# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>No.</th>
<th>Detail</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Schematic Report</td>
<td>1 - 6</td>
</tr>
<tr>
<td>2.</td>
<td>Report to Constitutional Assembly</td>
<td>7 - 13</td>
</tr>
<tr>
<td>3.</td>
<td>Explanatory Memorandum and Provisional Text</td>
<td>14 - 20</td>
</tr>
<tr>
<td>4.</td>
<td>Party Submissions</td>
<td>21 - 40</td>
</tr>
</tbody>
</table>
THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

SCHEMATIC REPORT ON FREEDOM OF RELIGION, BELIEF AND OPINION
<table>
<thead>
<tr>
<th>NO.</th>
<th>CONSTITUTIONAL PRINCIPLES</th>
<th>ISSUES</th>
<th>NON-CONTENTIOUS ASPECTS</th>
<th>CONTENTIOUS/OUTSTANDING ASPECTS</th>
<th>REMARKS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>II, XII, Section 14</td>
<td>Nature of the right</td>
<td>Right to be included</td>
<td>Academic freedom and placement of the right. To be: (a) retained in s 14 (ACDP); (b) moved to freedom of expression (ANC); (c) moved to educational rights (DP, FF); (d) covered as a separate right (NP).</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>Content of the right</td>
<td>Freedom of worship. Tolerance of all religions and diverse beliefs. The right to hold (and not to hold) religious and secular convictions and to express, profess, practice and propagate them publicly and in association with other.</td>
<td></td>
<td>ANC: Opinion to form part of expression. None to be barred from places of religious observance.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>DP: Conscience and religion to be grouped with speech, belief, opinion, expression, assembly and association as a Right to Fundamental Freedoms.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>FF: Prohibition on discrimination should not offend religious beliefs of individuals.</td>
<td></td>
</tr>
</tbody>
</table>

1 It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.
<table>
<thead>
<tr>
<th>NO.</th>
<th>CONSTITUTIONAL PRINCIPLES</th>
<th>ISSUES</th>
<th>NON-CONTENTIOUS ASPECTS</th>
<th>CONTENTIOUS\OUTSTANDING ASPECTS</th>
<th>REMARKS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>-Outstanding</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td></td>
<td>Application of the right (Nature of duty)</td>
<td>Positive duty to be imposed on state.</td>
<td>ACDP: Duty to be imposed on state in s 14(1) to ensure that religious practices uphold public order and Godly morals.</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td></td>
<td>Application to common\customary law</td>
<td>Right applies to common and customary law.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td></td>
<td>Application of the right (Duties on private actors)</td>
<td>Right to apply vertically and horizontally where applicable.</td>
<td>NP: State and academic institutions bound by academic freedom. Other aspects only state should be bound.</td>
<td></td>
</tr>
<tr>
<td>6.</td>
<td></td>
<td>Bearers of the right</td>
<td>Natural and juristic person where applicable.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7.</td>
<td></td>
<td>Limitations</td>
<td></td>
<td>Degree or level of limitation: Limitations to be imposed on beliefs that manifest themselves through ritual murders, enforced polygamy, violence etc -ACDP</td>
<td></td>
</tr>
<tr>
<td>NO.</td>
<td>CONSTITUTIONAL PRINCIPLES</td>
<td>ISSUES</td>
<td>NON-CONTENTIOUS ASPECTS</td>
<td>CONTENTIOUS\OUTSTANDING ASPECTS</td>
<td>REMARKS</td>
</tr>
<tr>
<td>-----</td>
<td>--------------------------</td>
<td>--------</td>
<td>-------------------------</td>
<td>----------------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>7.</td>
<td></td>
<td>Limitations (cont)</td>
<td></td>
<td>-Outstanding</td>
<td></td>
</tr>
</tbody>
</table>

- Outstanding

The holding of a belief or thought (religious or otherwise cannot be limited -ANC **Outstanding**

The manifestations of the belief or thought can under reasonable circumstances be limited in an open and democratic society. Such limitations may be permissible in order to give effect to other rights in the Constitution particularly the right to equality -ANC **Outstanding**

Rights subject to reasonable limitations such as S(33) - DP **Outstanding**

S(14(2) and (3) to be retained - FF, NP- **Outstanding**

The rights should not be capable limitation by the legislature otherwise than by an amendment of the constitution. The only justifiable limitation would be the curtailment of religious activities that conflict with the religious activities of other persons or groups or that contravene some other
<table>
<thead>
<tr>
<th>NO.</th>
<th>CONSTITUTIONAL PRINCIPLES</th>
<th>ISSUES</th>
<th>NON-CONTENTIOUS ASPECTS</th>
<th>CONTENTIOUS OUTSTANDING ASPECTS</th>
<th>REMARKS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>fundamental interest protected by the constitution, such as the public order and other interests mentioned in article 18.3 of the Interim Covenant on Civil and Political Rights ('public safety, order, health, or morals or the fundamental rights and freedoms of others') -FF Outstanding</td>
<td></td>
</tr>
</tbody>
</table>
THEME COMMITTEE 4
FUNDAMENTAL RIGHTS

REPORT ON FREEDOM OF RELIGION, BELIEF AND OPINION

This report is drawn up on the basis of submissions received from political parties, organisations of civil society and individuals, the public participation programme and other activities of the Constitutional Assembly.

PART I

MATERIAL CONSIDERED BY THE THEME COMMITTEE

1. Submissions received from political parties (in alphabetical order):
   - ACDP
   - ANC
   - DP
   - FF
   - IFP (original submission to T\C 4)
   - NP

2. Submissions received from the public and civil society

   2.1 Individuals (in alphabetical order)
   - Africa (26)
   - Ashfield M (344)
   - Blignaut E (354)
   - Blignaut J (630)
   - Boyd D (299)
   - Brink R (361)
   - Brussow FA (82)
   - Dekenah R (105)
   - Du Preez PI (803)
   - Egleton DM (388)
2.2 Organisations (in alphabetical order)

- African Enterprise (76)
- Ayittey GBN -Free Africa Foundation (311)
- Christian Science Committee on Publication for the Northern Province of South Africa
  -- Conscientious Objector Support Group (29)
- Conservative Party of South Africa (173)
- M L Sultan Technikon (Dr SM Qono) (486)
- National Assembly of the Baha'is of SA (165)
- Protestant Association of South Africa (612)
- Religious Society of Friends (326)
- South African Anglican Theological Commission of the Church of the Province of SA (81)
- The English Academy of South Africa (30)
- Underberg Christian Fellowship (205)
- United Christian Action (39)
- World Conference on Religion and Peace: South African Chapter (106)

2.3. Government structures/institutions

None

3. **Technical Committee reports**

None to date on this item.

4. **Relevant Constitutional Principles**

II, XII,
PART II

1. NATURE OF THE RIGHT

1.1 Non-contentious issues

1.1.1 Right to be included in terms of Constitutional Principle II.

1.1.2 Constitutional Principle XII also involved (FF).

2. CONTENT OF THE RIGHT

2.1 Non-contentious issues

Freedom of worship and tolerance of all religions\(^2\). The recognition and acceptance of diverse beliefs. The right of individuals to hold (and not to hold) any religious and secular conviction and to the right to express, profess, practice and propagate them publicly and in association with other.

2.2 Outstanding issues\(^2\)

2.2.1 *Right to academic freedom and placement of right*

2.2.1.1... and educational preferences compatible with the freedom of religion and *should be included* as stated in section 32(c) of the Interim Constitution (ACDP). (From the ACDP's proposed formulation of the right it appears that "academic freedom in institutions of higher learning" to be retained with freedom of conscience, religion, belief and opinion, whereas the other aspects referred to, to be covered by educational rights.)

---

2 The ACDP requests that Satanism to be excluded, due to the limitation of the right. See 7.1.1

3 It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.
2.2.1.2... are best dealt with under *freedom of expression* (ANC).
2.2.1.3... to be placed with the *rights to education* (DP; FF).
2.2.1.4... to be provided for in a *separate provision* (NP).
2.2.1.5... to *include* freedom to study, learn and teach, prohibition on the state to shape education or culture in accordance with any particular political or ideological commitment; academic freedom of every university and similar institution of higher education to be guaranteed (DP).
2.2.1.6... - *further submission* to be submitted at the appropriate time (FF).
2.2.1.7... to *cover* the right to teach and do scientific research and the autonomy of all institutions of higher learning over matters of academic relevance (NP).

2.2.2 Right to freedom of opinion is best dealt with under freedom of expression (ANC).

2.2.3 Places associated with religious observance to be respected and none shall be barred from entering them on grounds of race (ANC).

2.2.4 Freedom of conscience and religion to be grouped with speech, belief, opinion, expression (including freedom of the press and other media of communication), assembly and association as a single Right to Fundamental Freedoms - see also "academic freedom" in par. 2.2.1 (DP).

2.2.5 The new constitution should not prohibit a person from taking into account the sexual orientation of another person where such orientation is contrary to the religious beliefs of the person. The present section 8(2) may be interpreted as forcing a person to act contrary to his religious convictions. Provisions of article 18(2) of the International Covenant on Civil and Political Rights therefore to be included ("No one shall be subject to coercion which would impair his freedom to have or to adopt a religion of his belief or choice."
3 APPLICATION OF THE RIGHT (Nature of the Duty)

3.1 Non-Contentious issues

3.1.1 Positive duty to be imposed on state.

3.2 Contentious\ Outstanding issues

3.2.1 Section 14 to be revised to read: "Every person shall have the right to freedom of conscience, religion, though, belief and opinion, which are consonant with public order and Godly morality, which shall include academic freedom in institutions of higher learning." Inserted phrase imposes the duty on the State to ensure that religious practices uphold public order and Godly morals (ACDP).

3.2.2 The State's obligation to respect religious observances at state or state-aided institutions "under rules established by an appropriate authority for that purpose", in present section 14(2) unacceptable because any state regulation of religious affairs is rejected (ACDP).

4. APPLICATION OF THE RIGHT (Application to common\ customary law)

4.1 Non-contentious issues

4.1.1 The right applies to customary and common law.

5. APPLICATION OF THE RIGHT (Duties on private actors)

5.1 Non-contentious issues

5.1.1 Right to apply vertically and horizontally where applicable.

5.2 Contentious\ Outstanding issues

5.2.1 Academic freedom binds the state as well as academic institutions. In respect of the other aspects covered by the right, it seems as if only the state should be bound (NP).
6. BEARERS OF THE RIGHT

6.1 Non-contentious issues

6.1.1 Natural persons and juristic persons where applicable.

7. LIMITATION OF THE RIGHT

7.1 Outstanding issues

7.1.1 Degree and level of limitation

7.1.1.1 Religious beliefs that manifest themselves through ritual murders, enforced polygamy, cultic expressions, or violence explicitly promoting public immorality, should have limitations imposed (ACDP).

7.1.1.2 The holding of a belief or thought (religious or otherwise) cannot be limited (ANC).

7.1.1.3 The manifestations of the belief or thought can under reasonable circumstances be limited in an open and democratic society. Such limitations may be permissible in order to give effect to other rights in the constitution particularly the right to equality (ANC).

7.1.1.4 Rights to be subject to reasonable limitations in a properly formulated limitations clause, such as provided for in the Interim Constitution in terms of section 33 (DP).

7.1.1.5 Sections 14(2) and (3) to be retained (FF; NP)

7.1.1.6 The right should not be capable of limitation by the legislature otherwise than by an amendment of the constitution. The only justifiable limitation would be the curtailment of religious activities that conflict with the religious activities of other persons or groups or that contravene some other fundamental interest protected by the constitution, such as the public order and other interests mentioned in article 18.3 of the Interim Covenant on Civil and Political Rights ("public safety, order, health, or morals or the fundamental rights and freedoms of others") (FF).
1. COMPLIANCE WITH CONSTITUTIONAL PRINCIPLE II

1.1 The right to freedom of religion, belief, conscience and opinion is a fundamental right for the purpose of Constitutional Principle II.

2 PUBLIC INTERNATIONAL LAW

2.1 The right to freedom of religion, belief and opinion is a fundamental right which is reflected in all public law international instruments. The following are the most relevant examples:

2.1.1 Universal Declaration of Human Rights (1948) article 18:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

2.1.2 European Convention on Human Rights (1950) article 9:

2.1.2.1 Everyone has the right to freedom of thought, conscience and religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.

2.1.2.2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health, morals, or for the protection of the rights and freedoms of others.
2.1.3 **International Covenant on Civil and Political Rights (1966) article 18:**

2.1.3.1 Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2.1.3.2 No one shall be subject to coercion which would impair his freedom to adopt a religion or belief of his choice.

2.1.3.3 Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

2.1.3.4 The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

2.1.4 **American Convention on Human Rights (1966) article 12:**

2.1.4.1 Everyone has the right to freedom of conscience and of religion. This includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs either individually or together with others, in public or in private.

2.1.4.2 No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

2.1.4.3 Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

2.1.4.4 Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.
2.1.5 African Charter on Human and People's Rights (AFR) (1981) article 8:

2.1.5.1 Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

3 COMPARATIVE LAW

Nearly all national bills of rights contain provisions on freedom of religion, belief conscience and opinion. The content of the right is formulated differently in the various constitutions. Its limitation is likewise treated differently depending mainly on the general approach regarding the limitation of rights in a particular constitution.

3.1 Namibian Constitution section 21(1):

3.1.1 All persons shall have the right to ... 
(b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning. 
(c) freedom to practice any religion and to manifest such practice.

All freedoms guaranteed in section 21(1) are subject to a general limitation clause.

3.2 Constitution of the United States of America Amendment I:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof ...
The right is not subject to an explicit limitation clause, but the Courts have developed principles and criteria for its application.

3.3 Canadian Charter of Rights and Freedoms (1982) section 2:

Everyone has the following fundamental freedoms: (a) freedom of conscience and religion... The right is subject to the general limitation clause in section 2 of the Charter.

3.4 Constitution of India:

Section 25(1) Subject to public order, morality and health and to other provisions of the Part, all persons are equally entitled to freedom of conscience and the right to freely to profess, practice and propagate religion ....
Section 26: Subject to public order, morality and health, every religious
denomination or any section thereof shall have the right (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.

These sections contain specific references to the limitations of the right.

3.5 German Constitution section 4:

3.5.1 Freedom of faith, of conscience and freedom of creed (religious or ideological), shall be inviolable.

3.5.2 The undisturbed practice of religion is guaranteed.

3.5.3 No one may be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

The right is subject to general formal provisions on its limitation, but, unlike most other rights in the German bill of rights, does not provide for its limitation for specific purposes. The Federal Constitutional Court decided that the right may be limited for the protection of the rights of others and values embodied in the Constitution.

4 EFFECT IN DOMESTIC LAW

International and foreign case law clearly shows that the entrenchment of the right to freedom of religion, belief and opinion effects a very wide range of official and private conduct and relations, for example, the status of churches and religious organisations; determining what constitutes a religion and under what circumstances acts are influenced by religion and belief, the relationship between a church and its office bearers and members; conscientious objection to military service; religious instruction and practices in educational institutions; state support to churches and religious organisations; the law relating to blasphemy; compulsory membership of a health service; religious services in prisons and the armed forces; loyalty oaths. It is impossible to predict the exact implications of the right on such a wide range of issues.

5 RESPONSE TO REPORT

5.1 Non-contentious issues - par 1.1 - 1.6
We agree that the right to freedom of religion, belief and opinion is a universally accepted fundamental right that should be protected in the Constitution in terms of Constitutional Principles II and XII. The way in which non-contentious issues are provided for in the draft text is commented upon in the footnotes to the draft text.
5.2 Suggestions on resolving outstanding issues

Par 2.1 Content of the right

2.1.1 Although freedom of religion, belief and opinion overlaps with facets of academic freedom, academic freedom also contains facets of various other rights (for example freedom of expression, scientific research, associational autonomy, and educational rights). Academic freedom is not commonly dealt with as part of the freedom of religion, belief and opinion in other systems (the Namibian Constitution being the exception). We propose that academic freedom be dealt with in a separate provision.

2.1.2 Although "freedom of religion, belief and opinion" is usually interpreted to include the expression and dissemination of religious and other beliefs and opinion, it also covers the free forming and undisturbed "holding" of such beliefs and opinions which is not necessarily covered by freedom of expression. We suggest that freedom of opinion be retained with freedom of religion and belief.

2.1.3 We suggest that respect towards places associated with religious observance constitutes part of the duties imposed by the general formulation and does not require explicit reference. A prohibition on refusing entrance to places of religious observance on grounds of race could possibly be dealt with in terms of a section similar to section 33(4) of the Interim Constitution.

2.1.4 Grouping freedom conscience and religion with other "freedoms" is a separate freedom or set of fundamental freedoms is a pattern followed in the Canadian and Namibian Constitutions. It need not have any substantive effect on the interpretation and application of the rights in question. Calling the rights and freedoms "fundamental" could, however, reflect on the fundamental nature of other core rights not included in the category and we suggest that they be dealt with separately.

2.1.5 The problem relating to offending the religious beliefs of individuals could be dealt with by an equality clause prohibiting discrimination on the ground of religion.

Para 2.2 Degree and level of limitation

2.2.1 Imposing limitations on religious beliefs that manifest themselves through ritual murders, enforced polygamy, cultic expressions, or violence explicitly promoting public immorality, could be covered by generally
formulated limitation clauses. WE suggest that these matters need not be dealt with expressly.

2.2.2 Since the free formation and holding of beliefs, opinions or thoughts cannot empirically be prevented or prohibited by actors bound by the right, it may be unnecessary to provide explicitly that holding such beliefs, opinions or thoughts cannot be limited. This is the position in German law.

2.2.3 We propose that the issue be held over for the drafting of the limitation clause.

2.2.4 Whether sections 14(2) and sections 14(3) should be retained depends on decisions on how they relate to other limitation clauses and we propose that the issue be held over for the drafting of the limitation clause.

2.2.5 Providing for the justifiable limitations will probably require legislative measures other than amending the Constitution. Otherwise the suggestions follows the German approach to the limitation of this right (see par. 2 above). We propose that the issue be held over for the drafting of the limitation clause.

5.3 COMMENTS ON CONTENTIOUS ISSUES

Par 3.1 Application of the right (nature of the duty)

3.1.1 The proposed duty could be interpreted to imply that the state may impose limitations on religious practices that threaten public order and offend Godly morals and therefore relates to levels of limitation. The proposal on the regulation by the state of religious observances in state and state-aided institutions relates to outstanding issue on the retention of section 14(2) and (3) of the Interim Constitution - see par 2.2.4 above.

Par 3.2 Application of the right (duties on private actors)

3.2.1 It is suggested that it be considered how the present common law protection of religion, opinions, convictions, thoughts, etc. in terms of the protection of dignitas (dignity), fama (reputation) and especially privacy already accommodates the horizontal application of the right, and what the effect of a prohibition on the horizontal applications of the right would be on the development of the common law in this regard.
6 PROVISIONAL TEXT

6.1 "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion.

Notes:

a) Decisions on the insertion and formulation of clauses regarding the non-contentious issues of horizontal application, the application to common law and customary law and the duties of the state could be postponed until a clear picture has emerged on the extent to which they apply to other rights. The outcome could possibly require the formulation of general clauses.

b) Decisions on the retention of the specific limitation clauses in section 14(2) and (3) of the Interim Constitution could be held over until the drafting of a general limitation clause is considered.

---

4 This draft is based on the assumption that elsewhere in the new chapter there will be provisions providing for academic freedom, the limitation of the rights, and the application of rights to the common law and customary law.

5. Should it later be decided not to include a general provision similar to section 7(3) of the Interim Constitution, "every person" can be replaced with "Every individual and when applicable every juristic person".

6 In view of the non-contentious content of the right a sentence could be added similar to the formulation in most of the international instruments (see a 18 Universal Declaration on Human Rights, a 9 European Convention on Human Rights, a 18 International Covenant on Civil and Political Rights and a 12 American Convention on Human Rights quoted in par 2 above), for example:

This right shall include freedom to change his or her religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his or her religion or belief in teaching, practice, worship and observance.