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LAWYERS  
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## TELEFAX TRANSMISSION

DATE 2 July 1993MESSAGE FOR Melody - Multiparty NegotiationsFAX NUMBER (011) 397-2211SENDER David SullivanNUMBER OF PAGES (INCL. THIS ONE) 10

COMMENTS I don't know whether you received  
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THANK YOU

FAX TO: Multiparty Negotiations  
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For: Technical Committee on Fundamental Rights  
Planning Committee

From: Law Reform Project  
Lawyers for Human Rights  
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Attached is our initial submission to the Technical Committee regarding the "Interim Bill of Rights." Please forward this to all members of the Technical Committee on Fundamental Rights, the Planning Committee, and any other appropriate recipients. Also, please notify us of the date by which you expect this document to be finalized, so that if possible we can reconsider our position and submit a more thorough response at a later date.

This document is a quickly written response to the Technical Committee's report. While we have addressed many outstanding issues in that report, we reserve the right to make a more complete submission at a later date, once we have had time to consider all relevant issues.



Submission to the Technical Committee on  
Fundamental Rights During the Transition  
2 July 1993

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

1. Introduction and summary

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

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

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

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

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



### Principles behind an interim Bill

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

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

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

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

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



### Considerations provoked by specific provisions

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

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

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

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

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

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



Comments on specific provisions of the Bill as drafted.

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

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

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

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

This clause should also allow standing for class action suits.

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

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

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

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

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

Section 2. Equality.



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

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

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

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

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

**Section 2(3).**

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

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

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

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

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



"exploitative labour practices" on its own should sufficiently include unjust forms of forced labour, such as selling prison labour to farmers, while excluding acceptable practices which are arguably "forced labour," such as requiring prisoners to clean their cells, requiring military conscripts to clean their barracks, or parents requiring their children to work on a family farm. We would therefore suggest that "forced labour" be dropped from this provision, and that the entirety of section 7 become an inalienable "core" right under the terms of sections 30 and 31.

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

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

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

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

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

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

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

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



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

#### **Section 21. Detained, Arrested and Accused Persons.**

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

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

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

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

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

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

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

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

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

This provision should also allow for communal ownership.

#### **Section 25 (2). Property.**

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



**Section 27. Children.**

This section should explicitly prohibit child labour.

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

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

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

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

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

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

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

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

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

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

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