

AKCGENT
MULTI-PARTY NEGOTIATING PROCESS _

P O Box 307, Isando, 1600
Telephone: 011-397-1198 Fax: 011-397-2211

Mo Plbpoty CrometÂ©
oal [r61 03Â¢0
Mocri
22/ 47193
IS

L L Rl

IF THE MESSAGE OR COPY YOU RECEIVE IS INCOMPLETE OR
INDISTINCT, PLEASE ADVISE US IMMEDIATELY AT THE ABOVE
NUMBER.

The following are attached in order to form a brief update on the clauses referred to
the Ad Hoc Committee for debate and possible solutions arising from the Seventh
Report:

1.1. Annexure A. Notes on the amendments to be made as typed myself in brief
form from the transcription tapes.

1.2. Annexure B. Extract on the amendments to be made.

1.3. Annexure C. Minutes of the combined meeting where the Seventh Report
was revised and now called "Chapter 3". This shows the
numbering change and also the additional clauses discussed by
the Ad Hoc Committee.

1.4. Annexure D. The minutes of the last Ad Hoc Committee on 20th September.

1.5 Draft of the proposed Tenth Report (formerly named "Chapter 3").

The Technical Committee are awaiting confirmation from the Ad Hoc Committee on
the following: e

2.1 Application of horizontality to certain clauses. The Technical Committee had
from the beginning drafted their reports on the basis of horizontality. The

Ad Hoc Committee had debated this and the whole Bill made vertical. At the
meeting on 14th September Mr Maduna st_ated that there were fears that

certain wrongs would not be addressed and therefore the Equality Clause must have horizontal application and that some other clauses or subclauses should also be considered whether they should have horizontal or vertical application.

Property clause.

As can be seen from Annexure C - minutes of 8th September, several other clauses were debated by the Ad Hoc Committee for amendment by the Technical Committee, and subsequently debated and amended again.

Clause 24 - Administrative Decisions (Acts) which was changed from "Decisions" in the Seventh Report to "Acts" as requested by the Ad Hoc Committee at their meeting of 8th September, and debated on 14th September in Cape Town (you should still have a copy of those minutes) and at the meeting on 20th September seemed to have been finalised by including both Decisions and Acts. The reason for referring this to the Ad Hoc Committee was because there was very strong objections from the DP as they wanted a sense of "reasonableness" included. No objections were raised regarding the phrase "Administrative Decisions".

Perhaps I could suggest that Prof Louwrens du Plessis be contacted - 02231 77 3454 regarding the delays in submission of the Tenth Report.

Trust that the above will assist and that I have covered all your requirements. I shall not be here tomorrow, but expect to be here on Monday, 27th.

Kindest Regards,

S -

TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE
TRANSITION : SEVENTH REPORT : NOTES ON AMENDMENTS TO BE MADE
AS DEBATED BY THE NEGOTIATING COUNCIL : 3 AUGUST 1993

1. AD HOC COMMITTEE

The Ad Hoc Committee to attend to the following:

1.1 Decide on the whole issue of horizontality and verticality and to then identify each clause to which this would be applicable.

1.2 The following clauses and subclauses are referred to this Committee:

Â» 1. Application: Clauses (1) (a) and (b) and (4)

11. Freedom of Association

18. Administrative Decisions: Clause (1)

23. Property: Clauses (1) and (2)

PLANNING COMMITTEE

Item 4 in Additional Matters on page 14 referred to the Planning Committee for urgent attention due to the deadline of 9 August 1993.

TO BE DISCUSSED AND REFORMULATED BY TECHNICAL COMMITTEE

The following are to be discussed by the Committee and reformulated:

- 1. Application: Clauses (3) and (5) (a)

2. Equality: Clause (2)

. Freedom and Security of the Person: The PAC are to give a submission on this.

. Freedom of Expression: The Committee to give their reasons again and stronger why the request of the DP should not be considered.

. Freedom of Movement: The PAC are to give their submission on this.

. Residence: Subject to a submission from the PAC before reformulation.

. Access to Information: Committee to reconsider in the light of recent submissions.

Detained, Arrested and Accused Persons: Clause (1) Committee to consider the requests by the DP. Clause (2) Accepted except that the Committee will consider the request of the PAC regarding "confession" etc.

. Eviction: The Committee to prepare a memorandum for submission.

Economic Activity: Approved but may change as ANC preparing a submission on this Clause.

. Children: Various requests for additions such as provisions for children in prisons, shelter for street children etc. The Committee will discuss and reformulate.

Limitation: Clauses (1) and (a) - Committee to take consideration of suggestions from various parties and suitably amend/reformulate.

ITEMS IN SEVENTH REPORT NOT DEBATED BY COUNCIL

The following items have not as yet been debated:

4.1 29. Suspension

4.2 30. Interpretation - this was touched on in debating other Clauses, but in itself not fully debated.

4.3 31. Duration

4.4 Additional Matters:

4.4.1 Items 1 and 3

ADDEwDuM

ISSUES REFERRED TO THE PLANNING COMMITTEE
BY THE NEGOTIATING COUNCIL

Technical Committee on Fundamental Human Rights during the Transition:

-

1.1

The Planning Committee was requested to suggest a mechanism to resolve the differences arising from the following items:

= Item 2 (2)

5 Item 3 .

i The right to vote [persene +
. Item 30 (item on conviction)

The Planning Committee was requested to clarify the brief of the Technical Committee.

The Planning Committee was requested to set a deadline for the receipt of submissions from participants. It was agreed that the date should be Monday 26 July 1993.

Technical Committee on the Repeal of Discriminatory Legislation:

Z:1

To look into what mechanisms need to be employed or what suggestions can be made in respect of the date of implementation of the Bill of Rights.

To look into the issue of "verticality" and "horizontal" pending the report from the Technical Committee on Fundamental Human Rights, and establish some mechanism to resolve these particular issues.

To consider the issue of the need for democratic government and the rule of law government between the present time and the elections (getting from point A to point B),

To look into the issue of the uniformity of application of the Bill of Rights and the principles with regard to the elections.

The Fundamental Rights Committee and the IEC have suggested or are considering a set of enforcement mechanisms. Enforcement mechanisms are also necessary for the enforcement of the Bill of Rights. The Planning

- Committee should apply its mind to this issue and bring various

recommendations on how the overlaps could be avoided. This will give guidance to the Technical Committee on the Repeal of Discriminatory Legislation.

The Planning Committee should submit recommendations as to how to deal with the part of the Second report of the Technical Committee, with regard to specific pieces of legislation.

How the tribunals would work.

THESE DRAFT MINUTES ARE CONFIDENTIAL AND RESTRICTED TO MEMBERS OF THE AD HOC COMMITTEE, THE PLANNING COMMITTEE AND THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION. THE MINUTES ARE STILL TO BE RATIFIED BY THE AD HOC COMMITTEE.

DRAFT MINUTES OF THE COMBINED MEETING OF THE AD HOC COMMITTEE AND THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION HELD AT 11h00 ON WEDNESDAY, 8th SEPTEMBER 1993 AT THE WORLD TRADE CENTRE

Ad Hoc Committee:

Mrs S Camerer (Convenor)
Prof H Cheadle

Chief Gwadiso

Mr A Leon

Mr P Maduna

Technical Committee:

Prof. L M du Plessis (Convenor)

Prof. H M Corder (left meeting at 12h15)
Mr G Grove (left meeting at 13h00)

Mrs D S Nene

Adv. Z Yacoob

MINUTES: Miriam Cleary (Administration)

i APOLOGIES: Mr S G Mothibe - Ad Hoc Committee

1. AGENDA:

1.1 Everyone was given a copy of the proposed revised Chapter 3 on Fundamental Human Rights prepared by the Technical Committee. Mrs Camerer asked Professor du Plessis to take the Ad Hoc Committee through the amendments and additions to certain of the clauses and the approach of the Technical Committee to the comments in the Chief Justice's Memorandum.

It was noted that the numbering of the clauses had been amended to fall in line with the numbering in the Constitution. The previous numbers in these minutes are shown in-square brackets. Discussion ensued regarding the

AD HOC/TECHNICAL COMMITTEE
FUNDAMENTAL RIGHTS/8 September 1993

format of the proposed draft Chapter 3 before the Committee with the shadings and deletions shown. As the Planning Committee had requested that all amendments be clearly shown this was the best method of acceding to their request and in order that the Negotiating Council would easily note the changes made.

Customary Law.

Application - Clause 7. [old clause (1) Application]

2.1

Mrs Camerer asked whether the Technical Committee had taken into account the comments from the Chief Justice in his recent submission. Professor du Plessis advised that this had been done. After debate it was agreed that the deletion of 7(1) (b) was acceptable.

~ After discussion it was agreed that the new wording of 7(2) probably took care of the Chief Justice's point in connection with 1(2) - (paragraph 5 of the Chief Justice's Memorandum). It was agreed that the new wording should remain as it was.

The Committee agreed with the new wording of 7(3).

The Technical Committee had considered and debated the Chief Justice's submission regarding 7(4) in connection with a specific reference to the power of the Supreme Court to set acts aside but decided it was not necessary. Mrs Camerer asked the Technical Committee to reconsider this aspect.

It was agreed that the Technical Committee consider if the word "unable" in 7(4) (b) (ii) could be replaced by the words "not reasonably able".

The Ad Hoc Committee proposed that clause 7(4) (b) (iii) should be amended and after discussion the following formulation was agreed to:

"(iii) a person acting as a member of, or on behalf of a group or class of persons."

The Technical Committee would discuss and consider the addition of a further clause suggested by Mrs Camerer.

Equality - Clause 8. [old clause 2.]

% |

The word "unfairly" in subclause 8(2) was agreed to.

AD HOC/TECHNICAL COMMITTEE
FUNDAMENTAL RIGHTS/8 September 1993

3.2 MrLeon stated that there was a flaw in the drafting of subsection 8(3) in that adequacy as a qualification was an inadequate criterion. Mr Grove said that the wording was drafted similarly to that in the Constitutional principles (11).

Mr Leon said there was a further problem around the word "aimed" which made the validity dependent solely on the design of the programme of affirmative action and not its effects. To avoid the consequences an affirmative action clause should empower the courts to ask whether the programme is one of reasonableness and likely to achieve its aim. Once again Mr Grove said that the wording of the Constitutional principles was being followed but the meaning was the same. Mr Leon said he could not agree with that as there should be some element of reasonableness in the affirmative action measure and that it was too wide in its interpretation and did not challenge an affirmative action programme. Professor Cheadle stated that this was not a point yet settled by the Ad Hoc Committee and as such held over as the Technical Committee would be requested to consider all the points made by Mr Leon.

3.3 After discussion on subclause 8(4) [old clause 2(4)] it was agreed that the Ad Hoc Committee reconsider the Technical Committee's formulation and whether this subclause should remain or be deleted.

Privacy - Clause 13. [old clause 7.]

Mr Leon asked why the formulation did not end after the words "... personal privacy". Professor du Plessis explained that the formulation was done in this manner so that it should not be left to courts of law to decide whether or not to include the rights enumerated. Mrs Cameron referred to the Chief Justice's reservation in relation to 33(1)(b) and asked the Technical Committee to reconsider this Clause in the light of it. Adv. Yacoob stated that historically people have claimed that the "list" in this formulation had been included to ensure that this is never done again, and so it was decided to include it. It was agreed that this clause as formulated be reconsidered.

Freedom of Expression - Clause 15. [old clause 9.]

Regarding subclause 15(2) Mr Maduna requested clarity on the definition of "public media". The Technical Committee would discuss and consider this clause before working on another formulation.

AD HOC/TECHNICAL COMMITTEE
FUNDAMENTAL RIGHTS/8 September 1993

Freedom of Association - Clause 17. [old clause 11.]

This clause as now formulated was accepted by the Ad Hoc Committee subject to the Bill of Rights having vertical application only.

Access to Information - Clause 23 [old clause 17]

This clause as now formulated was accepted by the Ad Hoc Committee.

Administrative B Acts - Clause 24 [old clause 18.]

Professbr Cheadle said he had a problem with the distinction between "Decisions" and "Acts" as did Mr Leon. It was debated whether this distinction i.e. using "acts" rather than "decisions" met the point of the Chief Justice.

Professor Cheadle said that in subsection 24(1)(b) the requirement of adverse effect was missing and suggested the subsection start with "no person shall be adversely affected by ..." as adverse consequence was the first requirement for challenge. The Technical Committee would consider the discussions on this aspect but Professor Cheadle proposed that this be held over until the next meeting and until he has had administrative lawyers look at these aspects. Professor Corder, who is an administrative law expert, had already left the meeting.

Detained, Arrested and Accused Persons - Clause 25 [old clause 19.]

9:1

Subsections 25(1)(c) and 25(3)(c) were reformulated in accordance with the comments made by the Chief Justice. ~ The Ad Hoc Committee stated that they would reserve their discussions and revert to this at the next meeting.

Adv. Yacoob asked whether account had been taken regarding the matter of the State having to pay for legal expenses and if the Ad Hoc Committee would like to discuss the implications this would have on a future government.

It was agreed that there was a problem with the words "detained personsâ\200\235 as this always seemed to suggest detention without trial but other types of

AD HOC/TECHNICAL COMMITTEE
FUNDAMENTAL RIGHTS/8 September 1993

persons were "detained" without being criminals such as mentally ill persons, etc. The Technical Committee were requested to investigate the use of alternative wording.

Professor du Plessis advised the meeting that Mr Grove was currently having discussions with the Attorney General on the subject of "unlawful evidence" and the Technical Committee would revert on this at the next meeting.

Property - Clause 28 [23.]

10.1 The Technical Committee had reformulated this clause. The Ad Hoc Committee would consider and discuss subsections 28(2) and (3) and revert to this at the next meeting.

The Technical Committee submitted a proposed clause to the meeting entitled "Restoration of Land" - Annexure A. Mrs Camerer said that this should be considered as a separate clause but its inclusion might necessitate a change to 28(2). After discussion the Ad Hoc Committee decided to revert to this at the next meeting.

Children - Clause 30 [25.]

Professor du Plessis said that the reformulation had now been done from the child's point of view instead of from the parents' viewpoint. The formulation was accepted by the Ad Hoc Committee.

Mr Leon enquired whether having the Bill of Rights operating vertically would mean that the State would step in to take parental care of the children, this especially in the case of street-children. Professor du Plessis said that this would have to be a political decision.

Education - Clause 32 [old clause 27.]

12.1 Mr Maduna enquired how "basic" was the education envisaged in this clause and Chief Gwadiso suggested the word be omitted. Adv. Yacoob stated that the more one defined education the more the courts would be compelled to make the State pay for basic education. The Ad Hoc Committee was requested to advise the Technical Committee how this was to be defined and

to what extent the State would be prepared to face the consequences of the omission of "basic".

Mr Leon queried the words "equal access". The Technical Committee would ascertain whether the equality clause took care of this. Adv. Yacoob said that the inclusion of this was a political decision and Mr Maduna said that he would recommend that this clause remains as now formulated as it was a political statement. Mrs Nene agreed and said that it should never happen again that children are left out of access to educational institutions.

Customary Law

Professor du Plessis handed out the Technical Committee's suggested formulation on Customary Law - Annexure B. The Ad Hoc Committee recorded that their initial impression of this formulation was favourable. ~ Chief Gwadiso stated that this formulation was also acceptable in principle but he would like an opportunity to consult on this and revert next week.

Further Clauses Held Over:

~

The following further points were held over for discussion at the next meeting:

14.1

Limitation Clause 33.

14.2 Suspension Clause 34

14.3

Interpretation Clause 35

NEXT MEETINGS:

15.1

The next Ad Hoc Committee meeting would take place on Tuesday, 14th September 1993, from 10h00 to 16h00 in Cape Town. Mrs Camerer would arrange the venue for both the Ad Hoc Committee and the Technical Committee and fax this to the minute takers to advise the Committee members.

It was agreed that the next combined meeting would thus take place on Tuesday, 14th September 1993 from 11h00 to 16h00 in Cape Town.

AD HOC/TECHNICAL COMMITTEE
FUNDAMENTAL RIGHTS/8 September 1993

"

Erricye D

THESE DRAFT MINUTES ARE CONFIDENTIAL AND RESTRICTED TO MEMBERS OF THE AD HOC COMMITTEE, THE PLANNING COMMITTEE AND THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION. THE MINUTES ARE STILL TO BE RATIFIED BY THE AD HOC COMMITTEE.

DRAFT MINUTES OF THE MEETING OF THE AD HOC COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION HELD ON MONDAY, 20th SEPTEMBER 1993 at 09h00 AT THE MARKS BUILDING, CAPE TOWN

PRESENT: Mrs S Camerer (Convenor)
Chief Gwadiso
Mr A Leon
Mr P Maduna
Mr S G Mothibe
MINUTES: Mrs M Cleary (Administration)

APOLOGIES: Prof. H Cheadle

Agenda:

1.1 Re-cap on certain points from the minutes of the Ad Hoc Committee meeting of 8th September 1993 together with discussion on the revised draft of the proposed Chapter 3.

Vertical and horizontal application.

Outstanding items held over from previous meetings.

Certain items from Item 2 of the minutes of 8th September 1993 were discussed:

2.1 Eviction: It was noted that it had been agreed that this clause be deleted a long time ago.

In response to Chief Gwadiso's query regarding squatters Mrs Camerer stated that no provision was made in this clause and this would be dealt with by way of legislation. The Committee agreed.

Economic Action: Agreed that this clause be retained in its present form.

Equality: Agreed but could not be finalised until agreement had been reached on horizontal or vertical application.

Revised Draft of Proposed Chapter 3:

Each person present was handed a copy of this revised draft. It was agreed that the Ad Hoc Committee go through this revised draft in order to reach agreement and eliminate problem areas.

Application - Clause 7:

The amendments/additions to this clause and its subclauses were discussed.

4.1 7(1) (a):

42 7))

7(1) (c):

T2y

7(3):

7(4)

7(5)

Equality - Clause 8:

The formulation agreed upon with the appropriate deletion.
This to be held over for further discussion, but the Technical Committee would be requested to make mention in their Comment of the fact that the Ad Hoc Committee had previously reached agreement to delete this clause.

The formulation agreed upon with the appropriate deletion.

The formulation agreed upon with the words "decisions taken and" to be inserted before the words "acts performed".

The formulation agreed upon.
The new formulation agreed upon.

New formulation agreed.

Wording agreed but held over for finalisation pending agreement on horizontal or vertical application.

5.1 Regarding 8(3) mention was made of the Chief Justice's worry about the wideness and vagueness of this subclause. Mr Leon felt very strongly that this must not be an "open ended" clause and the word "reasonably" should be inserted between the words "measures designed". After discussion it was agreed that the Technical Committee be requested to include this word in the formulation. It was also stated that in the spirit of compromise, and to meet the reservations of one of the members, the Ad Hoc Committee would urge

AD HOC/FUNDAMENTAL RIGHTS
MINUTES/20th September 1993

the Technical Committee not to disregard their views in this matter.

8(4) It was felt that the word "unfair" should be deleted. It was decided that it was preferable that the whole subclause be deleted as it belonged to the

Law of Evidence and Procedure. Å However the Committee did not feel strongly about it.

Freedom and Security of the Person - Clause 11:

After discussion it was agreed to request the Technical Committee to reinstate the

deletion as 25(2) did not adequately provide for this. It was noted that there was a typographical error in the Comment as the clause referred to should read "25(1)(e)".

Freedom of Expression - Clause 15:

Agreed, but the Technical Committee was asked to ensure that the wording fitted with that of the IBA and IMC Bills.

Freedom of Association - Clause 17:

This clause was agreed subject to vertical application being agreed to. It would have to be reconsidered if the Bill had horizontal application.

Access to Information - Clause 23.

Mr Leon stated that the clause as formulated was very vague and general. Mr Maduna agreed but said that its strength was in its generality and recommended that the formulation be left as drafted. Mrs Camerer stated that this was the opinion of the Chief Justice who stated in his report that this formulation was too vague and would cause endless problems in interpretation.

After discussion it was suggested that the Technical Committee consider this and include the following after the word "information" "held by the State or any of its organs or agencies".

AD HOC/FUNDAMENTAL RIGHTS
MINUTES/20th September 1993

Administrative] Acts - Clause 24:

After discussion it was agreed that, as an act could not be carried out without a decision, both words should be retained throughout the formulation, to read "acts and decisions" or "acts or decisions" where applicable. The Technical Committee were requested to include this formulation.

Detained, Arrested and Accused Persons - Clause 25:

The whole of this clause and its subclauses were agreed upon.

11.1 Comment after 25(2)(c): The Technical Committee would be requested to draft a clause to safeguard the rights of those in custody in respect of self-incriminating confessions and admissions which could be used in evidence against them.

11.2 25(3)(d): The word "him" should be replaced by "himself".

Eviction: (no number given)

The Technical Committee would be requested to amend the Comment in this deleted clause by the removal of the word "recommended" replaced by the words "agreed to".

Property - Clause 28:

13.1 It was agreed that the suggested clause on the Restoration of Land was incorrectly placed in this draft (page 15) and without a number.

Mr Leon wished it to be recorded that he had reservations whether such restoration could be enforceable.

Chief Gwadiso enquired about the problems of communities having lost their lands and what their position would be in the reclaiming of these lands.

Mrs Camerer and Mr Mothibe recorded their objection to the right to

AD HOC/FUNDAMENTAL RIGHTS
MINUTES/20th September 1993

restoration of land in the Bill.

After discussion regarding the restoration of land it was agreed that the Technical Committee be asked to draft a subclause (4) to clause 28 on the basis of:

(a) A right to lodge a claim to have land restored or receive compensation.

(b) To be subject to terms set out in legislation.

Â©) Such right should be made subject to the terms of subclauses (1), 2) and (3) of clause 28 as a whole.

Mr Leon agreed with Mrs Camerer and Mr Mothibe that he had great reservations regarding the whole of the Property clause but wished it recorded that the Democratic Party's view was that unless restoration was addressed rights to property would not be secure.

Customary Law (Page 18):

It was agreed that subclause (3) be amended to include the words "assisting with the development of" to be inserted and the word "adapting" be deleted. This subclause would then read as follows:

"Nothing in this section shall preclude measures aimed at assisting with the development of customary law in relation to the values embodied in the other provisions of this Chapter."

Limitation - Clause 33:

Mr Leon suggested and it was agreed that the Technical Committee consider the following:

15.1 including a list of illimitable rights as in clause 34(3)(c);

15.2 that the Limitation clause should be consonant with South Africa's obligations under Public International Law.

AD HOC/FUNDAMENTAL RIGHTS
MINUTES/20th September 1993

Suspension - Clause 34:

It was agreed that the following amendments should be considered:

16.1 Subclause 34(2)(b): the words "by a majority" be replaced by the words "by two thirds majority"

16.2 Subclause 34(2)(c): the words "six months" be replaced by the words "three months" This is still subject to consultation and will be confirmed at the next Ad Hoc Committee meeting.

Subclause 34(2)(d): the Technical Committee would be requested to consider the question of the proper forum (i.e. was the Supreme Court appropriate?).

Vertical and Horizontal Application:

This issue was deferred to the next meeting of the Ad Hoc Committee. Mrs Camerer suggested that Mr Maduna and Mr Leon were really concerned with privatised apartheid rather than horizontal application of the Bill. She presented a draft formulation to the meeting and suggested the Technical Committee be requested to consider formulating a clause regarding this issue. This was agreed.

The formulation: "Nothing in this Chapter will justify racial discrimination on the interpersonal level except that freedom of association as regards private and personal activities is guaranteed."

General:

18.1 It was agreed that all other clauses not mentioned above were acceptable as formulated and/or amended.

18.2 The Technical Committee would be requested to present a revised draft of the proposed Chapter 3 on the basis of the above discussions.

Next Meeting:

19.1 Mrs Camerer advised that she would be overseas for two weeks from 26th September 1993. She said that Minister Kobie Coetzee would probably take

AD HOC/FUNDAMENTAL RIGHTS
MINUTES/20th September 1993

the chair himself for the next Ad Hoc Committee meeting and, after discussing this with the Planning Committee would advise which date would be suitable.

The next meeting would take place either at Minister Coetzee's office or at the World Trade Centre at a time and date suitable to everyone.

Closure:

20.1 The meeting closed at 14h15.

20.2 Copies of these minutes would be faxed/delivered to each person of each Committee.

AD HOC/FUNDAMENTAL RIGHTS
MINUTES/20th September 1993