

Representations on the draft Open Democracy Bill published for comment on 24 October 1997 in Government Gazette No. 18381

1. This representation is made on behalf of the Media Project of the Centre for Applied Legal Studies, University of the Witwatersrand, Private bag 3, WITS, 2050, South Africa, Tel: (011) 403-6918, Fax: (011) 403-2341 and with the kind assistance of the Freedom of Expression Institute, 5th Floor, Argon House, 87 Juta Street, Braamfontein, Johannesburg, 2017, Tel: (011) 403-8403, Fax: (011) 403-8309.

2. CALS has been integrally involved in open democracy issues for many years. Indeed, its comparative analysis of Freedom of Information statutes from various different countries and its proposals for a South African Freedom of Information Act were foundational to the work carried out by the Task Team on Open Democracy which has shepherded this Draft Open Democracy Bill ("Draft Bill") into being. CALS has also been a key participant in ODAF, the Open Democracy Advisory Forum and its researchers have written extensively on the subject.

3. The Freedom of Expression Institute has also been involved in open democracy issues for many years. They lobbied for the Access to Information clause that is provided for in s32 of the Final Constitution and were instrumental in the establishment and functioning of the ODAF. They have hosted numerous conferences and workshops on the issue of open democracy and provide a co-ordinating function for many organizations concerned with the necessity to bring about transparent and accountable government.

4. We submit therefore that our input by way of these submissions ought to be taken seriously by those considering the representations made on the Draft Bill and that our suggested amendments receive careful consideration. We welcome the opportunity to comment on the Draft Bill and we look forward to the passage of the Draft Bill into law, thereby confirming South Africa's Constitutional commitment to the transformation of government practices.

INTRODUCTION:

5. South Africa has a history of undemocratic, unaccountable and opaque government which trampled on the rights of its citizens and treated their desire for participative and transparent government with disdain.

6. The advent of democracy, and particularly of the Constitution underpinning that democracy, has heralded a new era of government and of the public service generally - government founded on principles of accountability, transparency and public participation in order to achieve our new national goals of transformation and development.

7. A crucial aspect of these principles is access to information. The Interim Constitution, Act 200 of 1993, made provision for a limited right of access to government-held information in s23 thereof. The drafters however intended that this right was to be amplified and extended in the Final Constitution and made provision therefore in Constitutional Principle IX which states:

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels government.

8. The drafters of the Final Constitution, Act 108 of 1996 ("the Constitution"), duly complied with the provisions of Constitutional Principle IX and enacted s32.

a. In terms of s32(1)(a) of the Constitution, **"Everyone has the right of access to any information held by the state."**

b. In terms of s32(1)(b) of the Constitution, **"Every one has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights."**

In terms of s32(2) of the Constitution, **"national legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state"**.

9. It is clear therefore that the Constitution requires, at a minimum, that open government legislation must give effect to the provisions of s 32(1)(a) and (b). Further, we submit that open government legislation ought to comply with other provisions in the Constitution, namely, with the provisions of s195(1) which set out the basic values and principles governing public administration. Of these, we submit that the following are particularly apposite and should be reflected in the Draft Bill:

a. **"(c) Public administration must be development oriented";**

b. **"(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making";**

c. **"(f) Public administration must be accountable";**

d. **"(g) Transparency must be fostered by providing the public with timely, accessible and accurate information".**

We would point out that s195(3) requires that national legislation **"must ensure the promotion of the [above] values and principles"**.

10. As organizations committed to open democracy, we welcome the opportunity to comment on the Draft Bill and to participate in ensuring that the Open Democracy Act really is a vehicle for ensuring accountable and transparent government that is responsive to the needs of all South Africans.

11. Arising out of what has been said above, our comments are addressed at a number of different levels: from suggestions about broad policy issues and including (or reincluding) entirely new chapters to suggestions concerning proposed section, paragraph or even word changes in order to better implement the principles of open government as required by the Constitution. We often

refer, by way of comparison, to the version of the Draft Bill that was first presented to Cabinet for approval in 1996, the "1996 Draft".

12. Without doubt, two of our most serious concerns deal with the scope of the Draft Bill:

a. The Draft Bill fails to comply with the Constitution which requires that it give effect to the provisions of not only s32(1)(a) ie access to government-held information, but that it also give effect to s32(1)(b) ie access to information held by private individuals where this is required for the exercise or protection of rights.

i. As it currently stands, the Bill provides a free-standing right of access to personal information held by a private person and in this way goes further than is required by s32(1)(b) of the Constitution but where non-personal information is required for the exercise and protection of rights, the person requiring same may not invoke the Draft Bill in order to give effect to his or her constitutional right.

ii. We submit that this failure by the Draft Bill to fulfil its constitutional mandate to give effect to the rights contained in the Constitution is serious and requires that the Draft Bill be redrafted to make provision therefor before it is introduced in Parliament.

iii. We would not dictate to the drafters whether an entirely separate chapter ought to be introduced which makes provision for a right of access to non-personal privately-held information in accordance with the provisions of s32(1)(b), or whether the current Part 4 can be appropriately amended but we submit that either option would require consequential amendments to other sections of the Draft Bill, such as:

(1) to the preamble, in order to provide for the right of access to privately-held information required for the exercise or protection of any rights;

(2) to the definitions section, to provide for a definition of "required" in the context of "required for the exercise or protection of any rights";

(3) to s3, the objects of the Act, in order to provide for such

access as one of the objects of the Act;

Note that the above is not an extensive or an exhaustive list of consequential amendments and further amendments would include those required to be made to the enforcement provisions of the Draft Bill etc.

b. The Draft Bill has entirely done away with the Open Meetings provisions as previously set out in Part V of the 1996 Draft.

i. The 1996 Draft provided a right of access to meetings of governmental bodies, subject to certain grounds for closure thereof, which grounds mirrored the exemptions section detailing when governmental bodies can refuse access to information.

ii. We submit that the failure of the Draft Bill to provide for open meetings is a serious failing that reflects back-peddling in the part of government and a reneging on promises made by the Task Team on Open Democracy dating back to October 1994 that provision for open meetings would be a feature of the Open Democracy Act.

iii. Further we believe that the provisions of s195(1) and (3) of the Constitution (referred to above in paragraph 9) would be undermined if no provision for access to governmental meetings is made. As is stated above, the Constitution requires that national legislation such as the Draft Bill promotes the values of accountability, development, responsiveness and public participation.

iv. Open meetings are an important mechanism by which members of the public are able to experience, first hand, the operations and workings of government. The accessibility of government to the public is an important principle of accountable and transparent governance. By ignoring this and the facts that-

(1) open meetings provisions are internationally regarded as integral to open democracy legislation; and

(2) open meetings provisions have been seen as an integral part of the Draft Bill since the planning stages thereof;

the Draft Bill in fact undermines the very values referred to above that it is Constitutionally enjoined to promote.

v. We submit that the provisions of the 1996 Draft on open meetings be reintroduced into the Draft Bill before it is introduced into Parliament. This will require certain consequential amendments to, inter alia, the preamble, the objects of the Act and enforcement provisions etc in order to reflect that right of the public to have access to meetings of governmental bodies.

13. We are also deeply concerned about the amendments which have been made to the enforcement provisions in the Draft Bill.

a. We are concerned about the wholesale abolition of the proposed Open Democracy Commission and the replacement thereof by the Human Rights Commission in regard to the functions it was to have performed in terms of this Draft Bill.

i. While we are aware that, in terms of s82 of the Draft Bill, the Human Rights Commission ("HRC") is to perform the functions of the Open Democracy Commission ("ODC"), we query the ability of the HRC to perform these tasks in light of the fact that:

(1) no provision appears to have been made for a specific unit within the HRC to undertake the overseeing and implementation of the Draft Bill; and

(2) the funding of these functions appears to be at risk as per our submission in paragraph 47 below.

ii. We submit that the project of open democracy requires the oversight of a skilled group of men and women whose specific