasonable and procedurally fair administrative action;*
 - (c) be justifiable in an open and democratic society based on freedom and equality;*
and
 - (d) promote an efficient administration."*

TRT/TC4 to provide new wording.

- (a) to remain silent;
 - (b) to be informed promptly -
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
 - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
 - (d) to be brought before a court of law as soon as reasonably possible, but not later than 48 hours after the arrest, or where the period of 48 hours expires outside ordinary court hours, on the next court day; and while there, to be released from detention unless that person is charged and the court orders the further detention; and
 - (e) to be released from detention subject to reasonable conditions if the interest of justice permits.²¹
- (2) Everyone who is detained, including every sentenced prisoner, has the right-
- (a) to be informed promptly of the reason for being detained;
 - (b) to choose and to consult with a legal practitioner, and to be informed of this right promptly;
 - (c) to have a legal practitioner assigned by the state if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (d) to challenge the lawfulness of the detention in person before a court of law and, if the detention is unlawful, to be released;
 - (e) to conditions of detention that are consistent with human dignity, including at least the provision of adequate accommodation, nutrition, reading material, and medical treatment at state expense; and

²¹ DP and PAC do not support this wording.

- (f) to communicate with, and be visited by, that person's
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.

- (3) Every accused has a right to a fair trial, which includes the right -
 - (a) to be informed of the charge with sufficient details to answer the charge;
 - (b) to have adequate time and facilities to prepare a defence;
 - (c) to a public trial that begins and concludes without unreasonable delay in an ordinary court of law;
 - (d) to be present when being tried;
 - (e) to choose and be represented by a legal practitioner and to be informed of this right;
 - (f) to have a legal practitioner assigned to the accused person at state expense if substantial injustice would otherwise result, and to be informed of this right;
 - (g) to be presumed innocent, and to remain silent, and not to testify during the proceedings;
 - (h) to adduce and challenge evidence;
 - (i) not to be compelled to give self-incriminating evidence;
 - (j) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
 - (k) not to be convicted for any act or omission that was not an offence under either national or international law at the time it was committed or omitted;
 - (l) not to be tried for any offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

- (m) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (n) of appeal to, or review by, a higher court.
- (4) Any evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would bring the administration of justice into disrepute.²³
- (5) Where this section requires information to be given to a person, that information must be given in a language that the person understands.

Limitation of rights²⁴

35. (1) The rights in the Bill of Rights may be limited in terms of law of general application only to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom.
- (2) Any limitation in terms of subsection (1) must -
- (a) **be related to its purpose;**
 - (b) limit the right as little as is reasonably possible; and
 - (c) take into account -
 - (i) the nature of the right;
 - (ii) the importance of the purpose of the limitation; and
 - (iii) the nature and extent of the limitation.
- (3) Except as provided in subsection (1) and (2) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

²³ ANC to provide proposed reformulation for discussion. See Panel/TC4 memo of 11 March 1996 with proposed wording. NP proposed addition of "unless the exclusion of that evidence would be detrimental to the interests of justice." Panel/TC4 considering possible alternative formulations.

²⁴ ~~New formulation proposed by Panel/TC4 in memo of 15.3.96, as amended by memo of 19.3.96. The former Section 35(3) (on anti-discrimination legislation) will be incorporated in new formulation of Section 8.~~

States of emergency²⁵

36. (1) A state of emergency may be declared only in terms of an Act of Parliament and only when -
- (a) the life of the nation is threatened by war, invasion, [general] insurrection, disorder, [national] disaster, or other public emergency; and
 - (b) the declaration is necessary to restore peace or order.
- (2) Any declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -
- (a) prospectively from the date of the declaration; and
 - (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The National Assembly, by a majority of at least two thirds of its members, may resolve to extend a declaration of a state of emergency for a period of up to three months, or for consecutive periods of up to three months each [for no more than 14 days ... up to 60 days, or for consecutive periods of up to 60 days each].
- (3) Any legislation enacted in consequence of a declared state of emergency may derogate from the Bill of Rights only to the extent that -
- (a) (it) is strictly required by the emergency;
 - (b) it is consistent with the Republic's obligations under international law;
 - (c) it conforms to subsection (4); and
 - (d) it is published in the national Government Gazette immediately after being enacted.

²⁵ TRT/Panel/TC4 to draft reformulation; feed-back from parties awaited.

(4) No Act that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -

- (a) the creation of retrospective crimes or the imposition of retrospective penalties except for an act or omission that, at the time it was committed, was criminal in terms of international law;
- (b) indemnifying the state, or anyone acting under state authority, for unlawful acts committed during the state of emergency; or
- (c) any derogation from this section or any of the sections listed below.

Section 8	Equality
Section 9	Human dignity
Section 10	Life
Section 11(3)	Freedom from torture and degrading treatment
Section 12	Freedom from slavery and servitude (excluding forced labour)
Section 14	Freedom of religion, belief and opinion
Section 22(1)	Fair labour practices
Section 22(2) and (3)	Right to form and join trade unions or employers' organisations
Section 27(1)(d)	Right of children to not be maltreated, neglected or abused
Section 27(1)(e)	Right of children to freedom from exploitative labour practices
Section 27(1)(f)	Rights of children who are detained
Section 33	Access to courts
Section 34(1)(a) and (b)	Right to remain silent, and to be informed of that right
Section 34(1) (c)	Right not to be compelled to confess or make statements
Section 34(2) (d)	Right to challenge detention and be released
Section 34(3) and (4)	Fair trial
Section 35	Rights contained in limitation section
Section 38	Application of the Bill

(5)...

~~[(6) Any superior court may enquire into the validity of~~

- (a) a declaration of a state of emergency;

- (b) any extension of a declaration of a state of emergency; or
 - (c) any legislation enacted, or other action taken, under a declaration of a state of emergency.]
- (7) Whenever anyone is detained in consequence of a declaration of a state of emergency, the following conditions must be observed -
- (a) an adult family member or friend of the detainee must be contacted as soon as reasonably possible, and told that the person has been detained;
 - (b) a notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and referring to the emergency measures under which that person has been detained;
 - (c) the detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner;
 - (d) the detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative;
 - (e) a court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless the detention is necessary to restore peace and order;
 - (f) if the court does not release a detainee, that detainee may apply to the court for a further review after 10 days, and the court must again review the detention, and must release the detainee unless the detention is still necessary to restore peace and order;
 - (g) the detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention; and
 - (h) the state must present written reasons to the court to justify the detention or continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

- (8) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

Enforcement of rights

37. Anyone listed in this section has the right to apply to a competent court, alleging that a right declared in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief including a declaration of rights. The persons who may apply for relief are:

- (a) anyone acting in their own interests;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or a class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interests of its members.

Application

38. (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all other organs of state.
- (2) The Bill of Rights binds all natural and juristic persons if applicable.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law, or legislation, to the extent that they are consistent with the Bill.
- (4) Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, every court -

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court must promote the spirit, purport, and objects of the Bill of Rights.

**ANALYSIS OF SUBMISSIONS
BILL OF RIGHTS
TECHNICAL COMMITTEE**

Subtc419.mar

1. Section 8: Equality

1.1 Summary

The Equality clause drew many submissions from the public. Most of the submissions commented on aspects of policy while some proposed reformulated wording. The submissions were made in respect of the various options that have now fallen away. Only those submissions that are still relevant have been included.

- 1.2.1 Section 8(2): The National Professional Teachers Association (18.12) stated that the principle of affirmative action was too wide and contains too few objective criteria for ensuring that it is applied as a bona fide remedy, particularly in the sensitive field of education. The Free Market Foundation stated that affirmative action made "nonsense" of section 8(1) and should be omitted. The state, it proposed, should promote equality of conditions and include it in the Preamble or a general statement of National Goals instead.
- 1.2.2 There was a proposal that there should be time limits for affirmative action measures.
- 1.2.3 The South African Chamber of Business (29.13) proposed that affirmative action measures contemplated in section 8(2) be limited to legislative measures only and that these measures should not "unfairly discriminate against the rights of others".
- 1.2.4 A number of submissions supported the use of the word "likely" in the formulation of section 8(2). [The Human Rights Committee (26.10), Human Rights Commission (26.8), the National Council for Women (18.11), the Women's Lobby (2.17) and the Transvaalse Onderwysersvereniging.]
- 1.2.5 The Association of Law Societies (11.1) proposed that "designed" in the current formulation be replaced because the word is ambiguous. The words may refer (a) to both the aim of the measure and its effect; or (b) to the aim alone. In the interest of effective affirmative action measures the Association proposes the elimination of (b) as a possible reading. It suggests that the following formulation will resolve the problem -

"Equality includes the full and equal enjoyment of all rights and freedoms. To achieve equality, legislative and other measures protecting and advancing persons or groups disadvantaged by discrimination will not be considered a violation of this section."

The effect of this wording will allow the courts to scrutinise not only the aims of measures purporting to be affirmative action programmes, but also their effects.

- 1.2.6 Section 8(2): The Deaf Federation of South Africa (21.15) and the South African Municipal Workers Union Medical Benefit (25.12) proposed that the measures in section 8(2) should protect or advance "persons with disabilities".
- 1.3.1 Section 8(3): The Human Rights Commission (26.8) and the Human Rights Committee (26.10) supported the retention of the word unfair in 8(2) on the basis that there are types of legitimate discrimination. This view was not shared by the National Women's Coalition (21.8) and the Gay and Lesbian Organisation of the Witwatersrand who proposed that it be deleted.
- 1.3.2 Business South Africa proposed that the clause prohibit discrimination by the state but that legislation prohibit discrimination by natural or juristic persons.
- 1.3.3 Proposals were made that the grounds in section 8(3) include "economic status" [National Children Rights Committee (18.10)] and "pregnancy" [National Womens Coalition - Western Cape Branch (21.28)].
- 1.3.4 The inclusion of the ground of sexual orientation drew a large response from the public with 546 petitions opposing its inclusion and 7032 supporting it.
- 1.4 **Recommendations**
 - 1.4.1 The technical committee proposes that the parties consider including pregnancy as a stated ground in section 8(3). In *Geduldig vs Aiello* 417 US 496 the US Supreme court did not regard a disability programme that excluded pregnancy coverage as discrimination. In order to avoid any controversy, it is recommended that pregnancy be included as one of the listed grounds.
 - 1.4.2 Consideration ought to be given to the use of the word "unfair" in section 8(3). The Technical Committee and the Panel are at present preparing a detailed memorandum on this subject.
2. **Section 9: Human dignity**
 - 2.1 **Summary**

Submissions were made that "person" should include corporate entities and groups. Submissions were made that the provision include the statement that dignity derives from God.
3. **Section 10: Life**

3.1 Summary

The Constitutional Assembly received 18 376 petitions in support of the constitutionalisation of the death penalty. This was supported in many of the submissions from individuals and organisations (for a list of organisations - see *End-Notes for 4th Edition* par 4). A number of organisations and individuals also expressed themselves against the death penalty (for a list of organisations - see *End-Notes for 4th Edition* par 4). The Nederduitse Gereformeerde Kerk (27.16) felt that the death penalty is not a constitutional issue.

3.2 The SA Catholic Bishops Conference (19.17) proposed that section 10 should protect life from the moment of conception. This was supported by 9 604 petitions from Pro-Life insisting on the protection of life from conception until natural death.

3.3 The Constitutional Assembly received 14 410 submissions stating that the Constitution should recognise the right to own fire-arms and should limit the government's power to disarm the civil population. It was also stated that the right to life should be qualified by allowing for justifiable homicide in the case of, for example, self-defence, lawful arrest or to prevent the escape of a person lawfully detained. Organisations opposed to any provision on fire-arms included the Cease Fire Campaign (21.1), Conscientious Objector Support Group (21.2) and Gun Free South Africa (27.9).

3.4 Specific submissions

3.4.1 If a decision were to be taken to provide for the retention of the death penalty in the constitutional text, the submission by I Glauber in "Additional Documentation" 5 March 1996.

3.4.2 A submission by Prof JH van Rooyen and Mr LC Coetzee of the Department of Criminal Procedural Law of UNISA. The authors developed a scenario of the train of events following a decision to incorporate the reintroduction of the death penalty in the constitutional text:

- (a) a rewrite, not only of section 11, but also of sections 8 (equality), 10 (human dignity), and 11(2) (torture and inhuman and degrading punishment) in order to permit a death sentence in the abstract;
- (b) approval by the Constitutional Court of the constitutional text;
- (c) a new criminal procedural provision enacted by Parliament; and
- (d) litigation challenging the new criminal procedural provisions before the Constitutional Court.

4. Section 11: Freedom and security of the person

4.1 Summary

Most of the public comment was directed to section 11(2). Many of the submissions welcomed the inclusion of the rights in section 11(2),

although some opposed their inclusion on the ground that they were "not rights".

4.2 The Committee wishes to draw the attention to the submissions of the National Network on Violence against Women who argue that the right in section 11(2)(a) should be rephrased as the right "to be protected from all forms of violence." This formulation could be considered by the parties although the Technical Committee is of the view that section 7 defines the range of duties on the State in relation to each right. The National Children's Rights Committee (18.10) recommended that the corporal punishment should be specifically prohibited in s. 11(2)(a). The Constitutional Court has already ruled that corporal punishment as a sentence in criminal cases constitutes cruel, inhuman and degrading punishment. It is a policy decision whether the parties want to constitutionalise a specific right against corporal punishment [State v. Williams].

4.3 Recommendations

The SAMWU Medical Benefit Fund recommends that section 11(3)(c) be amended to read: "No one may be ... (c) subjected to medical or scientific experiments without that person's informed consent." The Technical Committee recommends this addition to the parties as it ensures that consent is genuine and based on a full appreciation of the consequences and risks of the relevant medical or scientific procedure.

5. Section 12: Slavery, servitude and forced labour

5.1 The Chief of the South African National Defence Force (25.12) proposed including a specific limitation in respect of a system of military conscription. This issue was dealt with in the Technical Committee's Explanatory Memorandum of October 1995 [p.42], and is not recommended.

5.2 The Medical Association of South Africa (26.16) proposed that s. 12 should be extended to include compulsory labour. The Technical Committee is of the view that this prohibition is incorporated both in the right against forced labour and the new section 21 - Freedom of Occupation.

6. Section 13: Privacy

6.1 Summary

Many submissions by private individuals expressed concern that the protection of the right to privacy was too wide and should not preclude the normal activities of the police. The SA Constitutional Consultants on behalf of the Association of Credit Bureaus (27.20) expressed concern on the influence of the right on their activities.

6.2 Specific submissions

The submission of prof Nico Steytler that the word "unreasonably" be inserted in the opening phrase of section 13, is dealt with in a memorandum of the Panel and TC4 at the request of the Sub-Committee.

7. Section 14: Religion

7.1 Summary

Many submissions expressed concern about satanism and felt that it should not be covered by Freedom of Religion.

7.2 Concern was expressed about the legalisation of dagga and it was felt that the Constitution should preclude this, whereas 1040 petitions were received from the Burning Spear Movement calling for the recognition of the rights of the Rastafarian people. The Helenvale Dagga Forum (9.2) also linked the use of dagga to freedom of religion.

7.3 The Conscientious Objector Support Group (24.7) proposed adding the words "including the right to conscientious objection to military service to section 14(1).

7.4 The National Professional Teachers Organisation of SA (18.12) felt that the wording of section 14(2) is vague and should be deleted. The SA Jewish Board of Deputies (20.29) contended that "appropriate authority" in section 14(2) was vague and too restrictive, and should be deleted.

7.5 Specific submissions

The submissions from individuals and Muslim organisations (referred to in par 20 of the End Notes for 4th Edition) objected to section 14(3)(b) because their personal law is regarded as divine law which cannot be subjected to any other law. The SA Jewish Board of Deputies (20.29) felt that the wording of this paragraph was confusing - the matter has already been dealt with by the Sub-Committee.

8. Section 15: Freedom of expression

8.1 Summary

The contentious points in this clause revolve around the inclusion of the 'hate speech' exception in section 15(2). Again, these submissions were made on the basis of two versions in the published working draft which extended the exclusion to the advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement to discrimination. That wording has consequently shifted to a narrower focus namely "incitement to harm".

8.2.1 Section 15(2): The Freedom of Expression Institute stated that legislation would be sufficient to meet South Africa's international obligations but that there was no need to exempt hate speech at a constitutional level. One could achieve the exclusion of constitutional protection for 'hate speech' in the limitations clause.

- 8.2.2 Section 15(2): The Association of Law Societies (11.1), the Freedom of Expression Institute (19.7), NAVEL (21.6) and the Human Rights Committee (26.9) opposed the inclusion of 15(2).
- 8.2.3 Section 15(2): The National Network of Violence Against Women, the Rustenburgse Vrouforum and the National Hindu Youth Federation supported its inclusion. They were joined by the Human Rights Commission (26.8) who proposed that the word "imminent" should be deleted; and the South African Jewish Board of Deputies who proposed that subsection 2(b) the words "that constitutes incitement to discrimination" in subsection 2(c) be deleted.
- 8.2.4 Section 15(2): Members of the public, the Rustenburgse Vrouforum, Andre Delpont Brokers and the Society of Friends (Quakers) supported the idea of further qualifying the right by outlawing pornography. The Traffic and Licensing Services in Prot Elizabeth (28.11) proposed adding the word "or crime" to (2)(b).
- 8.2.5 Section 15(2): The Technical Committee wishes to draw the attention of the parties to the submission of the Conference of Editors. They accepted that there was clear support for hate speech legislation but stated their reservations concerning the exclusion of hate speech from constitutional review. The Conference of Editors (27.6) provided the following reasons for this position. The clause ignored the essence of a constitutional guarantee by deciding in advance what kinds of speech are undeserving of constitutional protection. This does not allow the Constitution to grow, develop and respond to the changing needs of society. South Africa has had 'hate speech legislation' which the previous government used to suppress legitimate political speech and to silence political opposition. In reality it was part and parcel of a programme of political oppression. Parliament can prohibit 'hate speech' and, if the law was sufficiently tailored to serve legitimate ends, it will survive constitutional scrutiny. It is a different matter to in advance preclude constitutional review of such a law as the exclusion seeks to do.¹
- 8.2.6 Section 15(3): The Human Rights Commission (26.8) suggested that section 15(3) be deleted as such a regulation allows administrative interference in important modes of communication. The Association of Law Societies also expressed reservations because of the potential for abuse.

8.3 Recommendations

The submissions all relate to policy.

¹ In view of the growing consensus over the new and more restricted wording of the exclusion, direction is sought as whether the Technical Committee should complete its detailed response to the submissions made by the Conference of Editors.

9. Section 16: Assembly, demonstration and petition

9.1 COSATU proposed that the right to picket be included in section 16:

"Everyone has the right, peacefully and unarmed to assemble, to demonstrate, to picket, or to present petitions."

9.2 Recommendations

It is an anomaly that the right to demonstrate and the right to present petitions are included and the right to picket is not. The different forms that the exercise of the general right to assemble takes ought to deserve the same attention.

10. Section 17: Freedom of association

10.1 Summary

The submissions address the issue of whether freedom of association included the right not to associate.

10.2 Submissions were received from organisation such as the SAAU supporting the right not to associate.

10.3 COSATU proposed that union security arrangements be expressly noted as a limitation to this right. However they suggested that the limitation should be placed in the limitations clause rather than act as an internal limitation.

10.4 Recommendations

10.4.1 The right to freedom of association can form the basis for a constitutional challenge to a legislature that permits and regulates union security agreements such as closed shops and agency shops.

10.4.2 The right to form and to belong to trade unions in section 22 may form the basis for a constitutional defence of union security arrangements. It is a policy issue whether union security arrangements should be specifically immunised for constitutional challenge. If the political parties wish to do so then an exclusion for union security arrangements ought to be included in the Labour Relations clause.

11. Section 18: Political rights

11.1 Summary

A number of submissions from individuals and from the Rustenburgse Vroueforum (26.25), Traffic and Licensing Services of Port Elizabeth (26.25) and Northern Region of the Transvaal Law Society (16.10) felt that the Constitution should specify 18 years as the voting age.

12. Section 21: Freedom of occupation

12.1 Summary

The submissions revolved around the content and the wording of the right. The formulation of this right was presented in various options in the

working draft. The present formulation in the 4th draft is found in option 3: "Everyone has the right ..."

- 12.2 Most supported the inclusion of the right with the exception of NADEL (21.16) and COSATU. COSATU claims that the clause attacks union security agreements and outlaws measures aimed at preventing or discouraging replacement labour. It may also prevent government from introducing community service. COSATU would however not oppose a freedom of vocation clause which addresses its concerns.
- 12.3 Business South Africa proposed that the right in option 3 be available to juristic persons and that the words "place of work" and "place of training" be omitted.
- 12.4 The South African Chamber of Business (29.13) supported the retention of the provision in the interim Constitution. They were supported by the Medical Association of South Africa (26.16) who proposed that there should be a separate right to occupational choice.
- 12.5 The Council of South African Bankers, the Human Rights Commission (26.8) and the Residents and Ratepayers Association supported option 3. the chamber of Mines also supported option 3 but proposed that the right for juristic persons to engage in economic activity be included.
- 12.6 The Life Officers Association (21.12) suggested the inclusion of the right to contract.
- 12.7 The Workers Organisation for Socialist Action (20.32) and the Evangelical Alliance of south Africa would affect association of different professionals and competition policy.

13. Section 22: Labour relations

13.1 Summary

The submissions focused on the right to strike, any limitation thereon and inclusion of a right to lockout.

- 13.2.1 Section 22(2) and (3): COSATU (21.3), the Methodist Church and NADEL were opposed to the inclusion of a right to lockout. COSATU argues that lockout does not balance the right to strike and draws attention to the Reconstruction and Development Programme, paragraph 4.8.4 which states that the right to lockout should not be included in the Constitution.
- 13.2.2 Section 22(2) and (3): The South African Agricultural Union, Chamber of Mines, Council of South African Bankers (19.4), National Professional Teachers Association of South Africa (18.12), South African Chamber of Business (29.13), Association of Law Societies and Business South Africa supported the inclusion of the lockout on the basis that it was recognised

locally and internationally as the counterpart of the right to strike.

- 13.2.3 Section 22(2) and (3): The Public Servants Association of South Africa proposed that the right to strike be restricted to collective bargaining purposes while COSATU (21.3) and SACTU (16.14) opposed any circumscription of the right. SACTU drew attention to the fact that South Africa had recently ratified convention 87 and 98 of the ILO which made these principles directly applicable to South Africa. It was therefore legitimate to strike in defence of promoting social and economic interests.
- 13.3.1 Section 22(4): The South African Chamber of Business was opposed to 22(4) on the basis that the provisions did not perform a constitutional function. They also opposed the entrenchment of centralised bargaining but not in the form included in section 22(4). The Chamber of Mines noted that the right should extend to individual employers as well as to employer organisations.
- 13.3.2 Section 22(4): The Association of Law Societies proposed that (4)(a) be omitted as it potentially prohibited the state from introducing measures aimed at 'financial probity and internal democracy'.
- 13.4 Section 22(5): COSATU proposed a new subsection (5) providing for the development of a Workers Charter to be appended to the Constitution. The Charter would have to be passed by a two thirds majority of Parliament.
- 13.5 Individual submissions emphasised the need to protect farm workers in particular.
- 13.6 Requests were made to bring the language of the clause in line with the new Labour Relations Act, 66 of 1995 eg 'employees' rather than 'workers' [Association of Law Societies and Transvaalse Onderwysveerniging].
- 13.7 **Recommendations**
The submissions concern policy matters which the political parties must decide. Various propositions made in support of more provisions protecting the right to strike, to lockout and centralised collective bargaining do not solve the problem. The Technical Committee is prepared to draft a memorandum responding in detail to these submissions if instructed to do so.

14. **Section 23: Environment**

14.1 **Summary**

Many public submissions called for the protection of animal rights in section 23(b). The difficulty is that this clause is fundamentally about the protection and preservation of the environment. One possibility is to specify the conservation of animal life in section 23(b)(ii). However, a

clause of this nature would not extend to the protection of animals from cruelty. It is ultimately a policy decision by the parties whether they wish to place a constitutional duty on the State to enact legislation against cruelty to animals in which case such a clause would be in a separate section. Animal rights are not found in international human rights instruments which are basically concerned with the protection of human rights. The Technical Committee is also not aware of any precedent for such a clause in other national Constitutions.

- 14.2.1 The Technical Committee draws the attention of the parties to the submission of the Environmental Planning Professions Interdisciplinary Committee (28.5). This submission proposes a more positive formulation of the right in section 23(a). It also suggests that section 23(b) should either refer to the right "to an environment protected through reasonable legislative and other measures." Alternatively, it should be formulated in order to ensure that the list of the purposes of the legislation is not closed [...designed, inter alia, to:...]. The concern expressed was that any issue falling outside such a list may be excluded from the ambit of the obligation. This is important as new and serious threats to the environment may emerge in future. A more expansive list is also suggested.
- 14.2.2 This submission also argues that this right should have a strong horizontal application, and proposes the addition of a new clause 23(c): "Everyone has the duty to protect the environment and to use its resources wisely" OR "Everyone has a duty not to harm the environment." [See also the submission of the Natal Parks Board (27.15) and Dr D Cowen in this regard].
- 14.3 The Chamber of Mines urged the deletion of section 23(b) of the environmental clause. Alternatively, they suggest that (iii) should be limited to the sustainable use of renewable natural resources, and "judicious utilisation" of non-renewable resources. The Technical Committee is of the view that it is unnecessary to make this distinction as the overall purpose of the legislation is the protection of the environment. Insofar as the use of particular non-renewable natural resources does not harm the environment, it is permitted (subject, of course, to other applicable law). The submission of Dr. B. Maas (advisor to the International Fund for Animal Welfare) argues that it is important to draw a distinction between ecological and economic sustainability. The exploitation of a species, even to the point of distinction, may well be economically sustainable in the long term, provided the returns have been invested in a profit-making way. Biological sustainability means that populations will not be reduced to levels which may threaten their future survival throughout the species' range.
- 14.4 Recommendations**
- 14.4.1 It is recommended that the suggestion of the Environmental Planning

Professions Interdisciplinary Committee be adopted and section 23(b) be inclusively phrased. We suggest that s.23(b) be reformulated along the following lines:

"23" Everyone has the right -

(a) ...

(b) to have their environment protected [for the benefit of present and future generations] through reasonable legislative and other measures, including measures which -

(i) prevent pollution and environmental degradation ...etc."

14.4.2 We also remind the parties of the decision to revisit the horizontal application of the right of access to information in relation to the environment once the scope of the right in section 31 (access to information) has been settled. In this regard we refer the parties to the Technical Committee Memorandum of October 1995 [at pp. 124 and 125].

14.4.3 In the light of Dr. Maas's submission we recommend that (iii) be reformulated along the following lines:

"(iii) secure ecologically sustainable development and use of natural resources."

15. Section 24: Property

15.1 Summary

This clause solicited a host of responses from business and the public. There was division as to whether there should be a property clause or not and the requirements for expropriation and compensation.

15.2 NADEL, COSATU, Development Action Group, and National Land Committee opposed the inclusion of a property clause on the basis that it would reinforce existing patterns of inequality and the onus on the state to pay market related prices would limit land reform. NADEL also stated that it was unnecessary as the current Roman Dutch Law protected ownership.

15.3 Business supported the inclusion of the Property clause as being important to growth and economic stability. These include: South African Chamber of Commerce, Business South Africa, Free Market Foundation, Genbel South Africa, Ladysmith Boerevereeniging, Porteville Landbou Kooperasie Beperk, Klipfontein Boerevereeiging, Langkloof Landbou Genootskapm the Company Business Dynamics and the South African Agricultural Union.

15.4 Section 24(1): Unilever and South African Breweries state the value of intellectual property should not be underestimated and suggested that the wording should specifically include intellectual property. They were supported by the Association of Marketers, Copyright Protection Agency,

World Council of Professional Photographs, Utico Holdings Ltd, Association of advertising Agencies, Rembrandt Group Ltd, Sasol Oil and the Loerie Committee. \$19 petitions were received in support of this right. Unilever suggested that the simplest way of dealing with the problem would be to include the words "(including intellectual property)" after the word "property". A more complicated addition came from the Association of Marketers -

"Everyone has the right to the protection of the moral and material interest resulting from any artistic, scientific or literary production of which they are the creator."

- 15.5 Section 24(4): Further submissions concentrated on the factors to be taken into account for compensation. The SAAU were 'appalled' by the inclusion of "the ability of the state to pay". They were supported by Genbel South Africa who suggested that a reference which would incorporate public international law would be desirable. Some submissions made reference to "just and equitable redress".
- 15.6 A number of submissions came from muslim groups who requested that Mosques and Holy places be excluded from expropriation.
- 15.7 The South African Property Rights Trust argued for a property clause which extinguished capital values in land and eliminated taxes on labour and savings. this change to rental tenure as apposed to freehold tenure would, it is argued, ensure that the right of access to land is enforceable. Such technical amendments however would be best left to legislation.
- 15.8 Most of the concerns raised by the submissions have been the subject of discussion in the sub-committee meetings. The submissions however demonstrate an increased interest in the explicit reference to intellectual property.
16. **Sections 25 and 26: Housing, land, food, water and social security**
- 16.1 **Summary**
As stated in end-notes 32 and 33 there were a range of reactions from the public to the inclusion of these rights. Some supported their inclusion as justiciable rights [see e.g. the Urban Sector Network(...) and the Centre for Applied Legal Studies Gender Project] while others were opposed to their inclusion [see e.g. the Chamber of Mines (...)].
- 16.2 Among the submissions that supported the inclusion of social and economic rights in the Bill of Rights, there were divergent approaches to the drafting of the rights. Certain submissions were opposed to qualifying the general statement of the rights with the words, "access to...". It is argued that this qualifier dilutes these rights, and may prevent the courts

from granting relief in respect of infringements of housing rights (the so-called 'negative enforcement' of social and economic rights). [see submissions of the Human Rights Committee (26.9); National Women's Coalition (21.28); the Centre for Applied Legal Studies Gender Project (...) and the Urban Sector Network (28.12)]. The Urban Sector Network proposed, for example, that the right in section 25 should read, "Everyone has a right to adequate housing and ..."

16.3 Other submissions argued that there should be no clear statement of the rights at all - only a duty on the state to pass legislation and adopt other measures to promote and advance access to the rights [see submissions of Business South Africa (22.2); the Association of Law Societies (18.4)]. Some appear to favour a hybrid formulation between these two approaches [see S.A.M.W.U. Medical Benefit Fund (25.12)]. The Human Rights Committee suggested that the duty of the State be made stronger with an obligation to act "with all deliberate speed" in realising the rights [see also the submission of Dr. D. Cowen].

16.4 The S.A. Jewish Board of Deputies (20.29) were of the view that the right of access to social welfare deserved to be included in a separate clause. The Human Rights Commission (22.8) submitted that the right to development should receive more prominent attention. They point out that the only reference to this right is contained in section 23(b)(iii) of the draft Constitution. COSATU argued for the inclusion of the right to work which should be drafted along the lines of the other social and economic rights to place a duty on the State to reduce unemployment. It should be noted that the right to work is protected in article 6 of the International Covenant on Economic, Social and Cultural Rights (1966). The inclusion of this right is a political decision.

16.5 The motivation for the drafting of the rights in their present form are set out in the various Technical Committee memoranda dealing with these rights (see particularly the memorandum of 14 February 1996). The Technical Committee remains of the view that the present formulation is appropriate and in line with international human rights standards.

17. **Section 27: Children**

17.1 **Summary**

The South African Federation of State Aided Schools (21.23) and the Transvaalse Onderwysersvereniging (29.12) supported the term "parental care" in section 27(1)(b). Prof RT Nhlapo of the SA Law Commission supported "family care".

17.2 The South African National Council for Child Welfare said that section 27(1)(b) and (c) should also provide for special care for homeless children, and the right of all children to a violence free family environment, community and country.

17.3 The Northern Region of the Transvaal Law Society (16.10) said that section 27(1)(f) should provide only that "a child, in addition to his rights in terms of s 11 and 34, also has the right to be detained separately from persons over the age of 18 years and under circumstances which take his age into account". The Traffic and Licensing Services in Port Elizabeth (26.25) felt that the criminal child was overprotected in this section.

17.4 The submissions of the National Children's Rights Committee (18.10) are analysed in paragraph 2 below.

17.5 Specific submissions

17.5.1 The submission of the National Children's Rights Committee(18.10). In view of the importance of this submission, the recommendations of the NCRC will be briefly evaluated.

17.5.2 In order to avoid repeating all the substantive provisions of the Convention on the Rights of the Child in section 27, TC 4 reiterates its previous recommendation (*Explanatory Memoranda 9 October 1995* page 159) that

- (a) care should be taken not to repeat rights afforded elsewhere in the Constitution to both adults and children; and
- (b) only key concepts that relate to the more extensive formulations in the international instruments should be used.

The NCRC proposals are as follows:

"27.(1) Every child has the right -

- (a) to a name and a nationality from birth;
- (b) to family care, [parental care,] or appropriate alternative care when [removed from the family environment] lacking a family environment; (1)
- (c) to basic nutrition, shelter, safety,(2) early learning opportunities,(3) basic health care services, [and] social services and social security; (4)
- (d) to free and compulsory primary and secondary education; (5)
- (e) to special care, if disabled, to maximise his or her full potential and reintegration into society; (6)
- (f) to express his or her views in all matters affecting him or her, with such views being given due weight in accordance with the age and maturity of the child;
- [(d)](g) to be protected from maltreatment, neglect, or abuse;
- (7)[(e)](h) to be protected from exploitative labour practices, and not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or that place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development; [and]
- (i) to be provided with automatic legal representation by the State in all civil and criminal matters affecting the child;

- (8)(j)(i) when charged with a criminal offence to be dealt with by an appropriate judicial system which takes account of his or her age and which allows for diversion of the child away from judicial proceedings where this is desirable and appropriate;
- (9)((f))(ii) not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under sections 11 and 34, the child may be detained only for the shortest possible period of time and has the right to be -
- (i) kept separately from other detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age.
- (2) The child's best interests are of paramount importance in every matter concerning the child.
- (3) No child may be discriminated against because of their nationality. (10)
- (4) Every child must be protected from the effects of armed conflict and no child may be used in armed conflict. (11)
- [(3)](5) [In this section] A "child" means a person under the age of 18 years. (12)

Comments:

- (1) The NCRC wishes to make it to make it clear that the duty to provide alternative care does not only extend to children who are being removed from their families through state intervention, but also to children lacking such environment. The proposal is not supported because *all* children are entitled to family [parental] care in terms of the first part of section 27(1)(b), whereas the second part deals specifically with alternative care in the event of state intervention.
- (2) "Safety" is covered by the right to security in section 11. To the extent that the security of children require special measures, the matter is covered by "every matter concerning the child" in section 27(2).
- (3) "Early learning opportunities" should be viewed within the context of the right to education on which agreement exists that it should only extend to "basic education". It seems unlikely that "early learning opportunities" could be included without appending it with the proviso in respect of "reasonable and progressive measures".
- (4) "Social security" is covered by section 26(3). To the extent that specific measures may be required to secure the social security of children, the matter is covered by "every matter concerning the

child" in section 27(2).

- (5) The question of "compulsory primary and secondary education" has already been considered extensively by Theme Committee 4 and the Sub-Constitutional Committee within the framework of section 28(1).
- (6) Considerations for the inclusion of this proposal also applies to disabled adults. To the extent that disabled children require special care, it is submitted that the matter is covered by the general tenor of provisions of section 27.
- (7) The "freedom of expression" of children is covered by section 15. To the extent that specific measures may be required to secure the freedom of expression of children, the matter is covered by "every matter concerning the child" in section 27(2).
- (8) The "automatic" provision of legal representation in *all* cases cannot be supported.

In criminal matters the matter is sufficiently covered by section 25(2)(c) and (3)(e).

Legal representation of children in civil matters depends on the financial position of the parents or persons *in loco parentis*, and they do not enjoy a constitutionally protected right to legal aid in civil. It is recommended that the insertion of the following subsection be considered: "*in addition to the rights a child enjoys under sections 25(2)(c) and 25(3)(e), to have a legal practitioner provided by the State in civil matters affecting the child if substantial injustice would otherwise result;*".

- (9) The matter is covered by the open-ended guarantee concerning a "fair trial" in section 25(3) read with section 27(2).
- (10) The matter is covered by section 8(3) read with section 27(2).
- (11) It is submitted that this proposal could be considered for inclusion.
- (12) The purpose of section 27(2) of the Working Draft is not to prescribe an entrenched general definition applying to the whole legal system. The proposal is not supported.

17.6 Recommendations

That consideration be given to the inclusion of the following two new paragraphs in section 27(1) -

"(g) *in addition to the rights a child enjoys under sections 25(2)(c)*

- and 25(3)(e), to have a legal practitioner provided by the State in civil matters affecting the child if substantial injustice would otherwise result;*
- (h) *to be protected in armed conflict and not to be used in armed conflict.*

18. Section 28: Education

18.1 Summary

Certain submissions favoured the inclusion of a right to free and compulsory primary and secondary education [NCRC (18.10)]. This raises a policy decision for parties - whether to stipulate these additional rights in the Constitution or leave them to be regulated by legislation. A policy decision to charge school fees would then be subject to constitutional scrutiny if the section was drafted as suggested. There were also submissions to consider the special educational needs of particular groups [Deaf Federation of South Africa (21.5); S.A. Federation for State Aided Schools (21.23); Women for Women in Government (28.13)].

- 18.2 A further concern expressed by certain organisations relates to the qualification, "**at their own expense**", in section 28(2) [S.A. Jewish Board of Education (20.26)] and the Independent Schools Council (26.11). Submissions varied in their support for the two options under section 28(2) [see end-note 38].
- 18.3 With regard to s. 28(2), the State's duties relating to public and private education under international and comparative law has been dealt with in the Technical Committee Memorandum of October 1995 [pp. 165-174].
- 18.4 The Independent Schools Council argued that the right to basic education in section 28(1)(a) should not be restricted only to "state or state aided institutions."

18.5 Recommendations

- 18.5.1 The specific mention of 'state and state-aided institutions' in sections 28(1)(a) may indeed be too restrictive. The Education Department and Parliament should be allowed a range of means through which they can fulfil the right to basic education. They should not be limited to a state or state-aided institution. For example, in the case of adult basic education this will not primarily occur in a state or state-aided institution, but is likely to take place through state-sponsored programmes or state assistance to NGO's specialising in the field.
- 18.5.2 Another difficulty is that the White Paper on Education indicates that the concept of 'state-aided institutions' is the subject of a great deal of confusion in present legislation. Certain schools which may be heavily subsidised by the State do not qualify as 'state-aided institutions'. It would be unwise to link this particular constitutional right to a term which is the

subject of controversy as it is likely to lead to unnecessary litigation.

18.5.3 The purpose of section 28(1)(a) is to ensure that fulfilment of the right to basic education is the responsibility of the state. The mechanisms and institutions through which it chooses to do so should not be constitutionally restricted (e.g. "in a state or state-aided institution"). Similar arguments apply in respect of the use of the terms 'state and state-aided institutions' under s. 28(1)(c). We also suggest that the word "education" is more appropriate in the context of s28(1)(c) than "instruction".

18.5.4 In the light of the above, we suggest the deletion of the phrase, 'state or state-aided institutions' in sections 28(1)(a) and (c). Section 28(1) would then read as follows -

"s8 (1) Everyone has the right -
(a) to a basic education, including adult basic education;
(b) to further education, which the State must take reasonable and progressive legislative and other measures to make generally available and accessible; and
(c) to choose education in any language where education in that language can be reasonably provided."

Whether or not sub-section (3), **Option 2**, is included is a political decision.

19. **Section 30: Language and culture**

19.1 **Summary**

There were not a great deal of public submissions on this right. Certain of the submissions favoured the wording in section 31 of the interim Constitution, whereas others called for a broader definition of language and culture.

19.2 The motivation for the present drafting of these rights is set out in the Technical Committee's Memoranda of October 1995 [at pp. 189-195], and of 21 February 1996.

20. **Section 31: Access to information**

20.1 Section 31(1): Submissions revolved around whether the right should be restricted to information held by the state, ie vertical application only. Business South Africa, Council of South African Bankers, SAAU and the Chamber of Mines suggested that the clause should be confined to information held by the state or its organs.

20.2 Section 31(1): There were a number of concerns expressed with the ambit of the right. The South African Council for Child and Family Welfare were concerned that the provision may have a disastrous impact in adoption proceedings. Further qualifications were suggested such as: access should

be restricted to the protection of a right, restrictions for state secrets and no disclosure where it would be prejudicial to the state or natural or juristic persons.

20.3 Section 31(1): COSATU was adamant that the right should have full horizontal application.

20.4 Section 31(2): The Association of Law Societies preferred that the clause guarantee a right to a Freedom of Information Act as opposed to a direct right.

21. **Section 32: Just administrative action**

21.1 **Summary**

The submissions dealt with particular options contained in the working draft.

21.2 The Association of Law Societies supported option 1 but wanted administrative action defined. They were joined by the Methodist Church who supported the inclusion of the word "justifiable", the South African Council of Churches and the South African Chamber of Business wanted the word "lawful" deleted.

21.3 The Northern Region of the Transvaal Law Societies preferred the formulation in the interim Constitution.

21.4 Option 2 was supported by the Residents and Ratepayers Association of Germiston and the Nederlandse Gereformeerde Kerk VS.

22. **Section 34: Arrested, detained and accused persons**

22.1 **Summary**

A number of submissions called for protection of the rights of victims of crimes. With regards to bail [s. 34(1)(e)], certain of the public submissions favoured option 1 [e.g. Northern region of Transvaal Law Society (...)] while others favoured option 2 [Residents and Ratepayers of Germiston (25.11); Community Law Centre (12.1 Addendum)] Certain of the submissions also argued that the right to be provided with a legal practitioner at state expense in s.34(2)(c) was too costly for the State [Office for Serious Economic Offences]. The S.A Chamber of Business (29.13) suggested that this right be subject to a means or affordability test in preference to the criteria "if substantial injustice would otherwise result." The Human Rights Commission was of the view that legal representation should be provided to accused persons if "the interests of justice require it" The Magistrate's Office in Johannesburg (16.6) submitted that the right in s34(3)(d) should be qualified to allow for an adverse inference to be drawn if the accused fails to testify in certain circumstances, and that the accused should be informed of this consequence.

22.2 Recommendations

- 22.2.1 Consideration should be given to the proposal of the Human Rights Commission (22.8) that section 34(2)(e) be amended to include "basic physical exercise".
- 22.2.2 Section 34(3)(l) should be deleted as proposed by the Community Law Centre as it is already protected in section 34(3)(c).

23. Section 36: State of emergency

- 23.1 Certain submissions were of the view that the person or body responsible for declaring a state of emergency under s36(1) should be specified. Others also suggested that provision should also be made for the declaration of a State of National Defence. Certain suggestions were also made in respect of the list of the non-derogable rights [see the submission of the S.A. Chamber of Business (29.13)] The National Association of Democratic Lawyers (21.15) argued that the period of detention under section 36(7) should be shortened.
- 23.2 The Panel of Experts in conjunction with the Technical Committee are in the process of preparing a further memorandum on the state of emergency section in which consideration will be given to these submissions. The shortening of the period of detention in section 36(7) is a political decision to be taken by the parties.

24. Section 35: Limitation of rights

- 24.1 Submissions revolved around the standard to be used for limiting a right. Most submissions supported a general limitations clause as apposed to specific limitations which was supported by the Free Market Foundation.
- 24.2 Section 35(1):The debate as to which standard would be appropriate was also varied. Some preferred "reasonable and necessary", others preferred "reasonable and justifiable" and a third group wanted a hybrid test. Reasonable and justifiable in general and in addition necessary for specific rights affecting free and law political activity. There were numerous variations with certain organisations such as Genbel South Africa Ltd. which felt that there were certain rights which could never be limited such as the right not to be tortured.
- 24.3 Section 35(1): The Public Servants Association of South Africa proposed that the limitation should not negate the essential content of the right. Other specific limitations were raised, such as those relating to prisoners and members of the security services.

25. Section 38: Application

25.1 Summary

Section 38(1) - horizontality and verticality.

- 25.1.1 The Reproductive Rights Alliance (18.15) and the Planned Parenthood Association of South Africa are in favour of horizontality.
- 25.1.2 The South African Agricultural Union (20.25) stated its support for the formulation in section 38(1).
- 25.1.3 Genbel (19.8), the Life Officers Association (21.12), Afrikanerbond (21.12) and the Transvaalse Onderwysersvereniging (29.12) argued against horizontality. Prof F Venter of Potchefstroom University also argued against unqualified horizontality because there was no good cause to impose constitutional rights on private relationships already being regulated justly by ordinary law.
- 25.1.4 Business South Africa (22.2) proposed a new formulation to the effect that the Bill of Rights governs all law that applies between the state and persons, but that section 22 (labour relations) also governs the law that applies between persons and persons.
- 25.2 The Human Rights Commission (22.8) said that section 38(2) should be positively phrased.
- 25.3. Section 38(3) - juristic persons
- 25.3.1 The Association of Law Societies (11.1), the SA Chamber of Business (29.13), the Public Servants Association of SA (25.9) and the Medical Association of SA (25.9) supported Option 1.
- 25.3.2 Business South Africa (22.2) said that juristic persons were entitled to the following rights: sections 8(1), 13(b)(c) and (d), 14(2), 15, 17, 21, 22 23, 24, 28(2) and (3), 29, 30, 31, 32, 33 , and 34(3) and (4).
- 25.4 **Specific submissions**
The Human Rights Committee of South Africa welcomed the inclusion of the judiciary in section 38(1) and suggested a number of various approaches to the issue of horizontality. The HRC conference where the submissions were formulated was attended by Panel members and the views expressed have already been considered by the Sub Committee of the Constitutional Committee.
26. **Section 39: Interpretation**
- 26.1 **Summary**
- 26.1.1 The Judicial Branch of the Navajo Nation (USA) (27.12) said that section 39(3) needed to be reviewed to ensure that customary rights are given liberal construction and not be denied for unconstitutional inconsistency, except in limited circumstances.
- 26.1.2 The submissions of the Human Rights Committee (26.9) and the Public

Servants Association of South Africa (25.9) are referred to in paragraph 2 below.

26.2 Specific submissions

26.2.1 The Public Servants Association of SA (25. 9 par 33 -35) commented: "It is not clear why only courts should be bound by the principles relating to the interpretation of the bill of rights. In the sphere of labour relations and labour law other important role players may be involved in the interpreting of the Constitution as well. For example the new Commission for Conciliation, Mediation and Arbitration have far-reaching powers with regard to the settlement of particular kinds of disputes It is accordingly suggested that the ambit of clause 39 be widened so as to include 'any other body' interpreting the bill of rights."

26.2.2 The following comments of the Human Rights Committee (26.9 page 10) should be noted:

- "(a) On the relationship between section 39(1)(b) and (c) the point was made that while international law must be considered, foreign law may be considered. However, may foreign courts have interpreted and developed international law, providing an important source of international interpretation. There may be an anomalous situation if the court must have regard to international law but is not obliged to look at its interpretation in foreign law. It was questioned whether clause (b) was meant 'as interpreted at the international level'. The problem with reading clause (b) as also referring to international law as interpreted in foreign law, would be that there are literally hundreds of foreign systems in which foreign law is being interpreted and that it cannot be expected of the courts to have regard to all of them.
- (b) Delegates felt that the courts may be less inclined to invoke the presumption contained in section 39(2) in the clause in certain circumstances, such as where there is an alleged violation of a secure and important right. This, however, is hardly a matter which can be constitutionalised.
- (c) The question was raised whether the interpretation clause should be in the Bill of Rights or whether there should be a clause which deals with interpretation of the entire Constitution."

26.3 Recommendations

This proposal of the Public Servants Association of SA could be accommodated by considering the following changes to section amending section 39(1) of the Working Draft:

- "39. (1) When interpreting the Bill of Rights, every court and body -
- (a) must promote the values that underlie an open and democratic society based on freedom and equality and human dignity;

- (b) must consider all applicable international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, [every court must prefer] any reasonable interpretation of the legislation that is consistent with the Bill of Rights must be preferred over any alternative interpretation of the legislation that is inconsistent with the Bill.
- (3) When interpreting any legislation, and when developing the common law or customary law, [every court must promote] the spirit, purport, and objects of the Bill of Rights must be promoted."

PANEL OF CONSTITUTIONAL EXPERTS TECHNICAL COMMITTEE 4

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA
(FOR SPECIAL ATTENTION OF PARTY REPRESENTATIVES INVOLVED IN BILL OF RIGHTS NEGOTIATIONS)

DATE: 19 MARCH 1996

RE: LIMITATION CLAUSE (SECTION 35)

1. At the CC Subcommittee meeting of 18 March the Panel of Experts and TC4 Technical Experts tabled a memorandum (dated 15 March 1996) on the limitation clause (section 35(1) and (2)) which contained a revised proposal in par. 5.
2. At the meeting we commented that the proposed wording for 35(2)(a) was problematic (because the meaning might have been changed inadvertently when the clause was reformulated).
3. After a meeting of some members of the Panel and Technical Committee 4, the wording below is suggested. It is more appropriate because it is more workable and reflects the test developed by courts in South Africa and elsewhere. The idea is to capture the widely recognized requirement of a rational connection between the limitation and its purpose.

Limitation of Rights

35. (1) The rights in the Bill of Rights may be limited in terms of law of general application only to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom.
- (2) Any limitation in terms of subsection (1) must -
- (a) *be related to its purpose;*
 - (b) limit the right as little as is reasonably possible;
and
 - (c) take into account -
 - (i) the nature of the right;

- (ii) the importance of the purpose of the limitation; and
- (iii) the nature and extent of the limitation.

(3) Except as provided in subsection (1) and (2) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

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