

**Workshop
on
Open
and
Accountable
Democracy**

*Generating recommendations on the
Open Democracy Bill of 1998 as tabled in Parliament,
and the Administrative Justice Bill, 21 June 1999*

**Breakwater Lodge, Waterfront,
Cape Town
15th ~ 17th July 1999**

**Conference
Report**



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INTRODUCTORY NOTE

The following is a report of a conference convened by the South African Human Rights Commission in Cape Town, South Africa, from 15-17 July 1999. The conference aimed to elicit responses from government and civil society on two new draft pieces of legislation: the Open Democracy Bill and the Administrative Justice Bill.

The report contains:

- An executive summary of recommendations from the various commissions set up during the conference to examine the Bills;
- Copies of speeches made by those invited to present papers to the conference; and
- Additional information on the conference.

The views expressed in this report are those of the presenters and delegates to the conference and are **not** necessarily those of the South African Human Rights Commission.

Executive Summary of Recommendations

A. OPEN DEMOCRACY BILL

Commission 1 - Horizontality

- It was agreed that, should Section 32 not be enacted, then 32(2) falls away and the “suspended” clause in the Constitution will come into effect.
- One of the main functions of the open Democracy Bill was to give some kind of shape and form to the horizontal application of this right to freedom of information.
- There was also the question of how the Bill will apply to natural persons because there’s a question of having to provide information to single individuals who are information requesters.
- No consensus on whether implementation of the Bill should be phased in.

Commission 2 - Implementation

- To address the issue of access to the mechanisms created in the bill by all citizens, it was recommended that the bill also provide for training and instruction to the Heads of Departments in the relevant agencies.
- Section 4 should be amended to include a provision relating to the suitability of a designated person as information officer.
- Licensing of broadcasters by the Independent Broadcasting Authority should contain a requirement that either the broadcaster partakes in educational programmes concerning the Open Democracy Bill or should provide free airtime for publication of such programmes.
- Tertiary education institutions should be obliged to partake in street law programmes educating people about the Open Democracy Bill.
- No consensus on whether the Public Prosecutor should share some of the public duties assigned to the SAHRC by the bill.
- The wording of Section 4(2)(1) must be reconsidered so as not to provide “lost records” as a ground for refusal. Alternatively - the section be scrapped altogether.
- Archive legislation must be strengthened to create a positive duty to keep accurate records.
- The bill should include a penal sanction to be visited upon anybody who wilfully destroys a record that has been requested.
- The definition of “record” in section 11(xxiii)) be refined to distinguish between information which must be requested in the prescribed form, and other types of information which can be requested in manners other than the prescribed form. The SAHRC should draft a preamble to the bill, which will highlight the history and the purpose of the legislation, in order to prevent a narrow interpretation that may stifle the free-flow of information. Hard-hit agencies such as the Police, Defence Force, Health & Welfare should be allowed to develop streamlined procedures and should not be obliged to follow the prescribed procedures of the bill for all requests for information.

- Different types of information should be classified in an attempt to prevent over the top bureaucracy. Information could be classified according to its nature into one of three classes.
 1. Information for immediate publication without a request;
 2. Automatic publication of information after a specified time delay;
 3. Information to be made available upon request.
- Information officers should be given discretion to decide whether or not to charge a fee upon a request. The bill should stipulate the criteria applicable in exercising this discretion.
- Implementation of the bill requires a transitional period and a provision concerning transitional arrangements should be written into the bill allowing for a staggered implementation. An exemption provision (similar to section 6 (6)) should be made applicable to the entire bill, thereby allowing the SAHRC to decide when certain governmental bodies become bound by the provisions of the legislation.
- The bill must have full retrospective effect.
- The bill should be redrafted in plain legal language. If necessary, the legislation could be passed in its current language style and then reworked into plain legal text.

Commission 3 - Exemptions

- An external judicial body other than the High Court should decide disputes about access to information. The adversarial nature of proceedings, and the expense involved were factors that motivated this recommendation.
- No governmental body should automatically be excluded from the reach of the Open Democracy Bill. The majority also recognised the need for a proviso that would allow information relating to the Cabinet, Judiciaries, etc, to be excluded and thus kept secret in certain circumstances. In this regard, it was concluded that a consequences based approach should be adopted. In other words, an evaluation should be made assessing the consequences or the results of a disclosure of information in a particular context, and decisions should be made on disclosure in that light, rather than just having a blanket time period.
- Use should be made of a consequences-based approach, where one looks at the consequences or the results of the release of particular information, rather than having a categories-based approach which decides disclosure on the basis of the category or type of document.
- The mandatory exemption should be removed. For example, in sections 29 and 31 the reference to “must” should be replaced by “may”.
- The section 44 override should remain, but the section 44 (1) test is currently too strenuous. The two tests in 44(1) and 44(2) should be merged.
- The bill should not try to cater for privacy concerns. The reference to an invasion of privacy should be toughened.

- The reference to “harm” in sections 31 and 38 should be qualified to refer to “unreasonable harm”.
- Section 34 is appropriate, although there was a concern that there should be a free-flow of information between agencies.
- There was strong support to retain the provision in Section 40, although there was some support for a possible rewording along the lines of “an unreasonable diversion of resources”. Alternatively - “frivolous and vexatious” is a term that does have a certain amount of meaning in legal contexts, and therefore the use of that term is sufficient.
- The majority recommendation was that shortness or conciseness in drafting style is preferable. The current bill is difficult to follow and is inaccessible to lay people and people without much education. It was therefore recommended that the Bill be made more accessible to non-lawyers.
- There was disagreement about whether more specific wording was required on the framing of exemptions. There was general support for a consequences-based approach.

Commission 4 - Appeal and Review

- Either the Head of Department *or* his or her delegated authority should have the power to consider appeals.
- Regulations should stipulate that the individual hearing the appeal should be suitably qualified to hear matters relating to access to information, and also should not be in the same line function as the information officer who may have declined or granted the request for information which has been appealed against.
- The harm’s test should be re-introduced into the section dealing with notification of third parties.
- There should be a strict duty imposed on all information officers to notify applicants of the role of the SAHRC in cases where access to information is denied.
- There was concern around the maximum time prescribed for providing access to information where an appeal has been successful. No recommendation made.
- Once a decision is made that information is available, information officers must immediately provide it, should it be easily accessible. The onus should be on the information officer to dispute that the information is *not* immediately accessible. Similarly, where the request is complied with after the maximum period for provision has expired, the information officer must justify why the extended time period was necessary.
- Information officers should be properly trained and part of this training must address the existing mind set, and set out to change attitudes.
- Basic guidelines regarding norms and standards for the procedure of internal appeals should be stipulated in the bill.
- Internal appeals should be done away with completely, as the applicant would still be dealing with the same cultural mindset. This view was not shared by all delegates.
- External appeals should be located within a specialized section of the Magistrate’s Court. The courts would be roving courts, with the same

basic characteristics as the Magistrates Court. Each Magistrate Court would have a trained Information Clerk, and the Presiding Officers could be roving presiding officers on a regular basis. Appointments would be made from amongst individuals who satisfied basic criteria, such as expertise or experience in access-to-information issues, administration of justice or alternative dispute resolution. The powers of presiding officers would include the power to conciliate, arbitrate and make orders. Orders would include punitive damages, in cases where the provision of the information is obstructed. These orders are final, and can be taken on review. The Magistrate Court rules would not apply, and rules and procedure would be more informal, within the context of the basic rules of natural justice. Legal representation would be permissible only where both parties agreed thereto.

B. ADMINISTRATIVE JUSTICE BILL

Commission 1 - Positive duties

- The language of the legislation should be easily interpretable by the official as well as by people who might be affected by the measures.
- The decision to prosecute should be reconsidered for inclusion. However, there is a specific dispensation in place involving private prosecutions and this should obviously be dealt with in co-operation with the relevant authorities involved in the prosecution of offenders.
- Some of the duties of the President and of Premiers should also be included.
- Due consideration should be given to the infra structures and financial planning that has to precede implementation. A process of phasing in of the legislation should be recommended.
- Matters falling outside the sphere of public law should be explicitly excluded from this legislation. This is specifically true of the South African National Defence Force, especially in operational circumstances, and is equally true of the South African Police Service, which are involved day to day in serious and important operational matters where instructions and orders should be effective immediately.
- The distinction between rules and standards should be reviewed.
- A duty should be imposed upon the person conducting the investigation to take this ambition seriously.
- It was strongly recommended that the “sunset” provisions be scrapped. The situation is aggravated by the fact that no fallback position is provided for. There is an absence of a warning and appropriate time to address *lacunae* that may appear to be there.
- Different regimes need different rule types and categories of rules as far as notice and comment are concerned.
- The phased implementation process should be able to solve many of the problems relating to the onerous duties imposed on the state.
- Many sectoral-specific systems of oversight and supervision are presently in force and these would overlap substantially with the

present legislation intended here and it would also in many instances be in conflict with it. A phased implementation process, in consultation with the sectors involved, would also present a solution to this dilemma.

- Alternative communication media (like the radio) should be involved as far as notice and comment is concerned to address the problems of illiteracy. Since this is expensive, a compromise should be reached to at least communicate a certain minimum of information in a certain number of important language groups so that illiterate people can be made aware of measures that might affect them.
- State Law Advisors do not have the capacity to deal with the workload of scrutinising and commenting on all rules and standards. In the 30-day period after which the rules and standards would go through, it would be an essential safeguard to involve the State Law Advisors.
- The length of time available to the public sector for the taking of, for instance, an administrative decision, should be dealt with positively in this legislation.
- A specific result should automatically come into effect after the lapse of a specific time period after the decision has been called for. The request or whatever is applicable should then automatically be regarded either as having been granted, or as having been rejected.
- The concepts of “rational” and “reasonable” should not be split in the legislation.

Commission 2 - Right to reasons and grounds of review

- An open-ended list for the grounds of review is more desirable.
- Section E (4) could provide a mechanism whereby an administrator could deviate from the provisions, and there should be a clause that obliges the State to comply with a standard, and which then sets out the circumstances under which deviations may be made.
- No consensus as to whether or not the grounds of review should be framed positively in the bill.
- The possibility of placing positive duties in the code-of-conduct was discussed. Concerns were raised regarding the creation of another closed list in this code, and the resources and capacity of the Administrative Review Council to draft and administer it.
- Further clarity on the distinction between appeal and review was required.
- Definitions of “public power” and “public function” were required. However, there was not consensus as to whether this should be effected by the bill, or by the courts.
- The exclusion of legislative authority of a Municipality in the definition section of the bill needs to be looked at. The decision to arrest should be included as one of the exclusions in the same the way that a decision to prosecute is; however, there was no consensus on that proposal.
- Concerns were raised as to whether public enterprises can be excluded and around the fact that specific cognisance had not been taken of *quasi-judicial* actions and whether these should specifically be included in the definition.

- Concerns were raised about areas of law that have their own kinds of appeal and whether these should be excluded again from the definition.
- On the issue of reasons - should the legislation provide additional rights to those that have already been given in the Constitution? A suggestion was made that perhaps the clause could be phrased around rights and legal interests, and another suggestion was that the phrasing could read, rights, be they based on statute, common law or constitution.
- The legislation specifically needs to acknowledge application cases as a specific category.
- The incorporation of the concept of *bona fides* is important, both in terms of how reasons were sought and who was seeking the reasons and in terms of how reasons were given.
- No consensus was reached on whether or not giving reasons on their own was sufficient or whether people should also be given material findings on fact.
- It was agreed that essentially the time periods regarding when reasons must be given are arbitrary and the broad recommendation was that, whatever the time periods are that are decided upon, it may be desirable to remove them from the legislation and place them in regulations. A period of monitoring should be built into these regulations so that, at the end of a certain period, the time periods can be assessed.
- A specific concern was raised about urgent cases - there is no provisions such as is common in judicial cases where an appeal can stop the execution of the judgement. It was recommended that drafters need to consider whether it is necessary to develop some criteria around urgent cases.
- Should reasons be furnished automatically or on request? The broad recommendation was that this is really a question of resources.
- A positive obligation should be placed upon government officials to give the person a simple yes or no answer and to inform people as soon as possible. In that communication, people could be informed that they had the right to request reasons.
- The definition of "adequate reasons" must be fleshed out.
- The legislation needs urgently to look at the issue of retrospectivity.
- There is certain incongruence in some of the time periods in other legislation. A scan of legislation needs to take place to see where these other periods exist and some kind of harmonisation needs to take place.
- There should be flexibility and developing criteria around urgent cases. It is important to have some kind sanction for non-compliance. There is incongruence between Section 6(2) and 6(3) that needs to be looked at because Section 6(3) could dilute the efficacy of Section 6(2).
- Regarding the presumptions in Section 6(4)(b) - there was general consensus that there is no problem with these.
- Should the Bill deal with evidential rules? One of the suggestions made was that there could be a test of adequacy.
- Too much power has been given to the minister regarding exemptions. It is important to flesh out what consultations should mean. The

provision could be redrafted to say that the minister would act on recommendation of the council or with the concurrence of the council.

Commission 3 - Synergies and Appeal and Review

- A specialist division of the Magistrate's Court should be developed to review administrative decisions. There also ought to be an express right of appeal to the High Court.

Alternative option - a tribunal to be set up to deal with administrative justice, which would have a conciliation, mediation and alternative dispute resolution function, to try and settle the dispute, after which it would make a final decision. There would also be some recourse to the judicial system in the process.

- Concerns were raised regarding the conflict of laws and the existence of a new forum and its relationship with other tribunals or bodies which deal with administrative actions, and how this would be handled, but there were no recommendations.
- The group was divided on the question of alternative dispute resolution.
- A suggestion was made that a provision for voluntary arbitration should be included at the internal level.
- There ought to be monitoring of the implementation of this Act and a review of the process and the efficiency of the system after two years by parliament.
- The role of Chapter 9 institutions (particularly the SAHRC and Public Protector) must be clarified and beefed up. However, the place to do this is not in these pieces of legislation, but in their own Acts.
- There should be no Chapter 9 institution represented in the Administrative Review Council because it is necessary for them to retain their independence.
- A concern was raised around the question of substantive review.
- With regard to the question of the reasons for a decision - the justifiability of the reasons opens up a whole new range of questions, particularly whether the reviewing mechanism, in this case perhaps the Magistrate's Court can impose its decision and override that of the internal body.
- There must be synergy and symmetry between the Open democracy Bill and the Administrative Justice Bill.
- Regarding the question of publications and registers, one of the key concerns was the issue of financial and human resources. A key concern was whether in the sections dealing with publications the Bill is dealing with access to the information or the actual information.
- In terms of the working together of the Administrative Justice Bill and the Open Democracy Bill, all references to "subject to the Open Democracy Bill" in Sections 6(3) and Sections 14 of the Administrative Justice Bill should be deleted.
- In terms of Section 6(2) of the Open Democracy Bill, the index of Rules and Standards of a Government Department should be included in the manual. There should be an audit of the Administrative Justice

Legislation, about where this notion of practice would be appropriate to work into Rules and Standards.

- The Administrative Review Council (ARC) is not necessarily a *sine qua non* for the operation of the legislation. The functions of the ARC could be taken up by different institutions.
- Regarding commencement - the whole question around commencement and the symmetry between the Open Democracy Bill and the Administrative Justice Bill needs to be looked at and the notion of enactment needed to be similar.
- A really good preamble is required, firmly locating the legislation in terms of giving effect to the Bill of Rights in the Constitution.

WORKSHOP ON OPEN & ACCOUNTABLE DEMOCRACY:

Generating recommendations on the Open Democracy Bill,
and the Administrative Justice Bill

Breakwater Lodge, Waterfront, Cape Town
15th – 17th July 1999

INVITATION

The South African Human Rights Commission ("the Commission") is hosting a three-day workshop in Cape Town in order to air and canvass the issues in the *Open Democracy Bill* and the *Administrative Justice Bill*.

These pieces of legislation are central to the development of an open and accountable government. The Constitution requires legislation which gives effect to section 32 (*access to information*) and section 33 (*just administrative action*), and requires further that the legislation is passed before February 2000.

The Open Democracy Bill (bill number 67 of 1998) has already been tabled in Parliament, and preliminary public hearings have been held. It is understood that further hearings will be scheduled before deliberations on the legislation. The South African Law Commission have developed a draft Administrative Justice Bill and are currently involved in a process of consultation around its content; according to their discussion paper, the Law Commission aims to report to the Minister by no later than the 30th September 1999.

The workshop is consultative in nature as the Commission wishes to use the opportunity to generate its recommendations on the two bills. The workshop report is intended to be placed before Parliament as the Commission's submissions on the legislation.

Accordingly, we request that you send a delegate from your organisation or department who will be in a position to discuss and debate the various issues, and present any views or positions which your constituency holds. We have invited delegates from civil society, the private sector, para-statal, parliament, academics, practitioners and national, provincial and local government in order to obtain as wide a range of perspectives as possible.

The programme for the conference is in the process of finalisation; however, we enclose a draft copy with this invitation. The programme divides delegates into specific groups to consider the key aspects of each of the bills. These areas are indicated on the programme. We would appreciate your advising us which area of the legislation is most important to you, in order that we may allocate your delegate accordingly to participate.

The Commission will accommodate delegates from outside of the city; however travel costs will not be covered except in cases of need. Please contact us to advise what accommodation arrangements need to be made on your behalf.

We request that you reply to Victoria Mayer at the Cape Town office of the Commission to advise who will be attending the conference, and what accommodation arrangements you require. She will also be available to answer any queries on the workshop, and to make workshop documentation available.

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LIST OF DELEGATES

Adam Mohamed Mr	Eskom
Ally Russell Mr	United Nations
Andrews Angela Ms	Legal Resources Centre
Barchard Les Mr	Cape Town City Council
Bean Marie Adv.	Provincial Government - Northern Province
Bham Mohamed Mr	Office of the Premier - Northern Province
Booth Linden Mr	CONTACT
Brand Robert Mr	The Star - Media
Breitenbach Andrew Mr	Project Committee
Breytenbach Andrew Mr	Justice Committee
Burman Daryl Mr	Law Society
Cassim Mahomed Mr	Inkatha Freedom Party
Coleman Neil Mr	COSATU
Cootzee Hendrik Mr	Die Burger - Media
Corder Hugh Mr	University of Cape Town
Crewe Adrian Mr	Department of Transport
Da Silva Caroline Ms	SA Insurance Associates
De Jager Johan Mr	Department of Defence
Dikgale Hardley Mr	SATRA
Dlamini Charles Prof.	University of Zululand
Duval Christiane Ms	Direct Marketing Association of SA
Fapohunda Olawale Mr	Human Rights for Law Service - Nigeria
Farlam Paul Mr	Legal Resources Centre
Firth Howard Adv.	Cape Town City Council
Galant L. Mr	Just Admin Campaign
Gaum Andre Advocate	New National Party
Geldenhuys Tertius Dr	SAPS
Gerntholz Liesl Adv.	Commission on Gender Equality
Gillian Fatima Miss	SA Human Rights Commission
Gillwald Cheryl Dep. Min.	Department of Justice
Glazewsky Jan Mr	University of Cape Town
Goldberg David Mr	University of Glasgow
Haarhoff Rowan	Credit Bureau Association
Hootnick Adam Mr	Justice Committee
Hurd H. Brig. General	Department of Defence

Iya Phillip Prof.	Vista University
Jagwanth Saras Mrs	University of Cape Town
Jenkins Frankie Mr	University of Stellenbosch
Joel Lance Mr	Parliamentary Monitory Group
Johnson Krista Ms	University of Cape Town
Jooste Chrisle Mrs	CMC
Jordaan Frans Mr	Furniture Traders Association of SA
Joubert Gert Adv.	SAPS
Kidd Michael Mr	University of Natal - PMB
Kieser Ben Mr	Cape Town Municipal Council
Klaaren Jonathan Mr	Wits / CALS
Klaaren K. Ms	Wits / CALS
Kok Louis Mr	SAPS
Kollapen Jody Mr	SA Human Right Commission
Krull Werner Mr	Afrikaans Handels Instituut
Kuznetsov Sergey Mr	Venice Commission
Lawrence Pat Ms	SA Human Right Commission
Lee Dudley Mr	Department of Land Affairs
Leshabane Judith Ms	Department of Home Affairs
Liebenberg Sandy Ms	Community Law Centre
Lund Troye Ms	Cape Talk - Media
Luus H. Colonel	Department of Defence
Mabapa Ms	SA Human Right Commission
Mabuza Monica Ms	Department of Sport & Recreation
MacMaster Xavier Mr	SA Human Right Commission
Makhubo Bafana Mr	Consumer Institute
Malete MD Ms	Justice College
Mali Lincoln Mr	The Banking Council
Mare C. Advocate	Provincial Parliament - Western Cape
Martin Patricia Ms	Black Sash
Masapu Susan Ms	State Law Advisors
Masuku Thabani Mr	IDASA
Matjila Mpho Mr	Eskom
Mavani Saloni Ms	Lawyers for Human Rights
Mayer Victoria Ms	SA Human Right Commission
Mazwai M. Ms	
Mokate Lindiwe Ms	SA Human Right Commission

Moloko Richard Adv.	NIPILAR
Moodliar M.C. Mr	SA Human Right Commission
Moran Greg Mr	SA Human Right Commission
More Lebogang Mr	COSATU
Morgan David G. Mr	Law Reform Commission - Ireland
Morris Michael Mr	Cape Argus/Independent Newspaper - Media
Mothoagae Karenj Ms	Provincial Government - North West
Motswai Xoliswa	SATRA
Mue Njonjo Mr	Article 19
Naum Jason Mr	SA Human Rights Commission
Ndokweni MB Adv.	Provincial Government - KZN
Nel Jaco Mr	State Law Advisors
Netshitomboni S. Adv.	Department of Justice
Nkeli Jerry Mr	SA Human Right Commission
Ntlabati Nombulelo	AZAPO
Nxarane D.K. Mr	E.Cape - Local Govt. Association
Paschke Ron Mr	Cape Bar
Payne Alton Mr	Department of Land Affairs
Pillay Karrisha	Community Law Centre
Pillay Watasha	Old Mutual
Pityana Barney Dr	SA Human Right Commission
Pollecutt Laura Ms	FXI
Poswa Sakhele Mr	SA Human Right Commission
Potgieter Theoniel Adv.	Cape Bar
Pothier Mike Mr	Catholic Bishop's Conference
Puddephatt Andrew Mr	Article 19
Radebe M.I. Mr	South African Secret Services
Rammutla Chris Adv.	Provincial Government - Gauteng
Redpath Geanne	SAIRL
Reinecke Lizell Ms	Department of Trade & Industry
Rose-Christy Valerie Ms	Black Sash
Rudolph Ignatius Mr	Wescora Just Ada
Saloojee Riaz Mr	ICD
Schrire Sylvia Mrs	Black Sash
Seedat Fatima Ms	Commission on Gender Equality
Sher Esther Mrs	Black Sash

Short Emile Com.	Commission on Human Rights
Snell Rick Mr	University of Tasmania
Soltan Fred Mr	University of Cape Town
Streek Btriry Mr	Mail & Guardian - Media
Swartz Steve Mr	ACDP
Teuteberg Charline Ms	Foschini Group
Theron Riel Mr	Old Mutual
Thipanyane Tseliso Mr	SA Human Right Commission
Tilley Alison Ms	Black Sash
Tilton Doug Mr	SACC
Tlakula Pansy Ms	SA Human Right Commission
Van Dyk Gwendy Miss	Masihlume
Van Schoor Empie	Department of Justice
Van Wyk C.W. Prof.	UNISA
Van Wyk Theo Adv.	Afrikaans Handels Instituut
Vassen Mukesh Mr	SA Human Rights Commission
Veriava Faranaaz Miss	SA Human Rights Commission
Vincent R. Adv.	Provincial Government - W. Cape
Wessels JH Ms	Justice College
Wessels L.N. Adv.	Provincial Government - Free State
Wessels Leon Mr	SA Human Right Commission
Wiechers M. Prof.	
Williams Dudley Mr	Justice College
Williams Suraya Ms	Parliamentary Monitory Group
Witkowsky Yossi Mr	Parliamentary Monitory Group
Wootton R. Mr	South Peninsular Municipality
Yacoob Zack Justice	Justice
Yacoob Zack Mrs	Justice
Zain Pia Ms	NADEL
Zweni W. Colonel	Department of Defence

This conference is kindly sponsored by the Venice Commission of the Council of Europe.

PROGRAMME

DAY 1: OPEN DEMOCRACY BILL

08h30 - 09h30 Registration

SESSION 1

09h30 - 11h00 (Chair: Dr Barney Pityana –Chairperson, SAHRC)

09h30 - 10h00 WELCOME & OPENING:

- Dr Barney Pityana - Chairperson, SAHRC
- Justice Yacoob – Judge of the Constitutional Court

10h00 - 11h30 KEYNOTE ADDRESSES: Access to information and human rights

- Rick Snell - University of Tasmania
- David Goldberg – University of Glasgow

QUESTIONS AND COMMENTS

11h30 - 12h00 Tea

SESSION 2

12h00 - 13h15 (Chair: Professor Charles Dlamini – Commissioner, SAHRC)

12h00 - 12h45 DEBATE ON HORIZONTALITY:

- Advocate Pansy Tlakula - Human Rights Commissioner
- Professor Marinus Wiechers – academic

QUESTIONS AND COMMENTS

12h45 - 13h00 CONCERNS REGARDING THE ODB:

- Jerry Nkeli – Human Rights Commissioner

13h00 - 13h15 BRIEFING ON COMMISSIONS:

Conference organiser

13h15 - 14h00 Lunch

14h00 - 15h30 COMMISSIONS:

1. Horizontality - (Facilitator: M C Moodliar – SAHRC Legal Department)
2. Review & Appeal mechanisms - (Facilitator: Faranaaz Veriava – Legal Officer, SAHRC)
3. Implementation - (Facilitator: Greg Moran – SAHRC Information, Training & Education)
4. Exemptions - (Facilitator: Rick Snell – University of Tasmania)

15h30 - 16h00 Tea

16h00 - 17h30 COMMISSIONS

DAY 2: ADMINISTRATIVE JUSTICE BILL

SESSION 1

- 08h30 - 10h00 (Chair: Jody Kollapen – Human Rights Commissioner)
- 08h30 - 09h15 KEYNOTE ADDRESS: Administrative Justice and human rights
- David Gwynn Morgan – Law Reform Commission, Ireland
- 09h15 - 10h00 SOUTH AFRICAN LAW COMMISSION BRIEFING:
- Hugh Corder / Andrew Breitenbach – Member of the project committee, SALC

QUESTIONS AND COMMENTS

- 10h00 - 10h30 Tea

SESSION 2

- 10h30 – 12h15 (Chair: Pansy Tlakula – Human Rights Commissioner)
- 10h30 - 12h00 PANEL DISCUSSION:
- Phillip Iya (University of Fort Hare) – Right to reasons
 - Jonathan Klaaren (Centre for Applied Legal Studies) - grounds of review
 - Jody Kollapen (Human Rights Commissioner) - review and appeal
 - Tseliso Thipanyane (SAHRC: Research) – Synergies between the bills

QUESTIONS AND COMMENTS

- 12h00 - 12h15 BRIEFING ON COMMISSIONS:
- Conference organiser
- 12h45 - 14h00 Lunch
- 13h30 - 15h30 COMMISSIONS
1. Reasons for Administrative Action - (Facilitator: Saras Jagwanth – University of Cape Town)
 2. Review & Appeal mechanisms and Synergies between the bills (Facilitator: Ghalib Galant – CCMA)
(Facilitator: Jonathan Klaaren – Centre for Applied Legal Studies)
 3. Positive Duties of Government - (Facilitator: Alison Tilley– Black Sash)
- 15h30 - 16h00 Tea
- 16h00 - 17h30 COMMISSIONS

DAY 3: RECOMMENDATIONS

(Chair: Leon Wessels - Human Rights Commission)

08h30 - 09h30 KEYNOTE ADDRESS: Administrative Justice and human rights

- Emile F. Short – Ghanaian Commission on Human Rights and Administrative Justice

QUESTIONS AND COMMENTS

09h30 - 10h00 Tea

10h00 - 11h30 REPORTBACKS AND DISCUSSION

- Open Democracy Commissions
- Administrative Justice Commissions

11h30 - 12h00 CLOSURE

- Leon Wessels – Human Rights Commissioner

PLENARY 15TH JULY

OPENING:

Dr Barney Pitjana

The Open Democracy Bill and the Administrative Justice bills have to be in the statute book by about 7 February 2000 in order to give effect to Sections 32 and 33. Now these are all vitally important pieces of legislation and I like to think at least and these are pieces of legislation that really and truly affect everybody in their ordinary daily activities. There's very little in our constitutional system that really touches on everybody's life to the extent that these pieces of legislation do. For that reason I believe that when these pieces of legislation are in place, they will introduce an additional quality to the rights that people have in our country. So, I really do believe they're important.

They're important for another reason - they're important because they, like everything else in our corpus of rights, have to be seen and viewed and understood and practised in partnership with the other rights that are there. And that makes these also particularly difficult pieces of legislation to enact because they must always be seen in a way that balances out rights in a fair and just manner. This, if I may say so, and if an explanation is necessary, is what has caused these laws to take so long to come to the point where they are today. It has entailed a great deal of discussion, drafting, redrafting, consultation and there will still be more drafting, consultation, redrafting, consultation and enactment. This is merely a stage in the process; this is not the final point by any means.

The Human Rights Commission has an interest in these matters. It has an interest because in part, and only in part, it may be called upon, by the people of South Africa to advance the rights that are contained in any legislation that follows as a result of the constitutional provisions. It also has an interest because it is the intention of at least one of the pieces of the legislation to give responsibility to the Human Rights Commission to inform the people of South African about their rights, as well as to receive complaints from them and investigate them, and to enable them to enjoy the rights that are provided for in the relevant legislation.

It's a major responsibility on our part but one which we believe is an important responsibility for the people of our country to be done effectively and efficiently and in order to continue to extend the rights that the people have. And so, we really are looking forward to the discussions that are to take place, which we believe will inform both the process of enacting the legislation, but I believe will also inform an effective and meaningful implementation of relevant legislation. We are here to participate, to listen, to share insights, so that together we can produce laws that all of us South Africans will be proud of.

WELCOME:
Justice Zack Yacoob

I don't know whether to start by saying Barney or Chairperson or Master of Ceremonies, but I might as well say Barney, all my other good colleagues and friends in democracy, experts who are here, international experts, honoured guests, ladies and gentlemen. Firstly Barney, thank you for those words of introduction and thank you also for saying three quarters of the things I intended to say. This probably means that what I have to say to you will be shorter! But more seriously, it is indeed an honour to be part of and to usher in what I consider to be a very significant phase in the development of our fledgling democracy.

We have had our democracy now for some five years or more, and that democracy, we've always said, is not simply constituted as a result of the fact that we have a constitution. We have made it quite clear that our democracy in South Africa, is a democracy which is going to work in practice - that it is not only going to be on paper, and that hopefully the majority of the citizens in our country are going to be a little bit more privileged in the final analysis than ordinary participants in the age old democracies of the West.

We know that up until recently, many of those who participate in the democracies of the West, were limited to voting every five years for a government, and then leaving it to that government to do what it wanted to do in the exercise of democracy. We always believed during the struggle for our democracy that that was not a democracy, and that the real difficulty in that sort of democracy lay in the fact that people even began to believe that it was enough simply to vote every five years.

So how was our democracy going to be different? Our democracy was going to be different because civil society was going to continue to participate in that democracy. Our democracy was going to be different because the process of achieving democracy and justice was going to be as important as the end result of the achievement of democracy and justice. And in a sense the fact that this conference is going on here today is reflective of the sentiment in practice that our democracy is different.

We're all experts, we're all sectoral representatives who are here, representing different aspects of society. I choose for a moment not to talk about or to the governmental representatives who are here, for the reason that the non-governmental representatives who are here bear a particular responsibility and a particular duty. They are here because a process of achieving justice and democracy is as important as the result of justice and democracy in the final analysis. And because they're here as part of that process, and because they're here as the representatives of civil society, they bear a particular responsibility on their shoulders. They bear the responsibility to ensure that the proceedings here do indeed involve the participation of a maximum number of people. They're here to ensure that their contributions are the contributions of civil society. And I take it that they will take their responsibilities seriously.

The governmental representatives are here also for a particular purpose. Their purpose is to ensure that the needs of government are properly and appropriately reflected. But democracy entails that the governmental representatives also need to take the views of civil society into account, and one trusts that this forum will be one of consultation between the government on the one hand and civil society on the other, assisted by experts so that those who make the law are assisted in ensuring that that law is as effective as ever.

And in that process of course, we will be informed by international experience and international developments. That international experience is one which must be tempered by, as Barney has indicated, Africa and African conditions. And hopefully we will not only be assisted by international experience, but in the final analysis, as a result of efforts such as this, we too will be able, as a result of what is produced in this conference to be international experts at other conferences. We trust that what emerges here will be the result of assistance by international experts but will in the final analysis give rise to assistance to other countries in order to ensure that they develop their laws properly.

So, while we are grateful to the international assistants, we trust that the proceedings of this conference will result in assistance being furnished elsewhere.

The historic responsibility, which we have here today, is firstly to achieve what one might call an appropriate balance, that balance at two levels. The first level is the appropriate balance between theory and practice. Quite obviously all practice arises out of theory as we know, and we know also that all theory is relevant theory only if it gives rise to effective practice. What one needs to achieve here, particularly in this domain, is an appropriate balance between theory and practice, to ensure that our theory informs practice to the extent where effective legislation comes about. This is not the situation to theorise - the days of theorising about administrative justice and access to information are over. We're not dealing with the theoretical situation - we're putting our theories into practice, and the theoreticians amongst us here need to understand that those theories can be put into practice only if the theories are properly informed by practical considerations. And the practitioners amongst us need to begin to understand that what we put into practice will work effectively only if it is informed by effective theory. But the balance is a very important one.

The second level at which we need to achieve an appropriate balance, is that balance which has always been spoken about between the need for good, effective government on the one hand, and the need to ensure that there is administrative justice and proper communication of information on the other. In most cases where such balances need to be struck, one normally has a margin within which we have to play, and it is normally a reasonably expanded one.

In other instances where such delicate balances have to be achieved, it is possible to say that it doesn't matter if one strays too much in one direction, or in the other. One can choose and say if we do err, it will be better to err to the right or to the left, as the case may be, and that is the direction in which we will go.

Unfortunately in the achievement of the proper balance between good government on the one hand and proper administrative procedures and communication of information on the other, the margin is very, very small and we will err grievously if we err on the one side or on the other side. We will be as mistaken in relation to the contents of the right if we err on the side of good government and effectiveness, and we will be equally mistaken if we err on the other side.

That makes the historic responsibility, which all of you have to bear here, of considerable significance. It is a delicate role, requiring the right balance between imaginativeness and creativity on the one hand, and discipline on the other. One needs to arrive at a situation where something is going to work.

A final matter which needs to be borne in mind in developing areas of law such as with which we are here concerned, is to sound the warning that in too many countries, laws of this kind have been available and accessible to the rich, the powerful and the strong. What has tended to happen in most countries is that the disempowered, the weak and the poor are generally not the beneficiaries of systems of this kind, which are meant to be put into place to ensure that those people benefit. Generally it is the rich who take advantage of these provisions meant for other purposes and get richer. The strong get stronger and the powerful get even more powerful. Really what has happened in many countries is that the weak and the powerless and the poor, tend not only not to benefit out of these provisions, but to lose as a result of their implementation.

And I would suggest that we bear in mind this warning, that we make sure that in everything we look at, we bear in mind as a picture before us, those thoughts of people who we really want to benefit as a result of these procedures. We're not involved in a theoretical exercise, we're not involved in the drafting of a law which looks wonderful and good on paper and which universities can write about. In the final analysis the enquiry is does the law do what it has to do.

And finally I want to apologise for not staying with you throughout the conference. I would have liked to do so. I think that our society is grappling with something very important in so far as judges are concerned, and that is the extent and the degree to which judges who will finally judge the legislation which comes out of processes such as these, can take part in these processes and listen to them, and yet still be seen to be independent when they sit in judgement later over bills which emerge out of processes like this.

I deliberated about staying longer but came to the conclusion that society has not developed sufficiently to enable this to happen, and to enable justice being

seen to be done in the final analysis. So it is with some regret that I leave you, and that I leave you early. But may I wish you the best of luck. May I encourage you to exercise the right balance between creativity and discipline; may I warn you that the work is going to be very difficult; may I hope that what originates from here moves the legislation very much more forward than it is at the moment.

I have pleasure in declaring this conference open in the hope that the negotiations and the debates here will be vital, alive, interesting and workable. Good luck.

KEYNOTE ADDRESS:

Rick Snell

Thank you very much. As I was sitting here listening to the talk, I thought governments and bureaucrats around the world would find this a very appropriate setting for those interested in freedom of information. They'd just wish that wasn't in the form of prison but it was an actual prison in itself!

Before I start, I'd just like to make a number of disclaimers about the points I'm about to make. First and foremost, I'm working under the assumption that most of you will have a much more detailed and intimate knowledge about the Open Democracy Bill than myself. What I've come here to contribute is my understanding of other pieces of freedom on information legislation around the world.

Secondly, because of the time constraints, I'll be making a number of points without providing the justification or explanation of what lies behind these points. For those who want to tackle me at morning tea breaks and afterwards, please do so. I intend some of the points to be controversial, but that I see as being part of my role here.

Thirdly, anything I say is not to be taken as an overt criticism of the Open Democracy Bill, but it is meant more to be my contribution as an outsider to the development of what I regard as a crucial aspect of open government and democracy.

The fourth disclaimer and the final one, is this version of my talk will be a much more muted version than the one I gave at 4 am this morning on the balcony of my hotel with the lights of Cape Town and the harbour around me, and with the waves coming in at that particular stage. So you'll just have to imagine the waves and the darkness and the lights just to get through some of the cadences that will come through in the talk.

As far as my background goes, I come from an interesting perspective. I've had four key roles to play with freedom of information during my lifetime. First and foremost, I was a former Freedom of Information Officer responsible for implementing and deciding freedom of information requests in Australia. I have been one of Tasmania's largest and most controversial users of freedom of information legislation and have been subjected to a great degree of criticism from the Tasmanian Parliament about my use.

I've also been an academic for the last six years, looking at FOI in Australia, Canada, New Zealand and lately Ireland - I've just spent four months in Ireland studying their legislation. And finally I've been used as a consultant for law reform and parliamentary committees around Australia and elsewhere for my viewpoints on freedom of information.

In colonial times, the Cape of Good Hope and Cape Town loomed large in the minds of many in the settlement of Van Dieman's Land, later to be known as Tasmania. For many it had been their last landfall on their way from England or other places to the great Southern Land. In fact the last time any of my

family visited South Africa was 150 years ago where we had the great privilege of nestling off on a ship on the harbour there in chains, before being in Australia. It's nice to be back as an invited guest!

More importantly, in the context of this Workshop on Open and Accountable Democracy, it was the ships on the Cape that brought the latest law reforms and news of the slow development of democracy in Europe during the nineteenth century. For my ancestors, we looked towards the Cape for hope and inspiration. For most of the twentieth century, we have not looked towards the Cape and South Africa for either law reform or inspiration in achieving and maintaining open and accountable democracy. Yet in the ending of the previous regime, that has given rise once again to interest in South Africa, and in particular interest in how it develops its own agenda of law reforms, especially in the area of accessing information and administrative review.

I've noticed, in a recent article in the Weekly Mail and Guardian on the Internet before I arrived in South Africa, an article titled "Hasty law making is vague and uncertain - a demand in relation to the Administrative Justice Bill." The comments could have been made in reference to the Open Democracy Bill as well. The writer said that there ought to be more attention paid to institutional design, local circumstances, less uncritical borrowing from other countries and less employment of international precedence out of context. From my studies of FOI in countries like Australia, Canada, New Zealand, Ireland, etcetera, I would endorse those particular comments. I think there's a lot that can be learned from other countries, but mostly it needs to be your legislation, appropriate for your particular circumstances.

Being acutely aware of the urgent deadline facing the Open Democracy Bill, I would still like to offer a number of observations about some ailments you might like to reconsider before adopting the final version of this bill. In my observations and analysis of FOI in Australia, Canada, New Zealand, Ireland, I've increasingly come to the conclusion that whilst the legislative architecture and design principles of such legislation are important, they are not as important as the necessity for the designers and implementers to have a clear commitment to open government, an understanding that secrecy should always be limited and always justified, and a desire to have an open and informed society.

I have seen legislation which has been regarded as perfect, and which has proved to be ineffective in the way that it's been administered. I have seen legislation which has been regarded by those implementing it as ineffectual and poor legislation, but nevertheless, ten to fifteen years on, have achieved a greater degree of openness than some of the more perfect pieces of legislation. So, more than anything else, it's your faith, your vigilance and your vision about what you want for your society, which is far more important than some of the technical details in the legislation, because the technical details can be overcome by malice and by non-compliance, by governments and agencies over time. It's your desire and your vigilance that's going to be far more important than anything else.

One of the key points I want to make about the legislation is about design principles. Many freedom of information acts are the result of begrudging acceptance by governments of pre-election commitments (which afterwards they wished they had never made), coalition negotiations, or an expedient adaptation of the US model, usually to get aid funds, and then (in the case of South Africa), an overriding constitutional imperative. As a result of these various demands, the principles in such legislation are often hard to clarify, or are an interesting combination of conflicting and countervailing objectives which make it very hard to implement the legislation. You have pro-disclosure objectives in the legislation; you have secrecy objectives being given some grounds; you have the need or necessity to find some place for cabinet or some place not for cabinet in the legislation; you need to contain intelligence imperatives or national security imperatives, privacy and public interest. The Australian and Canadian national versions of freedom of information share such a confusing mixture of objectives behind the design principle of the legislation, and from my reading of the Open Democracy Bill, your section 3 contains a series of similar confusing mixtures of principles.

Effectively section 3 provides a right of access, but it's offset by what is reasonably possible and without jeopardising good governments, privacy and commercial confidentiality. In my experience, that's going to cause some degree of confusion about implementing exactly what it was that was envisaged for the legislation. It raises privacy and especially commercial confidentiality to a new order of priority in access legislation and sees, in certain circumstances, access as being contrary to good government. I think that's going to militate against effective freedom of information legislation in this country if it stays.

It's hard to discern clear, simple design principles in the Open Democracy Bill from an outsider's perspective. Contrast that with New Zealand, where the designers had articulated right at the start, a very clear vision for the future which would accept the followings of key operation principles, in deciding how the act was to be framed, interpreted, implemented and operated.

First and foremost, the legislation was seen in New Zealand as a clear break with the secrecy of the past and I think there needs to be some kind of dramatic breakage with the past. One of the insidious leftovers of being a former colony of Great Britain is this effective predominance and prevalence of secrecy as a part of our civil society. Second, more information helps citizens make better and more recent choices about important public policy and other issues, and participate in critical process more fully. So the principles really need to be articulated towards achieving that end in nearly every single circumstance. Third, the capacity to obtain information from governments is a powerful detriment against governmental corruption and maladministration or just plain inefficiency. In this sense, freedom of information legislation can be a powerful aid to the process of economic development, not just democracy. I think it makes a powerful contribution in those areas.

One of the points I'd like to try to forewarn you against in relation to freedom of information is the timing of the introduction of the legislation itself. Michael Kirby of the Australian High Court told the British audience in December 1997 about the seven deadly sins he found with the operation of FOI in Australia. First and foremost of these sins was that the legislation had been strangled at birth effectively, in that by the time the legislation actually made it onto the statute books, and by the time it actually made it from the statute books into operation, it was often a far weaker and less powerful version of what was contemplated when it was originally designed.

Many here in today's audience who may have participated, observed and developed the Open Democracy Bill from the beginning, would share Justice Kirby's concerns about how long it takes to implement legislation. The longer it takes to get on a statute book, the longer it takes to implement, and the more likely it is that the legislation will be watered down, or that the final draft will contain a very much more neutralised version of what's actually taking place. Or if there's a long implementation period, it will suffer serious amendments.

Just as a quick example from my own jurisdiction in Tasmania, our legislation was passed in 1991. The bureaucracy said they needed time to adjust and get ready for the legislation, so the parliament gave them two years to get ready for it. Two weeks before the legislation was due to actually come into operation, the parliament and the government of the day passed a series of amendments that significantly watered down the legislation before it actually became operational. Ten months after the legislation was actually implemented and operational, the bureaucracy submitted to the government a 40-page document demanding that the act be severely amended as a result of its first period of operation. So looking at your section 87 of the Open Democracy Bill, where you don't actually put down a date when the legislation actually becomes operational after being proclaimed. This can contain some hidden dangers. If a government is committed and dedicated to it, they'll implement it straight away. However, if it doesn't have a set 'in use by' date, I think you are going to have some major problems in the future.

Another point that I want to make is about the role of the Human Rights Commission. I have seen a number of criticisms about the removal of the Open Democracy Commission from the latest draft of the bill. I share those concerns, unless the government and the legislation allows the Human Rights Commission to play the role of an institutional supporter of the legislation. Recent law reform reviews in Australia, New Zealand and Canada have specifically focused on the damage done by the absence of such an institutional supporter, defender and advocate for such legislation. Therefore the type of role that's envisaged for the Human Rights Commission in sections 82 and 83 of the Open Democracy Bill, I think are going to be fundamental to the legislation. If anything will make it effective and long lasting, it's going to be the retaining of that role for the Human Rights Commission, and the ability of the Human Rights Commission to actually fulfil the role, both in theory and in practice. So, whatever takes place, if you're going to take it away from the Human Rights Commission now, it needs to be replaced by some other

institutional supporter or defender. If it stays in, it needs to be funded to be able to carry out the role that's envisaged for it.

Another point I want to make is about the role and activity of internal appeals. The experience in Australia, Canada and New Zealand has been that there ought to be an alternative to the internal-appeal process, which allows applicants to go straight to the external review body. In those jurisdictions, like Australia and Canada, which has an internal appeals rights, these processes have been used unnecessarily in the majority of cases to delay access rights to people for information.

As Ralph Navis said back in 1971, the point about information is it needs to be timely provision of information. People will not normally demand or want information unless they've got some perceived urgent need for it now. The longer it takes to try and access that information, the more problematic it becomes.

Now, a more controversial point, given the nature of our previous speaker, is I believe very strongly that the applications for external review should not be to the courts, but it should be to some other body. In his talk, Justice Kirby highlighted the problem that many of the judiciary had caused the failure of freedom of information in Australia by not formulating the interpretation of FOI legislation in a way that was harmonious to the objects of that legislation. Justice Kirby suggested that, and this a quote:

"Judges also grew up in the world of official secrets and bureaucratic elitism. Sometimes they share the sympathies and the outlook of the Sir Humphreys of this world. From the experience in Australia, New Zealand, and Canada in particular, the development of Information Commissioners or Ombudsmen to play that external review role, have effectively been far more satisfactory mechanisms in terms of costs, efficiency and release of information and, acceptance by the bureaucracy...."

And I think that last point is fundamental - the acceptance by the bureaucracy of the objectives of the legislation. And more importantly, it's effective because it allows for the conciliation over access to information. It doesn't render it to merely an adversarial legal contest between an applicant and the Department - it allows negotiated settlements to take place where the Department may not actually give access to the very document requested, but may very well confirm that the information does exist or whatever else may be necessary at that time.

I think the courts' role should be reserved for resolving errors of law and/or interpretation of critical threshold issues. That is the job that they do very well - leave it for them to do. But I think you need some or other type of external review model that allows for greater co-operation between applicants and departments to allow the release of information, rather than a purely adversarial aspect to it.

Two final points. I think it's a mistake in your legislation to exclude the coverage of legislation to cabinet or to remove cabinet entirely from the legislation. They have done this in Australia and Canada, and I think that has, in many ways, been the cancer that has eaten away at the concept of open government. Allowing cabinet to either be an exemption, or allow cabinet not to be covered at all, is a major mistake in my view. New Zealand has allowed cabinet and cabinet information to be accessed under the Freedom of Information Act, using a public-interest test. The government has not collapsed; the Westminster system (as they know it in New Zealand) has not fallen into ruins; and the public has been better informed by being able to obtain some access, whether immediately or three or five or ten years later, to the information that went before cabinet on particular issues. So I think the lesson to be learned from New Zealand is that cabinet government can still survive with a degree of openness. The lessons to be learnt from Australia and Canada is if you exempt cabinet entirely, it allows that cabinet provision to be abused to hide information.

Thank you.

KEYNOTE ADDRESS: David Goldberg

Thank you very much, Chair.

Last Sunday, I went into my local news agents to buy a Sunday newspaper, and peaking out from the pile of newspapers was a headline - all I could see was just a headline and it said "Open Dream." Now, listening to Justice Yacoob, you might have thought that the newspaper was actually carrying a transcript of his remarks. In fact it was just about the open golf tournament which is taking place in Carnoustie, which is near Aberdeen, in weather conditions which is highly reminiscent of Cape Town!

I'm going to make a short presentation called "Open Democracy - a view from elsewhere" and I've deliberately called it 'elsewhere' because again to echo Justice Yacoob, I think one of the very important points he made was this notion of two-way communication between countries which are trying to create freedom of information legislation, and those which already have it. So nowhere has a monopoly, and I'd like to call this talk "A view from elsewhere" meaning really nowhere. Let's all agree that we've got some stuff to share with each other.

A very important quote from a few days ago:

"I would like to take this opportunity once more to reiterate the commitment of our government to honest, transparent and accountable government and our determination to act against anyone who transgresses these norms."

From President Mbeki's speech, opening parliament on 25th June 1999.

Over the course of the next few minutes, I would like to cover a number of things. First of all, despite what Justice Yacoob said and I entirely endorse it, about the need to be practical, I do think it's important to try to remind ourselves about some of the general underlying values in relation to open democracy and so that's what I'm going to start with. Secondly, I want to say something about present trends in the United Kingdom, just to share with you some recent developments, and not necessarily to make any great claims for them. Thirdly, I would like to touch on two specific issues that I think are of concern in both the UK and in South Africa, and those are the examples of costs - the cost of a freedom of information regime. Fourthly, the issue that hasn't really been touched here so far today, whistle-blowing which is part of the Open Democracy Bill, and I know it's causing some concern here because of the relatively limited dimensions with which it's treated in the bill. And finally, just to make a general point about how open democracy should be reflected in everyday life.

I've chosen two specific general approaches to open democracy, access to information and so on. And the first is to look at it from a gendered perspective. The reason I'm doing that is because to some extent, and I know it seems a little unkind to say so, open democracy and freedom of information

has almost become a cliché in the circles in which we move - academia, the press, government, NGOs and so forth. You've been talking about this stuff for years and so have we. So, I don't want to just focus on the link between access and democratic values. I tried to find a couple of specific takes on the notion of open democracy and freedom of information.

And the first one is one in which I rely on a quote from Jan Bouwer, the Canadian human rights activist, where she says that, in terms of freedom of opinion and expression, it can be said that more often than not the right has been interpreted on the basis of the male conception of challenge. The male conception of challenge - this notion that there is a power-elite who want to hold on to power; or there is a group who are trying to acquire power; or there is a group in a slightly outer ring who need to try to access that power. I don't know how much to make of this, but I thought it was quite an illuminating notion, that the underlying background assumption of openness and access is in fact premised on this male conception of challenge. I don't want to try and take it too far, but indeed when I pointed this out to one of my colleagues before I left Scotland, we kind of kidded about the way in which perhaps open democracy is almost the feminisation of the male notion of access. I don't want to take that metaphor too far for obvious reasons, but I just leave you with that as a potential existential thought.

Less controversially perhaps, but from a slightly less well known source than I think it ought to be, are the reports of the United Nations Commission on Human Rights Special Rapporteur, Abby Tosoigne. He is the Special Rapporteur on the Promotion of Freedom of Opinion and Expression, and he has linked the right to seek and receive information to the right to development. The working group on the Right to Development in the United Nations has linked this notion of participation in society and the evolution of socio-economic progress, to access to information. And I think that's a very important linkage, because again I think it goes rather deeper than the linkage between open democracy and access to information as simply being a political value. Linking it to the right to development and the right to participation in order to enhance development is, I think, an important linkage and that is again simply why I've chosen to draw that to our attention.

But enough of philosophy, let's move now to the more practical questions of what are the present trends in the UK. Of course we've heard certain throwaway remarks about other parts of the world being ex-colonies and therefore I'm highly sensitive to the history of the United Kingdom in relation to other parts of the world. But I think at this particular juncture in the UK's history, we can actually look at two rather promising developments. The first is, as I know it, is the move from being serfs to citizens. One of the most important developments, particularly legally, which has happened in the last few weeks is the incorporation of the European convention on human rights into our domestic law.

The Human Rights Act, which will implement those rights domestically by October 2000 and indeed earlier in Scotland for technical reasons which I shan't go into, means that we are moving to a rights-based legal system, and

that is going to have a profound change in the way in which our relationship to government is going to be conceived.

One of the problems that I think we are going to be left with is the degree to which the European Convention on Human Rights itself promotes the right to seek information as a fundamental human right, and I think article 10 of the Convention, which talks generally about freedom of opinion and expression, is weak on that. It may be that we would actually need to see some changes in the Strasbourg rights based system in order to fully take on board and use to our advantage, the rights based system that is evolving.

The reason that there is this rights based system evolving in the UK is both to be seen as a means to an end and an end in itself. But what is that end? The end of the present government is modernisation - it's part of a package in which the present government is looking at the reform of the House of Lords, joining the Euro currency, evolving to proportional representation voting systems. In other words, the rights-based system and the evolving freedom of information regime in the UK is to be seen as an element of modernisation. That's the word which the Lord Chancellor uses, and in that sense I think the UK and South Africa are rather similar. We are both, from our very different backgrounds and our very different histories, attempting to emerge from some prior historical context into a new, more open, more democratic and more rights-based regime. And so, again, one of the most interesting developments in the UK in the last few weeks, as many of you here will know, has been the publication of the draft Freedom of Information Bill. The draft Freedom of Information Bill is the first general-access-right bill to be tabled in the United Kingdom by any government. Curiously, we are likely to have that implemented later indeed than you are. Anyone who looks at the draft Freedom of Information Bill at the moment should recognise that it is still going through a pre-legislative consultative process, and so therefore nothing that is in the terms of the bill should be taken as read. But it is nonetheless a very significant process which is going on in the UK.

The other thing I would like to point out, and again, I don't know how this plays in the local context here, is the creation of the Advisory Group on Openness in the Public Sector. Rick has made the point, and Justice Yacoob also made the point, about the absolute necessity of rooting this business of access and open democracy in the bureaucratic culture in the minds and hearts of ministers, and in the minds and hearts of officials. And one of the valuable things I think, which has been established recently, is this Advisory Group, which is a body which exists within the Home Office, and which has been set up to advise the Home Secretary on proposals for promoting cultural change in the public sector, and also importantly, to assist in development of training and educational programmes for public servants. Now again, I don't know in the local scene here - whether you're trying to do that here as well. I know that it's going to be done in Sweden and it's going to be done in the United Kingdom, and in fact it's a role for the academics.

Justice Yacoob rightly pointed out the limitation of academia in terms of trying to be too theoretical. But one thing that we are doing in my own law school is

evolving a kind of certificate in freedom of information access, which we are evolving in conjunction with the Scottish Office, so that officials from the Scottish Executive can come to the University, and get a kind of diploma in the mechanics, principles, policies and so forth of access to information. We think that that will be a valuable contribution to creating this real practical culture where it needs to be - amongst the public sector officials.

The other great aspect of the modernisation programme which is going on in the United Kingdom at the moment, is the policy of Home Rule - the policy of devolved parliaments. Scotland had its first devolved parliament for 300 years, which opened its doors a few weeks ago. On the back of that, we now have the Code of Practice on Access to Scottish Executive Information (which somebody recently said is really just a national code of practice on access to information with a kilt on). The Justice Minister in Scotland, Jim Wallis, has promised that there will be a Scottish Freedom of Information Act enacted by the Scottish parliament to cover devolved matters.

Now, I'm not an expert by any manner of means on South African political life, but I do understand that you have nine provinces in South Africa as well as a national political structure. And I'm just wondering whether there's any impetus, interest or focus here on the possibility of there being provincial laws as well as there being a national law. Now you may say let's take things one at time - it's difficult enough to get a national law, never mind looking at provincial laws. The Canadian model has, of course, provincial FOI statutes as well as the national one, and I don't know whether this is something that is worth considering within the South African context.

Moving on to the two specific topics that I wanted to deal with in relation to any freedom of information regime. The first is the one which relates to the costs. The cabinet office, when it released the papers which supported the White Paper called 'Your Right to Know' last year, revealed this very interesting sentence in which it said:

"There is...(tape ends)...quantifying with any accuracy the estimated costs of FOI. The process is too much demand driven against the actual number of requests as well as being subject to many other factors, some unquantifiable for estimating purposes."

So, there are two or three points I want to make here. The first is the UK Government, I think to its credit, has never made it a point of principle that arguments for or against freedom of information should be cost-driven. In other words, it's always been regarded as something which just has to be born out of general resources. That's point number one.

The second point is that this was very recently reinforced by the House of Commons Public Affairs Select Committee, commenting on the White Paper, which said that dealing with information requests appears to be an added burden on authorities, but that it is no less part of their normal job than is advising ministers or carrying out their other functions. And we are confident that it will become to be viewed as such.

I think that the general important point to make is not to be overawed by any issue of costs. Of course everything which is done in life costs - there is no such thing as a free lunch, or a free FOI regime, or an open democracy culture. But that doesn't mean to say that it isn't something which oughtn't to be funded, and again the real dilemma is trying to estimate the costs of it. The problem is not just trying to do that. I think the thing that particularly civil society needs to do is to be very, very sceptical and very, very questioning of the figures which are used, particularly if they try to transpose from other international jurisdictions where freedom of information regimes are already operating.

For example, in the United Kingdom, the cabinet papers revealed that in the first year of operation, an FOI regime would cost £26.5 million, and in the second and subsequent years, £23 million. When they came to launch the draft Freedom of Information Bill a few weeks ago there was supporting documentation that the figures had jumped to between £90 and £125 million. From £26.5 million, to £90, to £125 million? Now how could that possibly be explained? The paper says that it was based on forecasting a much higher demand for information, which suggests that unlike the 10 000 requests a year that were factored into the original cabinet's office papers, they were now contemplating 190 000 requests per year. But this is just pie in the sky - these figures are plucked out of the air. It's completely meaningless. For example, the number of requesters can be determined or deterred by the fees or the charges which are applied to making requests. So, of course you can enhance the number of requesters by having a differential-charging regime.

Secondly, transposing the figures from one jurisdiction to another often doesn't work because of different factors and different considerations, and that is certainly so in the UK situation. It was also based on the most pessimistic range of cost per request. The British papers revealed that from foreign experience it would cost something between £150 to £1 000 per request. But the figure of 90 million was based on the top level - the £1 000 per request. Well, it's just not going to be like that. Most requests under freedom of information legislation are for personal information - somewhere between 75% and 90% of requests are for personal information, and that is not information which tends, on balance, to take a lot of time to search for and to access or to dig out. So, if the costs are based on hourly costs of the labour of the bureaucrats in digging up the information, then one should recognise that the vast majority of requests are not going to be that costly.

So the two messages I want to leave you are as follows. First of all, is it an issue of principle? And I'm arguing that it is not an issue of principle which is not to say that there will not be costs. And secondly, be very sceptical of the calculations or the projections which are or may be used at any discussion because they are often very misleading in themselves.

Let me finally just mention for information's sake that in the United Kingdom, the Public Interest Disclosure Act came into force a few weeks ago. This has been commended by the principal American NGO working on this issue, as the most far reaching act of its kind in the world. It was largely piloted through

by a marvellous NGO in the United Kingdom called Public Concern at Work. I won't take the time to say very much about it save to note that for example, it covers private and public entities, including the voluntary sector. Secondly, it extends to blowing the whistle on malpractices which reveal crime, illegality, miscarriages of justice, dangers to health and safety, even if the information is confidential and even if the malpractices take place outside the United Kingdom. Thirdly, it allows for different levels of whistle-blowing, both internal to prescribed authorities, and also under certain very specific conditions to the media or to ministers of the Crown.

And finally, where whistle-blowers have been victimised to their detriment (and indeed figures show that 80% of whistle blowers lose their jobs where they are not protected by some form of legislation), there is the principle of uncapped compensation to workers who lose their jobs through blowing whistles.

Open democracy in daily life - I couldn't really think of a good way of concluding this until I noticed in Glasgow (which has been designated as the 1999 International City of Architecture and Design for 1999), there's a great exhibition which has opened up called the Architecture of Democracy, and this sentence appears in the blurb for the exhibition:

"Prominent architects throughout the twentieth century have sought an appropriate architectural expression for democratic processes."

So I would like to leave the room with this open question: what are the appropriate embodiments of open democracy in a physical way? We talk about the Agora - the market place - as being the physical embodiment of Athenian democracy. Jeffersonian democracy is embodied in the town-hall or the town-hall meeting. Parliamentary democracy is embodied in the old Westminster version of the opposition and the government sitting opposite each other. From the French Revolution, and this has been adopted in most modern legislatures, you now have a semicircular, horseshoe shape so that you don't have that oppositional 'we and them' government.

And so, I would just like to leave it there, and perhaps we could make this a kind of competition - I'm not quite sure what the prize would be, perhaps a free trip to Carnoustie to the Open Golf Tournament. It might be a nice thing to think as to how in a daily life, how one's institutions, how one's physical space might reflect the principle of open democracy. To take the point that Justice Yacoob was making, it's not just an issue of theory versus practice, it's also an issue of the intellect versus the material expression of that intellectual value in daily life. How would you like to see your society physically embody open democracy?

Thank you.

HORIZONTALITY: Adv Pansy Tlakula

I think I should say, now that we are talking about transparency and openness, that my paper raises more questions than answers. Therefore, it means I won't be able to answer any questions that you are going to put to me. I thought I should be up front about that.

The Open Democracy Bill introduces a radically new concept into the relationship between citizens and state – it sets out detailed instructions and procedures as to how to obtain information from the state. This concept is radical in the context of the transition of state bureaucracy from secrecy and sometimes obstruction, to transparency and openness.

Constitutional Principle 9 required the drafters of the constitution to make provision for “freedom of information so that there can be open and accountable administration at all levels of government”

From this principle we can see that the key issue for freedom of information was to ensure open and accountable governance. Accordingly, section 32 of the Bill of Rights provided for access to information from the state, and gave life to the constitutional principle.

However, section 32 went one step further in terms of the right to information, and provided a further component to the right

- a) The right to any information held by the state, and, in addition
- b) The right to any information held by private bodies / persons which is required for the protection of any right.

This constitutional protection of the right to information from the private sector is unique.

Perhaps for this reason, but in any event to allow sufficient time for some level of regulation, the Constitutional Court, in the certification judgement, accepted an interim right to information. This is set out in section 23 of Schedule 6 to the Constitution, and is, to all intents and purposes, the right to information as it appeared in the interim constitution – that is, the right to information from the state, but no right to information from the private sector.

The Court acknowledged that Parliament needed time to provide the necessary legislative framework for the implementation of the right. The court noted that this kind of legislation often involves detailed and complex provisions defining the nature and limits of the right, and the requisite mechanisms for its enforcement. There is also an incentive for government to pass the legislation before the deadline, as doing so will allow the inclusion of measures which can alleviate financial burdens on the state

Thus, the final right as set out in section 32 (which includes the horizontal application) is accordingly suspended until the legislation is passed, and parliament was given three years to generate the legislation.

The Open Democracy Bill, which is currently before parliament, gives effect to the right to information held by the state thoroughly, and in great detail. It provides for mechanisms to obtain the required information; it provides for categories of exempted information which may be refused access; and it provides for internal and external appeal mechanisms. Accordingly, the so-called vertical application of the right as between citizens and the State, as set out in section 32(1)(a), is fully (and some say too thoroughly) catered for in the Open Democracy Bill.

However it is the second component of the right – the right to any information held by private bodies or persons which is required for the protection of any right - the so-called horizontal application of the right which is not fully provided for in the bill, and which is the subject both of much controversy, and of this debate.

The bill makes some headway into the arena of horizontality, but its intervention is limited. Part 4 of the bill provides for access to information held by private persons, but only by individuals to information held about themselves. Because the access is limited to information held about the requester him or herself, as opposed to any information, Part 4 does not meet the requirement of horizontal application. Part 4 also provides for the correction of this information, and protection against its abuse; the chapter is clearly aimed at the scenario of a person challenging information held about him or her by a credit bureau, or related issues. As such it addresses the question of the right to privacy, rather than the right of access to information.

The drafters of the bill are well aware that their bill does not give full effect to section 32-(1) (b). In paragraph 3 of the Memorandum to the bill, they suggest that the Human Rights Commission investigate and consult in order to make recommendations

“...regarding legislation which would give full effect to this right...”

One of the purposes of this workshop is to commence some level of consultation around this issue, in addition to many others, in order to establish what the various positions on horizontality are.

This afternoon, one of the working groups will be discussing and debating horizontality, and their recommendations, as reported to the Plenary on Saturday morning, will be placed before Parliament during their deliberations on the bill. I have been advised that there are delegates from various private sector groupings who responded to our invitation to attend this workshop. These include the Afrikaans Handels Instituut, the Committee for Private Data Base Users, the Credit Bureau Association, the Furniture Trader's Association, Foschini, Direct Marketing Association and the South African

Chamber of Commerce. I trust that these delegates will add their voices to this important discussion.

Let us look more closely at paragraph 3 of the Memorandum to the Open Democracy Bill. What does the acknowledgement by the drafters that the bill does not give full effect of the right mean? Does the mandate to the South African Human Rights Commission to investigate further legislation imply an acknowledgement that the area of access to information in the private sector requires legislative regulation? Further, does the mandate imply that this legislation may be distinct to the Open Democracy Bill, and if so, what ramifications does this have for the time limits on the legislation?

Let me look at these issues one by one.

Firstly - legislation which gives effect to the right. The Constitutional mandate to parliament in section 32(2), is to pass legislation which "gives effect" to the right as set out in section 32(1) of the Constitution. Section 23 of Schedule 6 of the Constitution requires that the legislation be passed before February 2000. It is unfortunate that there are such pressing time constraints. Parliament must pass this legislation before February 2000, which means practically that the legislation must be passed in this parliamentary year. In addition to the short amount of time available, the Justice Portfolio Committee has the additional pressure of having to consider two other critical pieces of legislation, the Administrative Justice Bill, and the Equality Legislation within the same time frames.

Views have been expressed that it may have been preferable, perhaps, to implement the legislation giving effect to the vertical application of access to information, and follow it, in due course, after extensive research and consultation, with a further piece of legislation giving effect to the horizontal application. However, this approach appears not to be an option, as the deadline draws near, and a staggered approach seems impossible.

The central question is whether, in the event of the Open Democracy Bill being passed in its current draft, this law would give effect to the right? In other words, would legislation, which fails to regulate access to information from the private sector, give effect to the right as set out in section 32(1) which encompasses both components of the right? I hope that some clarity will be provided on this question in this afternoon's commission on horizontality.

I believe that the status of legislation which only gives effect to half the right is questionable. Some may disagree. Legislation giving partial effect to section 32(1) may well activate the entire clause, entrenching a right of access to records of private bodies with no mechanism to regulate the form and manner of that access. The disadvantages of this scenario are discussed below.

However, in so far as there is at least some ambiguity about whether the Open Democracy Bill in its current form does in fact give effect to the right, I would submit that the consideration of amendments to the current draft of the

bill, to deal with both state-held and privately-held information, may be the more prudent approach.

Does the right of access to information held by the private sector require legislative regulation? Could it not be argued that this area of the right to information should be self-regulating? Applicants who are aggrieved by non-disclosure by a private entity can rely on the right, and enforce it in the courts? Given the Constitutional Principle underpinning section 32 - open and accountable administration at all levels of government – could an argument not be raised that the additional component of the right, as applicable to the private sector, could be left unregulated?

I would argue not. Those requiring access to information from the private sector require as much assistance as those requiring it from the state, if not more so. If the state bureaucracy has the historical baggage of being untransparent, the baggage of the private sector is far heavier. Leaving those requiring information to rely on the bare bones of the right, rather than on regulated procedures, and dispute resolution mechanisms, will force many matters to court, where the “deep-pocket” syndrome of big business “out litigating” individuals may place the protection of the right at risk.

In addition, the private sector will benefit from the application of the exemptions to information they hold, and which they may believe is justifiably withheld from a requester.

The form of the additional legislation. Unfortunately it appears that this debate has been subsumed into the concern regarding the time frames. It seems unlikely that an entirely new bill dealing with access to privately held information can be generated, passed through cabinet, the law advisors and tabled in parliament for deliberation and finalisation before the end of the year, in addition to the Open Democracy Bill. What seems clear is that should there be consensus on whether regulation of the private sector’s provision of information is required to give full effect to section 32, then amendments must be made to the Open Democracy Bill, before it is passed to extend it to cover the horizontal application of the right.

Such an extension of the bill’s ambit would motivate strongly for a fresh title, such as “The Freedom of Information Act”. Open Democracy may not be an appropriate concept to cover access to information from both the public and private sector.

However, should it be held that the Open Democracy Bill in its current form is sufficient to trigger the final right, then consideration can be given to a subsequent bill, to be passed later. This has the advantages of allowing more time for the research and consultation around regulation of the private sector. On the negative side, this route would have the major disadvantage of a general, but undefined right, coming into being. This would have pitfalls for all concerned:

- **For the private sector:**

Although the private sector does not benefit from the incentive which is provided to the state to comply with the time limits – that is that the bill make contain reasonable measures to alleviate the administrative and financial burden on the state, the private sector would benefit from the protection of some of the categories of exemptions which would apply.

In the absence of pre-determined categories, exemptions applicable to the private sector would develop on a case-by-case basis, until such time as appropriate legislation is passed.

- **For citizens:**

A bald right to information necessary to exercise or protect any right, without clear mechanisms for access, principles of refusal, and dispute resolution mechanisms, provides little protection in the face of an unco-operative and wealthy company. The details governing freedom of information belong in legislation, not in a Constitution, and without the details in an accessible legislative framework, the right will not be utilized by the public.

In conclusion, I would submit that it is preferable for the legislation to be passed giving full effect to the right articulated in section 32(1) of the Constitution, thereby including the right of access both to government records and to privately-held information required for the exercise or protection of any right. It is my view that the Constitution makes no provision for a piecemeal recognition of this right, so legislative half-measures may create unnecessary constitutional confusion. We are the pioneers in this country with socio-economic rights - I am sure we can ride this one as well.

Thank you very much.

PROF MARINUS WIECHERS:

Mr Chairman, ladies and gentlemen, I am going to take the whole question of the Horizontal application of the Bill of Rights in a bit wider context and then leave it to you and the Commissions to discuss it in the context of freedom of information.

What we are talking about is actually found in the provision in Section 8 (2) in the Constitution. It regulates:

“A provision of the Bill of Rights binds a natural or juristic person, if (and this is important) and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

The simple question here is whether the right to information in the Constitution is also applicable under Section 8 (2) between natural or juristic persons.

I want to make one proposition right from the outset: it would be quite preposterous, it would be a glaring anomaly and a contradiction, if you have a wonderful Bill of Rights on the one hand which prescribes to government what are individual human rights which apply between government and ordinary persons and, on the other hand, not to have a duty on natural person to respect these rights amongst themselves. Such an anomaly will lead to schizophrenia in a society. No Bill of Rights can operate or survive without a sub-stratum or a sub-structure based on a human rights culture which respects human rights amongst natural and juristic persons.

The Constitution's point of departure is quite correct. The Constitution has a Bill of Rights, which is applicable between government and citizens. But the same value system which underscores the Bill of Rights must also apply amongst citizens themselves. How can persons who denied the values of the Bill of Rights in their private and corporate lives be expected to subscribe to these values once they are elected into government?

Having said that, let us look at our Bill of Rights. It is a marvellous Bill of Rights. It is very progressive, it is very encompassing, but it is also a highly complex document. It is not simply giving rights left, right and centre to everybody and asking or demanding from government to acknowledge these rights. If you analyse these rights, they include the very clear classic individual rights as well as the so-called second generation and fourth generation rights. Time however, does not allow us to expand on the nature of these categories of rights.

Also, notwithstanding its wide, expansive character, our Bill of Rights is not complete or exhaustive. For example, it safeguards the right to personal integrity and freedom, but it is silent on the subject of marriage. In another, important respect, the Bill is also not clear in so far as it does not distinguish between concrete rights and personal liberties. A liberty is a right to acquire rights and assume duties but does not, in itself, constitute a concrete right. For instance, freedom of expression, is a personal liberty to express oneself, but it

does not oblige a person to express him/herself if such person wishes not to exercise that liberty.

This rather lengthy introduction was necessary to explain that the right to access freedom of information which the Constitution permits, is also a very complex right. It is not a right which simply applies amongst private citizens as well, merely because Section 8 (2) demands that.

Horizontal application of the provisions of the Bill of Rights poses, many questions. Last week in the press and the radio, we heard about people in Britain who stipulated that an organ transplant is not to be given to a black person. This is blatantly discriminatory. But the question is: is it allowable in terms of the Constitution? What is stronger? The right to personal life and integrity or the demand of non-discrimination? Or, if we come closer home, is there a general right to freedom of movement in the Constitution? A right to settlement? A right to reside? Does it mean that I can move over your property, just like that or reside there? Is it applicable in the private relationship? One could elaborate on these uncertainties.

As far as freedom of information is concerned, let us look at the following example: if I know that I am in close contact with a person whom I suspect to be HIV positive, may I ask his or her doctor to be supplied with the necessary information in order to regulate my own conduct? or another example: I am a shareholder in a company or I want to acquire shares, may I (because it is very much linked up with my economic rights) ask for the necessary financial information from that company?

The question of a horizontal application of the Bill of Rights needs one or two philosophical observations. Our Bill of Rights applies to all persons in our country. In terms of the Bill, these are not lesser or better persons whether natural or juristic, it applies to all persons. Thus, although the Bill recognises categories of disadvantaged persons, the overriding value remains that of non-racism.

The second point is that the Bill of Rights invites government to be very active. Our Constitution and our Bill of Rights set the rules for a social democracy. A social democracy costs money. For instance there is a right in the Constitution to emergency medical treatment. Does it allow you, if you have a serious accident to go to the first and best private clinic and say, "I need emergency medical treatment"? I think yes, but then the government must supply the means for this private clinic to supply this emergency treatment. A social democracy should aspire to improve the general quality of life on the condition that it is affordable.

This is the positive side of a social democracy. But there is also a negative side. A government which tries to do too much, in order to give effect to a wonderful Bill of Rights, may deteriorate. A government which tries to regulate everything may lapse in what Germans would call "Staatlichkeit". This means the State and government is everywhere, regulating private lives. I have an inborn distrust for a government which tries to be each and everything to each

and everybody, because it leads to bureaucracy and corruption and ends up destroying the very high values which the Bill of Rights wants to promote.

So, be very aware of a government that tries to do too much and tries to put up appearances for the next election by claiming that all the necessary legislation has been passed. Precisely, under the apartheid regime, a myriad of legislation has been passed which never reached the hearts and minds of people.

The other more philosophical point of view that I want to raise is that there are inequalities in each and every society. There are huge inequalities and people should be free to bargain themselves out of inequalities and that is why basically, I should like to plead that state interventionism, in the guise of horizontal application of human rights, should not rule out a person's right to contact freely.

In applying the Bill of Rights between citizens or private individuals, I want to propose two practical guidelines. First, human rights are the primate. They are the point of departure. If therefore, in the relationship between human beings and juristic persons, it is a question of human rights being trampled upon, then the preference would always be on the human rights side. However as much as the individual has rights that are non-derogable against the State, the individual also has non-derogable rights vis-à-vis other private individuals.

What we must establish is where to the right to freedom of information infringe on the individuals non-derogable rights vis-à-vis his/her fellow citizens.

In doing so, there is not simply one clear answer. I do not believe that freedom of information could be regulated, once and for all, in one single act. If the Constitution mentions 'nautical legislation', does not necessarily mean one single act of policing. Personally, I would prefer to be regulated in a Health Act and then in conformity with the Constitution. I mean, taking into consideration what vast incredible proportions this illness has taken in our country, a very sound case is to be made out for freedom of information or necessity of information amongst private individuals. Taking everything into consideration, I would think that a strong case could be made out for the freedom of information in the Health Act, which overrides the private individual's rights to privacy.

In short, my message is very clear: freedom of information as far as private individuals are concerned, should be contextualised, be regulated in specific acts to promote our social democracy and not necessarily be contained in one single act which has to regulate all spheres of life and which would inevitably lead to a much dreaded 'Staatlichkeit'. Mr Chairman, that there is no closed category of human rights. There is also no closed point where you can say, now the Bill of Rights operates horizontally between private individuals. What is vastly important, is an educative process which will ensure that the set of values which underlie the Bill of Rights become a total ingredient of our civil society.

MR JERRY NKELI: INTRODUCTION

The South African Human Rights Commission has been discussing the Open Democracy Bill for some time, and has considered each of the drafts which have been made available in the course of its development. In 1998, members of the Commission accompanied parliamentarians on a study tour to Australia. The insights of this tour further coloured our discussions.

The Open Democracy Bill is a central and important piece of legislation: not only must it give effect to the constitutionally entrenched right of access to information, but is also the one piece of legislation which will give life to the aspiration of open and accountable governance.

Constitutional Principle IX Schedule (Interim Constitution) required provision for “freedom of information so that there can be open and accountable administration at all levels of government”. Section 32 of the Bill of Rights provides for access to information and gives life to the constitutional principle.

While open and transparent government – “government in the sunshine” - and the free flow of information is a noble and praiseworthy notion, the drafters of the Constitution were mindful that access to information needed to be legislatively regulated, and that such legislation could include “reasonable measures to alleviate the administrative and financial burden on the state”. The final right is suspended until the legislation is passed, and parliament was given three years to generate the legislation, which is currently before it.

The South African Human Rights Commission (“the Commission”) has two interests in the bill: on the one hand it wishes to be satisfied that the bill in fact gives effect to the right; on the other, the Commission is tasked with supporting, monitoring, educating and training around the bill, and the Commission wishes to be clear on its mandate, and its ability to deliver.

I will restrict my comments to broad areas of concern and lastly raise some issues that will hopefully be answered during deliberations at this conference. The broad areas of concern are as follows:

- The horizontal application of the right to information
- Enforcement mechanisms
- Plain language
- Role of the Commission as set out in the legislation
- Privacy
- Package deal
- Whistleblowers

- Conclusion
- Horizontality

This is the question as to whether the legislation will “give full effect” to the right to information if it does not cover access to information held by the private sector. My colleague, Commissioner Pansy Tlakula, has covered this aspect in the Debate on Horizontality held earlier today.

• **Enforcement Mechanisms**

The bill sets out internal appeal procedures. Should these be exhausted, and an aggrieved applicant (or respondent) remains dissatisfied, the bill sets out the High Court as the forum for relief. Apart from certain procedural changes, such as an automatic presumption of urgency and a greater discretion as to costs, proceedings follow standard normal High Court procedures which are very legalistic, cumbersome, protracted and not understood by lay persons.

The Commission is extremely concerned that the choice of the High Court as the forum for relief is an inappropriate forum. It is inaccessible, both geographically, and in terms of costs, and it does not offer a speedy remedy. It also lacks flexibility around issues of procedure, and as a result many matters may be diverted on questions of procedure, thereby preventing the development of sound jurisprudence, particularly on the question of the exemptions. This is particularly relevant to access to information, where there is no existing precedent, and a body of jurisprudence needs to be developed from scratch.

Effective and appropriate enforcement mechanisms are crucial to the successful implementation and functioning of the bill. They play a critical role in facilitating the culture change which is necessary to move from a closed beaurocracy, to open and transparent governance. Following implementation of an access to information system, there is bound to be a large number of appeals due to a limited understanding amongst information requesters and providers. There is a view that a system which relies on an inquisitorial system, rather than the adversarial system, is likely to be more effective.

What alternatives do we have? There are various options, which could replace the use of the High Court and in fact the court system at all. These include the creation of a tribunal system, or the use of an Information Commissioner to resolve disputes. For example, an Information Commissioner may be an appeal body in cases of refusal to provide access to information. He or she may have powers to mediate, negotiate, review decisions and it may be necessary for such decisions to be binding. These options need careful consideration, with the emphasis on the short-term cost implications of setting up new beaurocracies, and the long term cost implications of clogging up the court system even further.

Discussions around alternative enforcement mechanisms need to take into consideration developments in other constitutional legislation, most notably the Just Administrative bill, and the Equality Legislation.

There are discussions devoted to this issue on both afternoons, in the context of both bills, and I hope that these will generate useful recommendations.

• Plain Language

The drafting style of the bill is unnecessarily detailed and tortuous. The irony of this drafting style is that it obscures the subject matter of the bill, thereby hindering access to the information of the bill. This is particularly so in the sections dealing with the exemptions, which are probably the most important substantive area of the bill.

It is imperative to have a simple language bill. This was successfully achieved in the Bill of Rights, and did not detract from the essential content of each section.

• Role of the SAHRC

The Commission is willing to take on the role allocated to it in the current draft of the bill, provided that it is appropriately resourced. In order to be effective, the Commission will require dedicated personnel and specialised components in the Secretariat.

The bill provides the Commission with a wide range of functions. These may be found in sections 5, 27, 43, 63, 66, 77, 82 and 83, and can be summarised as follows:

- The annual publication of a guide on how to use the act, in each official language, and dissemination of the guide (section 5);
- Receive reports annually from governmental bodies setting out certain statistics regarding requests for information (section 27);
- Make determinations regarding provision of information already open to the public (section 43);
- Receiving disclosure by whistleblowers (section 63);
- Preparation of a notice setting out the procedures available to whistleblowers for circulation in government bodies (section 66);
- Litigate on behalf of illiterate or disabled individuals, where there are important matters of principle (section 77);
- Additional functions set out in section 82:
 - Annual review of the Act
 - Recommend amendments to Act
 - Monitor the administration of the Act
 - Develop & conduct public education programmes
 - Encourage government and private bodies to develop their own programmes

- Promote provision of information by government
- Assist any person wishing to exercise a right in terms of the Act
- The Commission is also granted the following powers and responsibilities:
 - Make recommendations to private or public bodies regarding the administration of the Act
 - Train information officers
 - Consult with public and private bodies regarding problems with the Act
 - Receive advice or proposals from public or private bodies
 - Receive money to perform its functions
 - Donate money to private bodies conducting education around the Act
 - Request certain information from the Public Protector
 - Inquire into any matter connected to the Act
- Report annually to Parliament on the Act (section 83).

The Commission believes that it is appropriate for these functions to be allocated to the South African Human Rights Commission, as they deal with a protected right in the Bill of Rights, and many functions set out in the Bill can be synergised with existing projects.

However, we are concerned that, having been given the extensive mandate in the bill, that the Commission is financially enabled to deliver on that mandate. The Constitutional Court judgement as per Justice Pius Langa, Deputy President, asserted in *NNP of SA v Government of RSA* that Chapter 9 Institutions must be “financially independent” which means that these institutions must have access to the funds reasonably required to enable them to discharge the functions they are obliged to perform.

Section 84 entitles the Commission to defray any expenses related to its functions in terms of the Act. In addition, the Commission is entitled to receive money from any other source, which introduces the possibility of fund-raising for specific projects. The Commission foresees that, in order to effectively deliver on the mandate assigned to it in the bill, an increase in its annual budget will be required, and is in the process of developing this budget for inclusion in a further submission.

• Privacy

The underlying rationale for privacy and access of information is antagonistic: the former system by its own nature restricts access to information, whereas the latter provides access to information. Consideration should be given to the problem of placing both systems in one piece of legislation, as it may complicate both the implementation and the comprehension of the regimes by the public.

The notable interface between privacy and access to information is the privacy exemption in a freedom of information act, which should contain the embryo of privacy legislation.

Experience has shown, and this is true of Australia, that the majority of requests under freedom of information are requests for personal information. Consideration should be given to placing mechanisms to obtain personal information in a Privacy Act, which deals with all aspects of personal information, including the collection, use, storage, access amendment and disclosure thereof; this approach would then free up an Open Democracy Bill to be used only for accessing information which is sensitive, controversial or involves a third party.

• **Package deal**

From the experience gained on the study tour, it seems clear that for any Freedom of Information legislation to be successful, it should be introduced concurrently with legislation on judicial review or administrative justice. Where freedom of information legislation has been introduced by itself, it has, as a rule, been weakened.

In addition, there are obvious areas of overlap, particularly in the area of enforcement.

• **Whistleblowers**

Part 5 of the bill provides for the protection of whistleblowers. These kinds of provision are important and necessary. However, attention needs to be paid to whether these provisions are best placed in a bill of this nature. Whistleblowing and freedom of information are different issues and do not belong together. The former relates to anti-corruption strategies, and the latter to open government and the responsibility of government.

In addition to the context of the provisions, the four sections in the bill are too brief and much more clarification and detail is required.

• **Conclusion**

The Open Democracy Bill is a groundbreaking and vital piece of legislation, which provides a concrete and specific realisation of a constitutionally guaranteed right.

PLENARY 16TH JULY

PROF DAVID G MORGAN (Head of Law Department, University College Cork, Ireland):

May I start with a biographical note very briefly, my first job out of University was in the early 70's, teaching in Lusaka in the National Institute of Public Administration in Zambia, I have very good memories of that. Not, I think, because I was young and wearing rose tinted spectacles (as opposed to the pair I acquired more recently), but because I was helping a young country, grappling with huge problems, not of its own making. These problems rose partly from the neglect of colonialism, and partly from the problems of the illegal unilateral declaration of independence in the neighbouring country which was then called Rhodesia and is now called Zimbabwe. So I was happy in Zambia but, unfortunately, for reasons you will understand, I didn't take the opportunity to visit South Africa then. Accordingly, I am doubly pleased to be able to do so now and very grateful and humble that you have chosen to ask me. I should perhaps apologise that my paper is not written and had to be prepared in something of a hurry because I only had few days notice of this Conference. I suppose the only thing I can say in mitigation is that perhaps this will mean that it would be easier to dialogue with you on the ways in which what I am saying fits into your thinking on the Act.

Before coming to the Administrative Justice Act, I would like to mention that in the field of fair procedure, the Irish concept is called Constitutional Justice which in some ways is just a matter of natural justice with knobs on. As you know, natural justice consists of the two rules of fundamental fair procedure, the no bias rule and the *audi alteram partem* rule. But, it has been renamed as constitutional justice and it has been said to be derived from the Irish Constitution. This has had a couple of consequences which may briefly be of some interest. In the first place, we have an extremely activist judiciary. I would, I suppose, make the claim that it is among the most activist in the world though it is a little difficult to measure such things. The judiciary has used the fact that natural justice has been re-christened Constitutional Justice to import into the law a number of other procedural improvements. For example: the tribunal should sit in public; a reasonably prompt decision should be given; and reasons for the decision should be given. In some cases that there should be free legal aid and, possibly, there should be an appeal - though that depends on which line of authority you take. Apart from extending the content, the other point about this being implanted in the Constitution, in the personal rights section, is that it has been said to be part of the personal rights of the citizen.

The second point is that constitutional justice applies to all the state organs. Whereas in the South African Constitution, fair procedure is simply a matter for the executive organ of government. In the Irish Constitution it applies to the legislature and the court. It applies to the legislature, for instance when examining somebody before a legislative committee or when one of the deputies or senators is being disciplined. More significantly, because more

individual rights are concerned before the courts, it also applies to the courts and it is being used in a few quite significant ways there. For example, in a case arising about an inquest, in which the verdict of suicide was brought in, the family of the deceased were naturally disturbed by this verdict and they complained successfully to the High Court that they hadn't been represented before the Coroners Court which was holding the inquest. That precedent could, and I think probably will, be used in rape cases if the prosecutrix in the case claims that she should be separately represented.

The second way in which the Constitutional Justice provision might be used in the courts is to amend certain of the rules of evidence (most obviously the exclusionary rules like hearsay) because it can be quite plausibly argued that they are disabling one of the parties from bringing all the relevant evidence on which she wishes to rely, before the court.

So, having just made that diversion into Irish law, I turn now to the excellent draft Act, praising in the first place the two provisions dealing with what I suppose should be called Participatory Democracy. The first of these is Section 4 on page 9 of the booklet we were given by the organisers which says that:

“An Administrator must hold a public inquiry before taking any discretionary administrative action which imposes a material burden or confers a benefit on the public generally or on any group or class.”

Obviously, the words “imposing a burden or conferring a benefit” will need some interpretation and we know that regulations are going to be made by the Administrative Review Council helping in that. But I think this is a useful provision. All we have in Ireland is that, sometimes when a major administrative function is being established which affects a lot of people, the legislature will specify that there has to be a public inquiry. But usually it does not require the report to be published as the South African provision does. More usually Irish law, doesn't require an enquiry at all - an awful example being the Development Plans which local authorities make to govern zoning or land-use planning decisions. That is something in which I think local people ought to have a say.

The second example of participatory democracy is your Section 5, which specifies procedure for making mainly delegated or subordinate legislation and says that “Those who are likely to be affected by it must be notified and their comments taken into account.” Now, this seems to me a very sensible state of the art way of approaching the problem of delegated legislation, because delegated legislation politically has been regarded as not very sexy and tends to be ignored by parliaments - certainly by the Irish Parliament. The way the Irish judges have approached it is slightly interesting. As I say, they are fairly activist and we have a form of separation of powers in the Constitution which has been given an even sharper cutting edge than that in the States. Article 15 which is part of our separation of powers states that the sole and exclusive power of making law is vested in the parliament. No other legislative authority has power to make laws for the state. Now, anyone who

knows anything about Irish history would prick up their ears at that last bit - that no other legislative authority has powers to make laws for the state. The southern part of Ireland, also known as the Republic of Ireland which is where I come from, became independent in 1922, (the northern part of the island remains British to this day; you will have read of the troubles there). But it was an incomplete kind of independence, and so what Article 15 was rubbing in was that Westminster no longer had authority to make laws for Ireland. But the judges seized on that provision and said it meant that only the parliament can make law. Ministers can't. Local authorities can't. Only Parliament can. What about the problem of delegated legislation? Is that constitutional? "Well", the judges said "Delegated legislation is acceptable provided it only deals with matters of detail, not with matters of new principle. Any new principle must come from the principal legislation made by the parliament in conformity with this provision". What that means, is that quite a few pieces of delegated legislation have been struck down for because they go beyond detail and bring in new principles. Obviously, the policy underlying this interpretation is that new law should be debated in the parliament and people should get to hear about it. This is one way of achieving that objective but it doesn't deal as the South African provision will deal - with the fact that persons affected by a rule, particularly a detailed rule, may still have it brought into effect without any consultation.

So, having praised Section 5. I go on to the right to reasons. Now this, of course, is an appendix to yesterday's work on the Open Democracy Bill. It is an appendix because it is a special category of information and indeed the Irish legislation on freedom of information takes in the right to reasons as well as the right to obtain other sorts of information.

The Irish law in this area has evolved through three stages. In the beginning and for most of the law's history, there wasn't any right to reasons. You may be familiar with the teasing phrase "That is for me to know, and for you to find out." That was a considerable restriction and particularly so on anyone who is thinking of going for substantive judicial review because they thought they had been treated unfairly or improperly by an Administrator. If one looks at it from the point of the law on the streets or in the lawyer's office, rather than the law in the books, there was a huge difficulty there because while there are possibilities of obtaining information through the process called discovery or inspection or the issuing of interrogatories, that can only be done when the client has launched High Court proceedings which of course is traumatic. And there were other difficulties. Discovery is a hugely tedious and time-consuming process. Someone has to personally ensure that every page of every document in the case is found and gone through. And all the time costs are running up and lawyers flourish. So it was a great improvement when we went to the second stage, which was to say that there was a right to reasons implicit in Constitutional Justice. The concept I was talking about a moment ago first swam onto the scene in 'International Fishing Minister for Marine (1989) IR 149' What was at stake was the minister's refusal to renew the applicant's sea fishing boat licence. The applicant, it was alleged, had breached a condition which required that at least 75% of its crew should be nationals from an EU state. The solicitor for the boat, who was thinking of

launching substantive review proceedings, wrote to the minister seeking more detailed reasons and received the time honoured response that the minister had refused, as a matter of policy, to give more reasons. Counsel for the fishermen then argued effectively that there was a duty to give reasons.

Then, after about ten years of judicial development, we had our Freedom of Information Act 1997, which states that reasons must be given where any person is affected by the act of a public body. In contrast to the case law, this is not conditioned on the person thinking of taking review proceedings or taking an appeal (if there is an appeal) - it just exists as a right. And this is something which might be taken on board in respect of Section 6 of the draft Act (here on page 13 and 14 if you are singing out of the same hymn book as I have before me).

To come back to the Irish law for a moment, the requirement is that the minister should give the reasons for the act and also (and here is the important point): "Any findings on any material issues of fact, made for the purpose of the Act." There is no equivalent that I can see in the South African Section 6. I think perhaps there ought to be because the reasons are obviously going to be of various types among them: legal interpretation, a policy view; but also a finding on the facts. And it is just possible that the finding on the facts would not emerge in the reasons. If one uses the wording here, which is "adequate reasons". So, it may be well to spell it out as it is spelt out in the Irish law.

Another brief comment on Section 6 as just indicated - it goes beyond the Irish law in that it states that the administrator must warn the person affected of his right to apply to a court for judicial review. I wonder whether one should go beyond that and require a warning as regards the possibility of any appeal in a particular case. In practice, if there be an appeal, it is more likely to be used than judicial review. That is just a fairly brief drafting point. I think that these rights to reasons are obviously a good thing from a policy point of view. In the first place, a decision is apt to be better if the reasons for it have to be set out in writing. The reasons then are more likely to have been properly thought out. And secondly, reasons give to the person immediately affected, and also the public generally, confidence that the decision has been properly taken. Obviously, in practice, what is going to be interesting is: what adds up to an adequate statement of reasons? There's been a fair amount of that uncommon thing, common sense, in Ireland in this area and most administrators reasons have been informal but informative and the courts have said that this suffices.

I turn next to Judicial Review, mentioning briefly Sections 8 and 10. Sections 8 and 10 are the procedural sections. These provisions are in line with the normal policy in that they seem very restrictive from a time point of view because they only give the applicant 180 days and then go on to say in, I think Section 10, that the court may grant an application to extend this time period. I would have thought there ought to be some guidance there. There ought to be some words giving guidance to the judges, requiring, for presumably on the instance, that there be good reason for delaying by the applicant" and also

questioning or bringing in the condition that the extension doesn't cause injustice to the public body or any third party.

Another relic I feel I see in that provision is the reluctance to award damages because, at worst, you can get a situation where a person is arrested on the basis of a flawed warrant and then you have to take judicial review proceedings to establish that the warrant is flawed and then, secondly, another set of High Court proceedings for false imprisonment to get your damages. Which, to anybody who is not a lawyer, would seem an extraordinary and a horrible arrangement.

Now, the existing draft in Section 9 states that damages may be awarded but then goes on to say: "in exceptional cases where manifest injustice would otherwise arise." Well, unless you want to make work for lawyers and judges, I would have thought there is no need to bring in these extreme words like 'exceptional', and 'manifest injustice.' I mean God knows there has been so much injustice in South Africa that a rather high standard of injustice might be applied.

There is another blemish which comes down to us from the history of this relic the prerogative orders. (As you can imagine, like anyone whose trade is Administrative Law lectures, I have 3 to 6 hours of lectures up my sleeve on this. If a speaker doesn't come because of a plane, it can be provided for you later.) But one bit of history leads to a reluctance to allow the High Court to put any blemish, which it discovers right by substituting the correct decision. Instead, the decision must be struck down by the Court and then sent to drag its long length back to the original tribunal or minister which then must take the correct decision. Now obviously that may be inappropriate where there is something left to be decided even after the law or procedure has been correctly stated by the High Courts, but in some cases there won't be. Why can't the Court just give the licence or whatever is the appropriate decision? Well, again, that is only to be done in 'exceptional' cases (according to the present draft) and I would have thought a less extreme word than that perhaps should be used there.

Now, turning finally to what I take possibly wrongly to be the central provision in this, which is Section 7. Section 7 sets out the substantive grounds on which one may seek a judicial review. And we have also got a statement, a rather good statement of natural justice or constitutional justice in an earlier provision. I am not going to go into that, I just want to make a few comments on the way the grounds of review are set out, raising a couple of areas about which I have some doubts.

The first of these is Section 7.1 (e) (iv), where the action was taken "because of too rigid an adherence to a standard". Well, this of course sounds fine if you say it quickly and keep smiling, but if you look at it from the point of view of an Administrator who wants to seem to be fair (exercising a discretion, let us say, to give a grant or to allocate a house). The Administrator will have been given some kind of standards by the Senior Administrator who is their boss - for instance a point system for the award of housing or a provision that you give so much money to a farmer with so many cattle. That seems to be a

fair way of doing it and, in most cases, is a fair way of doing it. But there have been cases in Irish Law where the Administrator has been tripped up because of this somewhat old fashioned idea that the Administrator must freely exercise a discretion and if he has imposed on him any guidelines, then these interfere with the free exercise. Possibly the phrase 'too rigid' suffices to take the harm out of it. I think I would, myself, want to consider the drafting of that significant phrase.

The other difficulty of course is the developing law on legitimate expectations, which is where an Administrator gives a commitment. The Administrator is expected to keep his or her word and there is a constant tension between that provision and the idea that there must be a free exercise of a discretion. I think sub-section (iv) would need to be looked at to reconcile the ideas of legitimate expectations and of Administrators keeping to any standards which they have set. This sub-section too draws with it quite a big bag of history and only would need to be careful not to stifle the infant legitimate expectations, at birth.

Finally, I want to turn to something which almost caused me to jump out of my seat on the plane when I read it. That is, that a ground for judicial review is now, (and here I am looking at 7.1(d)) that the action was materially influenced by an error of law or fact. Now that is a really big expansion. As most of you are lawyers and you know that judicial review is the result of a compromise by which the legislature, in setting up a grant awarding scheme or an alien expelling provision or whatever administrative power is in question, wants it to be done by the minister or by the local authority. In general, it doesn't want the court interfering. But, on the other hand, the legislature doesn't want the minister or the local authority to go completely berserk and so there is this kind of compromise. One leg of that compromise was that the minister or the local authority could go wrong with certain types of law but not major errors of law. The other was that the minister or the local authority's finding on the facts wouldn't come up in review proceedings unless there was absolutely no evidence. But this provision seems to be reversing that and stating that if there is an error of law or fact, then the matter can be brought before the High Court on appeal proceedings. The big question really is whether you **do** want to expand judicial review in this way. I'll come back to that in a moment. I note too that judicial review has also been expanded by giving this power to the Magistrate's Courts and not just the High Court.

Now I think that this expansion of the control by the courts over Public Administration may be a bad thing for three reasons. (I like to have three reasons - it carries conviction - and I have three here.) The first is that the ideology of the common law is rather pro property and has in it a slant against collective state action on behalf of the citizenry by contract, in a country in which 40% or more of the population is unemployed, radical collective action would sometimes be necessary. I am fond, of President Nyerere's remark about the need to develop in Tanzania. I quote "It isn't brakes we need but an accelerator."

One can illustrate what I was saying about the common law's temper and instinct being pro property and against collective rights by a line of Irish cases in which property has been bought at its agricultural value and then the purchaser (who is what is euphemistically called a 'property developer') seeks permission to put buildings on it. He is turned down because it is not in accord with the zoning plan and then he is able to claim compensation on the basis of the value that the land would have had if he had been able to put those houses on it. So he's made a big profit from the local authority and this is grounded on his constitutional right to property. A similar line of authority concerns a local authority which wishes to levy contributions from developers for the cost of roads, sewerage and water supplies which would be necessary for the houses. Again, there is legal authority in the planning Act to enable local authorities to do this, but in fact it is been interpreted very much against the local authority and in favour of the developer. Again, on the basis of this right to property.

A second point is that of course in South Africa you have significant private business and this is a big factor, or this should be a big factor in the law. In fact the law has traditionally been rather slow to corral huge economic power. It's been very good at dealing with what Hobbs (if you remember your political philosophy) called the Leviathan (or the state), but it has been a bit slow in being concerned about the huge reserves of economic power.

When I was in Zambia, there was a rather bitter joke arising from the fact that, at that time, President Kaunda was nationalising the copper companies and the Zambian state and he didn't have very much money. So, the way he did it was to take over just 51% of the mining companies and to pay for even that percentage out of future profits. And the story goes that, there was a rumour that he was going to lay uncivil hands on the Anglo American interests in the Copper belt in Zambia and one of Harry Oppenheimer's aides became very excited and rang him at four in the morning to tell him of this. He stuttered into the phone that: "President Kaunda says that he is going to take over 51% of our mines on the Copper belt and pay for it out of future profits". Oppenheimer wasn't pleased at being woken up and he said "Well, tell Kaunda, if he does that, I am going to take over 100% of Zambia and I am going to pay for it cash."

This simply by way of making the obvious point that economic interests are strong, they are not very well corralled and sometimes laws are brought in to do that. I was involved, on one occasion, in giving advice to a small market garden which had started by being very pleased to sell half its produce to a major food marketing chain in Ireland (which, for reasons of libel, I am not going to name). And this went up to 70% and the food marketing chain encouraged my clients to provide fruit which was grown to their particular specifications. And the market garden was even more pleased about this and eventually let go all its other customers and then, when it came to negotiate the contract for the next cycle, they found that the price which the big supermarket was going to pay them had fallen by 20% - this at a time of inflation running at about 10%. They were caught. Any common lawyer will tell you 'There is nothing that can be done about this - this is just freedom of

contract.' We have now in Ireland, of course, some help in this sort of area from competition law - not directly in point in respect of The Market Garden, but we also have things like unfair contract provisions. But these are only just coming in and the point I am coming to is that the good of the public call for legislation to be brought in to control major economic interests and this sort of legislation may be attacked, or the administration of it may be attacked, on judicial review. The kind of provision extending judicial review we have been talking about will facilitate that sort of attack.

The third point can be made more briefly. It is simply that judicial review, or the expansion of it could lead to a clash or friction between the government and the judiciary along the lines that we have seen in India in the 1970's or Malaysia in the 1980's.

Obviously the final point (I see I have four reasons here - that is good) - the final point is that judges are well used to dealing with certain areas of the law, for example in criminal procedure, because they know about that, because they see it or examples of abuse everyday in court. They may not know so much about public administration. The point I am coming to is that, if you do want to increase control of public administrators, does it have to be done through the courts by way of judicial review? I am pleased that we have my former colleague Dr Snell here from Tasmania. He may be able to help us with the Australian experience in this field because, of course as everybody knows, what happened in Australia when they wanted to control the public administration was that they didn't expand the powers of the High Court. Instead they went for a strong overarching tribunal. Certainly the idea of an independent tribunal to which one can appeal is contemplated in your Constitution.

The other possibility is to strengthen what I call, the Ombudsman, but what you call the Public Protector. I am pleased to see that the Public Protector is mentioned in your Constitution among your state institutions which support constitutional democracy. That is a step we haven't yet taken in Ireland, but he is another way, I suppose, of controlling the administration apart from the High Court.

So, once more, I repeat my thanks to you for inviting me and say how much I've enjoyed the intellectual discussion and the social activities here. Thank you.

MR. EMILE FRANCIS SHORT:

Mr. Chairman,

Distinguished Commissioners and Staff of the South African Law Reform Commission and the South African Human Rights Commission,

Distinguished Ladies and Gentlemen:

In July 1998, I had the opportunity of attending the 2nd International Conference of National Human Rights Institutions organized by the South African Human Rights Commission in Durban. I was as much impressed with the excellent organizational prowess and warm hospitality demonstrated by our hosts as I was with the seriousness and relevance of the issues canvassed and the quality of discussion and recommendations which ensued.

And now, exactly a year later, I have the honour and privilege of delivering a keynote address at this timely and important workshop on Open and Accountable Democracy. I understand that this consultative workshop aims at furthering discussions and generating specific recommendations on the draft *Open Democracy Bill*, which has already been tabled in the South African Parliament, and the *Administrative Justice Bill*, which is at a fairly advanced stage of public evaluation.

Before I proceed further, Mr. Chairman, I would like to express my utmost gratitude to the South African Human Rights Commission for this handsome opportunity. I would also like to add my voice to the chorus of voices that has commended the South African Law Commission for its vigorous efforts in initiating and developing the two bills. As well, I commend the South African Human Rights Commission for its important and tireless role in providing this and other vital platforms for serious public consultation and debate on the draft bills.

I understand that you had fruitful deliberations yesterday on the Open Democracy Bill. It is my fervent hope that we will, today, have an equally useful and engaging review and critique of the draft bill on Administrative Justice.

Mr. Chairman, Distinguished Ladies and Gentlemen:

It is my pleasure to share with you today my thoughts, derived mainly from the experiences of the Ghana Commission on Human Rights and Administrative Justice of which I am the head, on the benefits and importance of administrative justice in fostering a democratic culture that is at once respectful of human rights and equally attentive to the crucial values of accountability, transparency, reasonableness and dispatch in responding to citizen concerns about administrative actions. In doing so, I will also highlight some of the challenges in promoting administrative justice in an era of dwindling resources. Finally, I must quickly add that I do not intend to discuss the specific details of the Administrative Justice Bill but merely to speak

generally on the topic of administrative justice and thereby provide a framework for a much more focussed discussion on the Bill.

Definition

First, Mr. Chairman, permit me to begin with a brief and elementary definitional sketch of administrative justice.

Administrative justice is inextricably linked with the growth of the modern welfare state. At the dawn of the 20th century, it was observed that “a sensible law-abiding Englishman could pass through life and hardly notice the existence of the state, beyond the post office and the policeman”. However, national insurance, town and country planning, education, health, factories regulations and the establishment of a number of inspectorates have enhanced the power of officials beyond measure. Because of the growth of regulatory legislation and the tendency to entrust more and more power to the state, and because the state began to care for its citizens from the cradle to the grave, protecting their environment, educating them at all stages, providing employment, training, houses, medical services and in the last resort food, clothing and shelter, the administrative apparatus has had to be considerably enlarged. Rules and regulations had to be formulated and discretionary power given to officials. This vast array of governmental powers has tremendously increased the opportunities for public mal-administration. The legal aspects of all such matters come under the rubric of administrative law. It is the law relating to the exercise of governmental power.

Administrative law aims at subordinating the actions and decisions of all officials to the due process of law. It emphasizes that since it is always possible for power to be abused and misapplied, absolute or unfettering administrative power is undesirable and the exercise of every power should be subject to legal limitations.

Administrative law may be applied both to prevent excesses where authority is misapplied and to compel the right thing to be done. In the case of actual wrongful acts - which we may be perceived as malfeasance - the scale may range from actual malice or bad faith or real “abuse” to instances where government departments may actually misunderstand their legal position because of ignorance or because the law they are to apply is itself complex and uncertain. From the minister’s order which is set aside as unlawful, and the compulsory purchase order which has to be quashed to the decision of the planning authority which is declared as irregular and void because appropriate notices were not given, we see quite clearly the need to correct the abuse of some human right or the other.

It would be a pity if administrative law only applies to correct maladies. It also ensures that public authorities are compelled to perform their duty if they are in default. The Internal Revenue Department may have a duty to repay a tax, a license authority may have a duty to grant a license, the Passport Office may have a duty to issue a passport.

In simple terms, the concept of administrative justice refers to those protocols and standards of behaviour, which have evolved to ensure fair, reasonable, expeditious and efficient administration of the public sector and the redress of citizen grievances or concerns about administrative action. It puts civility, reasonableness, due process and procedural fairness at the centre-stage of the public officer's dealings with the citizen.

The key purpose and foundational basis of administrative justice is the avoidance of arbitrariness, excess of jurisdiction and the timely disposition or redress of citizen grievances arising from real or perceived acts of unfair treatment, bias, delay, caprice or dictatorship on the part of public officers.

These time-honoured protocols serve to ensure social, economic and administrative competence, as well as sensitivity to universally accepted standards of decency and fairness; they invigorate and sustain respect for democratic and human rights values, norms and practices.

Administrative justice is also about ensuring a regime of lawfulness, accountability, corruption control and prevention; its essence is the promotion and advancement of constitutionalism and greater social justice through the control of capricious, opaque or non-transparent actions and the exercise of vested or assumed power. It also aims at removing the shroud of uncertainty and unwarranted secrecy that all too frequently facilitate corruption and maladministration. It stands as a check against the denial of natural justice and procedural fairness in the day-to-day operation of administrative agencies or public sector organizations.

Especially in new democracies and developing countries generally, administrative agencies are often the site of much executive fiat and capriciousness, significant non-transparency which violate the rights of others, unaccountability, impropriety and, sometimes, crass arrogance. These catalogues of negative tendencies, which are inherent in weak economies, tend to support corruption and undermine democratic governance, the rule of law and the cultivation and entrenchment of a human rights culture.

FOUNDATIONAL PRINCIPLES OF ADMINISTRATIVE JUSTICE

There are several legal principles which underpin administrative law. I will with your permission, Mr. Chairman, address just a few.

The Rule of Law is a fundamental constitutional principle of administrative justice. It acts as a constraint on the exercise of all power. Its basic elements include the idea that (a) no person is punishable or can lawfully be made to suffer in body or goods except for a breach as the law has established in the ordinary legal manner before the ordinary courts of the land; (b) no person is above the law and every person, whatever be his/her rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals; (c) individuals wishing to enforce the law have reasonable access to the law; and (d) there should be no arbitrariness in determining or disposing of individual cases. The rule of law rests upon the principles of legal

certainty, the principle of equality and equal treatment without unfair discrimination.

With regard to equal treatment, there are two senses of equality: formal equality and substantive equality. Formal equality requires public officials to apply and enforce the law consistently and without bias. In the words of Dicey “ With us, every official, from the Prime Minister down to the Constable or collector of taxes, is under the same responsibility for every act done without legal justification.”

Substantive equality does not refer to enforcement of the law but its content. It means that laws should not discriminate against individuals on arbitrary grounds such as race, gender, political opinion, social origin, birth etc. All persons in a similar position should be treated equally.

The principle of *ultra vires* is another important foundational principle of administrative law. First, a power given to an administrative authority should be exercised strictly within the parameters of the power given. Acts done in excess of a power granted by statute would be struck down as being *ultra vires*.

The powers of an authority include not only those expressly conferred by statute but also those which are reasonably incidental to those expressly conferred.

Second, discretion must not be abused. An official, may, for instance, act within the apparent limits of his/her statutory powers, but still he/she may act with wrong motives or on irrelevant grounds and arbitrarily or unreasonably. In such a case, an action would lie. Whereas an Act may allow a Minister to revoke a license, the law will not allow him to do so unreasonably or oppressively. In such a case, the judges become involved with the merits of discretionary action, finding their warrants in the implied intention of Parliament and the Constitution and invoking both the letter and the spirit of the law.

Another foundational principle of administrative justice is the principle of natural justice. Just as the principle of reasonableness and its corollaries can be used to control the substance of an administrative decision, so the principles of natural justice can be used to ensure procedural fairness. This fundamental principle of law has crystallized over the centuries into two rules: (1) that no person should be a judge in his/her own cause and (2) that no person should suffer without first being given a fair hearing - the *audi alteram partem* rule.

Under the first rule, the decision of a collective body or tribunal will be invalid if any person who has participated in it might be thought to be prejudiced or biased. Procedural fairness demands that a person or body that has to make a decision should not be biased or prejudiced in such a way as to preclude a fair assessment of the arguments advanced by the opposing parties. Actual bias need not be proved but an appearance or risk of bias will be sufficient, so

as to preserve the integrity of the decision making process. The obvious justification for this rule is that a disinterested party is more likely to give an accurate decision in a case. It is also intended to generate public confidence in the decision-making process.

Bias or potential bias may be established in a variety of ways which I cannot delve into here due to time constraints. An interesting application of this rule was made in the *Pinochet* case where a decision of the House of Lords was set aside because one of the judges was a member of Amnesty International which was one of the parties in the case.

Under the second rule, an administrative body that has the power to make a decision or take action that would adversely affect the rights or interests of a person has an obligation to give notice of the intended decision or action. This rule can be applied in a variety of areas such as compulsory acquisition of property, refusal or revocation of licenses, dismissals, etc.

MECHANISMS FOR PROMOTING ADMINISTRATIVE JUSTICE

Various procedures or institutions have been used to review the acts, decisions, determinations or orders of individuals and bodies performing public functions. The issue as to which institutions or procedures are best suited for dealing with public decision-making has been hotly debated for sometime. Internal controls and grievance mechanisms and procedures may be put in place to control administrative action. However, there are a number of difficulties inherent in this approach. Chief executives and senior administrators cannot always monitor effectively actions taken by their subordinates. Alternatively, there may be a reluctance on the part of public officers to expose their own misdeeds. Moreover, where the action complained of involves the exercise of a discretion, it will be the manner in which the discretion has been exercised or the quality or merits of the action taken that will be in issue. In such cases, external mechanisms to resolve the dispute would seem more appropriate.

In some jurisdictions, special administrative courts or tribunals have been established to resolve disputes between citizens and administrative agencies. The status and functions of these courts are similar to those of the ordinary courts of the land. There are many who prefer the special tribunals to the ordinary courts in the quest for administrative justice. They offer the important advantages of speed, informality, and of being relatively inexpensive. The tribunals also have expert and specialised knowledge which a court with a wide general jurisdiction may not have. They also offer the advantage of being able to develop a coherent and distinct body of administrative law. However, they are invariably themselves subject to judicial review.

Access to the courts has always been an important avenue for citizens who are aggrieved by the decisions of government. There are those who argue that the courts are not suited to resolving every kind of dispute between government and the citizen. It is argued that "modern government gives rise to many disputes which cannot be solved by applying objective legal principles

and standards and depend ultimately on what is desirable in the public interest as a matter of social policy.”

The formality of the courts, the heavy case load, the delay inherent in the judicial process in some jurisdictions and the lack of a sound appreciation of social policy legislation and decisions are some of the reasons why some contend that tribunals are preferable to the courts. It is, of course, not possible to make general or sweeping statements on this issue because in the final analysis much depends on the competence and independence of the judiciary in any given jurisdiction.

In England, it is only within the last 30 years that judicial review of administrative action has attained a respectable position in English jurisprudence. Earlier judicial attitude had been one of restraint. All that has changed. The number of applications for judicial review has been rising steadily and the jurisprudence on the subject has been enriched by this new trend.

The use of public inquiries continues to be an important step in the process by which certain decisions are made in public administration to ensure administrative justice. They have been used in areas such as land development generally, but especially in compulsory purchase of land that is needed for public purposes, construction of motorways or a new town etc. The objects of such inquiry are (a) to protect the rights of citizens who might be affected by the proposed government action by giving them an opportunity to raise objections to the proposal; and (b) to enable the authorities acquire all relevant and material evidence to make an informed decision. This procedure obviously promotes transparency and enhances open government.

In many jurisdictions the primary mechanism that has been used to monitor and control the excesses of governmental power is Ombudsman institutions. In many countries of the developing world, there are different types of Ombudsman institutions established to deal with acts of administrative injustice on different themes or subject matter. For example, in England there is a Parliamentary Commissioner, a Health Service Commissioner, Building Societies Ombudsman, Legal Services Ombudsman, a Local Government Ombudsman, the Prisons Ombudsman etc.

I shall now examine the Ghanaian experience in promoting administrative justice from 1966 to the present day.

Administrative Justice and Democracy: The Ghanaian Experience

I would like, at this juncture Mr. Chairman, to connect the foregoing discussions to Ghana's experience in promoting administrative justice and ensuring its entrenchment in our country. Our experience in Ghana finds that administrative injustices reflect and generate corruption, with all the market inefficiencies produced by corruption.

Administrative injustices also weaken nation-building and equality trends. Together, these forces constitute a significant threat to democracy and good governance as well as the cultivation of a human rights culture. These evils are antithetical to the principles of transparency, probity and accountability which are vital to combating corruption and they undermine democracy and human rights.

In Ghana, concern with the incidence and control of administrative injustices has a long and unbroken pedigree. As far back as 1966, following the overthrow of the government of President Dr. Kwame Nkrumah, the military junta of the National Liberation Council established the Expediting Committee as a miniature Ombudsman to look into complaints of administrative injustices, largely in the form of executive excesses, perpetrated by Nkrumah's civilian dictatorship. The Committee chronicled and redressed a wide variety of administrative injustices, including capricious and summary discipline, sometimes without the courtesy of adducing reasons for the executive actions taken against the victims.

The Ombudsman Act (Act 400) of 1980, which was provided for by the 1979 Constitution, gave the Ombudsman the mandate of investigating 'all acts of commission and omission by the Public Service.' It also mandated the Ombudsman to 'make recommendation for corrective actions', and 'to submit annual reports on its activities to Parliament'.

The ombudsman was bedeviled by logistical and other constraints which severely restricted his capacity to control acts of administrative injustice. His office was not widely known and had a lean geographical spread. He was only able to open three offices throughout the 13 years of his existence. In addition, the political climate under which he operated, an era of military rule, was not conducive to an effective advancement of administrative justice.

The constitutional and statutory framework of Ghana's new administrative justice scheme holds a substantial *promise* of guaranteeing for every person or group the right to lawful administrative action where any of their fundamental rights and freedoms or interests is affected or threatened by unfair, unreasonable, unjust, oppressive or discriminatory legislation, regulation, decision or action. Thus, by virtue of Section 18(1) of the *Commission on Human Rights and Administrative Justice Act 1993*, (Act 456), the Commission is empowered to determine that a decision, recommendation, act or omission that was the subject matter of an investigation by the Commission

a. amounts to a breach of any of the fundamental rights and freedoms under the Constitution; or

b. appears to have been contrary to law; or

c. was unreasonable, unjust, oppressive, discriminatory or was in accordance with a rule of law or provision of any Act or a practice that is unreasonable, unjust, oppressive, or discriminating; or

- d. was based on irrelevant grounds or made for an improper purpose or
- e. was made in the exercise of a discretionary power and reasons should have been given for the decision.

Clearly then, the CHRAJ is empowered to transcend the legalities of a case and make a determination which accords with the dictates of justice. It is significant to note that this provision even mandates the Commission to question a rule of law or provision of any Act that is unreasonable, unjust, oppressive, or discriminating. It would also appear from the wording of Section 18(1) of Act 456 that Ghana's human rights law is quasi-constitutional and, as such superior to any other law of the land except the Constitution. This view of the semi-constitutional nature of the Ghanaian human rights legislation accords with the Canadian Supreme Court's position in respect of federal and provincial human rights statutes in Canada.

In the context of Ghana, public sector officials are constitutionally required to observe the principles of administrative justice. The right to administrative justice in Ghana is constitutionally rooted. Article 23 of the Constitution provides that:

23. Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.

It is significant to point out that this provision, appearing as it does under the broad rubric of Fundamental Human Rights as articulated in Chapter 5 of Ghana's 1992 Constitution, elevates the right to administrative justice to the status of a fundamental human right.

Undoubtedly, the CHRAJ falls into the category of 'other tribunal' from which aggrieved persons may seek redress. The CHRAJ is empowered to investigate any complaint of administrative injustice. This is provided for by Article 218 of the Constitution and Section 7 of Act 456 which include the duty:

(a) to investigate complaints of violations of fundamental human rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties (Emphasis added) .

Thus the CHRAJ has accorded administrative justice issues as much importance as human rights concerns in its activities over the years.

Another important constitutional provision relating to the exercise of governmental power is Article 296 of the 1992 Constitution. It is one of the most potent weapons for checking arbitrariness and abuse of power by public officials at all levels. Under clause (a) of Article 296 public officers who exercise discretionary power have a "duty to be fair and candid" in their

exercise of such discretion. The duty to be “fair and candid” was the subject matter of judicial interpretation in the case of *People’s Popular Party v. Attorney General* (1971) where the Court considered an identical provision in Ghana’s 1969 Constitution. The High Court ruled that the duty to be fair and candid meant that “when the police refuse to grant a permit they must assign reasons and if they fail to do so the court can enquire into the grounds and reasons for the police action.”

Second, clause (b) of Article 296 provides that “ the exercise of discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law.” Another important constitutional safeguard against the proper exercise of discretionary power can be found in clause (c) of Article 296 which provides “ for the promulgation and publication of “regulations to govern the exercise of discretionary power.” Article 296 (c) provides that “ where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power.” Where legislative regulations and guidelines have been published, the validity of the exercise of the particular discretionary power should be determined by reference to such regulations and guidelines.

The CHRAJ has reversed thousands of administrative actions and decisions by officials which it found, after thorough investigations, to be unfair, oppressive or discriminatory. It has also returned to the owners numerous assets confiscated by military tribunals established by various previous military dictatorships. The CHRAJ, over the years, have emphasised the need for administrative decision-makers to give reasons for their decisions and to adhere to the strictest standards of natural justice and procedural fairness.

Permit me, Mr. Chairman, to cite one or two of the many administrative justice cases that the Commission has handled recently. In one case a Ghanaian resident in Canada applied to the Ghana mission in Canada for a new passport. He was required to pay and did pay an amount of \$167 for the new passport which had a five-year duration period. Barely two years later, the Ministry of Foreign Affairs issued a directive withdrawing all passports irrespective of when they were issued and requesting everyone to obtain new passports on payment of a new fee. The petitioner complained alleging that the Ministry’s action smacks of “administrative impropriety, abuse, injustice or unfairness” and claimed a pro rata refund of the earlier fee he had paid. The Commission upheld the petitioner’s claim, taking the view that the Ministry’s action was arbitrary, unreasonable and unfair insofar as the directive applied to all Ghanaians irrespective of when they procured their old passport. In yet another recent case the Commission disagreed with the Bank of Ghana’s decision not to grant the owner of a Forex Bureau a license to open a Savings and Credit Bank because the Governor of the Bank claimed that it would create a situation where the applicant could siphon monies from the Bank to the Forex Bureau. The Commission noted that the applicant had satisfied all the Bank’s conditions for the issuance of a license and that the reason given

by the Bank for the refusal was an irrelevant consideration and highly speculative.

It must be stated that victims of administrative justice have frequently resorted to the Commission because the agency is generally perceived as being independent and impartial.

It must also be pointed out that the courts remain, theoretically speaking, a vital arena for, and instrument of, redress for impugned administrative actions. Indeed, Article 33(2) of the Constitution entitles any person to apply to the High Court for redress where that person alleges that a provision of the constitution relating to his or her fundamental human rights and freedoms, including the right to administrative justice, has been or is being or is likely to be contravened. This entitlement, it must be stressed, is available without prejudice to any other action that is lawfully available to that person. And the High Court may, upon the application, issue such orders, directions or writs as it deems appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person concerned is entitled. Among such directions, orders or writs are those in the nature of *habeas corpus*, *certiorari*, *mandamus*, prohibition and *quo warranto*.

Article 33(3) of the Constitution also provides an avenue of appeal to the Court of Appeal for any person aggrieved by the determination of the High Court, with the right of a further appeal to the Supreme Court.

Thus, although Ghana lacks an explicit Judicial Review Act, the citizen's right to administrative justice through the courts is effectively guaranteed.

It must be conceded, however, that the Ghanaian judiciary has historically played a less than significant role in the control of administrative action. This unfortunate state of affairs is probably due to the fact that, prior to the establishment of constitutional democracy under the Fourth Republic in 1993, the nation, for the most part, had groped in political wilderness under dictatorial military regimes which had no appetite for intervention by the judiciary or any other institution in the decisions of the executive.

Resource Constraints and Other Challenges in Promoting Administrative Justice

The birth of a new democracy is frequently characterised by the creation of a myriad of constitutional and statutory bodies designed to give effect to the yearnings and aspirations of the people for more and better of all that is good in a democracy; greater human rights and freedoms for the citizen, socio-economic development (including improved access to good quality education, housing, health and employment); greater and better transparency and accountability; freedom of expression, including media freedom, and greater civil society participation in governance.

Thus, in Ghana for example, in addition to the traditionally- recognised institutions of democracy, namely the legislature, the executive and the judiciary, our 1992 Constitution has mandated the creation of several national institutions designed to support democracy and good governance. Among these are the CHRAJ, the National Commission on Civic Education, the National Commission on Children, the Electoral Commission, the Media Commission and the National Development Planning Commission. The functions of these cognate agencies are self-evident from their names and warrant no elaboration here. The resources required to support the work of these democracy-enabling institutions in order to render them effective are truly enormous.

Yet, such resources are scant and are rarely sufficient or released in time as demanded by the practical operational necessities of the institutions. It is no secret that governments sometimes play financial football with financing for democracy-enabling institutions; sometimes they play one institution against the other. And as the Akan people of Ghana say 'the chick that is closest to the mother hen gets the thigh of the grasshopper.' Moreover, the work of institutions such as the CHRAJ do not bring votes to governments or bear them any immediate tangible returns. Public education on human rights and administrative justice issues, while supporting democracy in the long run, can be terribly unsettling for governments in the short-term.

Funding for democracy-enabling institutions is not matched by popular expectations and good will which often attend the birth of such institutions. In addition to inter-agency competition for funding from governments, such agencies also compete with NGOs for supplementary project or core funding from the donor community.

The practical effects of such resource constraints include inadequate personnel; delays in administering justice in a timely manner; low employee morale and high staff turn-over, difficulties in prioritizing agency goals and in meeting established timelines.

When you multiply the Ghanaian experience by the number of African, Caribbean and Pacific countries undergoing democratic transformation in the last decade or so, you begin to appreciate the enormity of the challenges faced by democracy-enabling national institutions in Africa in securing funding from the international donor community. A corollary to the challenges of securing funding from external agencies is the potential impairment of agency neutrality, impartiality and independence. These are real pitfalls which we must watch out for.

And what does an agency such as the CHRAJ do when it faces the prospect of having to investigate a donor agency that is accused of administrative injustice by its local staff. The potential for public apprehension of bias is real and must be seriously considered when deciding on the nature of funding which must be allocated to independent statutory administrative justice agencies.

Ghana's 1992 Constitution ensures that the administrative expenses of the CHRAJ, including salaries, allowances and pensions of staff of the Commission are charged on the consolidated fund. The Commissioner and Deputy Commissioners enjoy the same terms and conditions of employment and tenure of service as those of an Appeal Court judge and High Court judges respectively. These constitutional guarantees serve to insulate the Commission from direct financial and political control by the Government. Most importantly, Article 225 of the Constitution provides that the Commission and the Commissioners shall, in the performance of their functions, not be subject to the direction or control of any person or authority.

These safeguards have served to ensure the complete independence of the CHRAJ in its quasi-judicial functions. For instance, pursuant to its obligations under the Constitution and the enabling Act, the CHRAJ, in 1995, successfully investigated allegations of corruption against several senior government officials, including cabinet ministers, some of whom subsequently lost their jobs as a result of the CHRAJ's adverse findings against them.

The CHRAJ has also reversed thousands of administrative actions and decisions by officials which it found, after thorough investigations, to be unfair, oppressive or discriminatory. It has also returned to the owners numerous assets confiscated by military tribunals established by various previous military dictatorships. The CHRAJ, over the years, emphasised the need for administrative decision-makers to give reasons for their decisions and to adhere to the strictest standards of natural justice and procedural fairness.

One of the most formidable challenges facing the new democracies in Africa in ensuring a regime of administrative justice is the task of breaking the hard crust of authoritarianism, despotism and high-handedness of a historically uncontrolled and relatively unaccountable and opaque public service which has become an entrenched part of the bureaucratic culture. This untenable situation is rendered even more daunting by the triple menace of extreme poverty and illiteracy, ethnocentrism and exclusion, and mounting corruption and lack of governmental will-power to address these challenges. For these problems feed on and into each other, and fuel the flames of administrative injustices and broad-based human rights violations. In such an environment, individuals and groups adversely affected by unjust administrative action have little motivation to seek redress through officially independent and impartial tribunals or courts; they have no desire to expend their scant energies and resources in pursuit of administrative justice through state institutions which are, in fact, controlled by corrupt bureaucrats. Such individuals and groups have, in such circumstances, more incentives to acquiesce to unfair treatment.

Public ignorance of available redress mechanisms, such as those provided by the courts and the Commission on Human Rights and Administrative Justice, is another significant challenge facing the promotion of administrative justice in developing countries. This lack of awareness can only be effectively tackled through well-planned and comprehensive public education programmes that

take into account variations in socio-cultural, linguistic and literacy levels among our peoples. This requires money.

In an era of dwindling financial resources, human rights commissions and administrative justice agencies must explore creative ways of balancing rights and responsibilities and expanding the scope of public appreciation of human rights in all its dimensions. Collaboration and networking with cognate statutory bodies, such as the exemplary partnership between the South African Law Commission and the South African Human Rights Commission in staging and sponsoring this workshop, as well as co-operation with credible NGOs which possess similar goals, is one sure way of overcoming the financial crunch and the politics of negative competition in sourcing for funding.

Lack of judicial independence, reflected in governmental control and interference in judicial decision-making, threaten the future of administrative justice in some of our new democracies. For governments which have become accustomed to direct and naked interference in the dispensation of justice by the courts and tribunals, return to an inclusive and civilian democracy does not necessary result in departure from established and proven tactics of dominance and control.

Conclusion

In closing, Mr. Chairman, I cannot over-emphasize the centrality of administrative justice to an open and accountable government. No doubt, it is this vital recognition that propelled the framers of the South African Constitution to include a provision requiring Parliament to enact an administrative justice legislation within three years of the coming into force of the Constitution. Without a firm foundation in administrative justice, Ghana's young democracy, as those in the rest of Africa, cannot flourish, for administrative justice and human rights are twin bed-fellows of democracy in the modern world.

Mr. Chairman, Distinguished Ladies and Gentlemen: I thank you for your kind attention and for this opportunity to speak to you. I wish you all fruitful deliberations in this urgent and important endeavour

Thank you.

PROF HUGH CORDER:

Thank you very much Chair, and thank you for this opportunity to be here this morning to talk a little bit about the work which has been going on, particularly under the auspices of the Law Commission, in the last six months. Andrew was introduced as the Chief Researcher, the only researcher, the only part-time researcher, the only very part-time researcher for this project. I thank the Human Rights Commission for the opportunity to be here this morning, to talk to some aspects of the drafting process of the Bill.

I am going to talk about the process and refer to one or two aspects of the content of the Bill and Andrew is going to make some remarks in response to, in reaction to, the Bill itself. Let me say that, although not all of the members of the Project Committee could be here today, (two of them are actually abroad at the moment), this is obviously a wonderful opportunity and we welcome this for further comment within the context which I am about to describe. I think it would be accurate to say that this Bill is 'the end of the beginning' and, I would hope the 'beginning of the end' in regard to Administrative Justice in South Africa. It is the end of the beginning in this sense: Any person involved with administrative law in South Africa in the past 50 years or so, but particularly in the last decade, will know the very powerless state in which administrative law finds itself. Anyone involved in Administrative Justice, as it was under Apartheid, will know the generally unaccountable ethos, if one could elevate it even to that level which characterises the public administration in South Africa at more or less all levels, and will know the abysmal record of the courts in using their power of judicial review under the common law to limit and regulate and hold accountable the work of the Public Administration, particularly its discretionary power in the socio-economic sphere and in the security sphere. This was present in the minds of almost a hundred Administrative lawyers and Public Administrators and people who are now part of government and part of cabinet when we met at a conference in this venue, but not in this particular hall, in February 1993 and again in March 1996 in two conferences which focused on advancing the reform agenda of Administrative Justice in South Africa.

Documents or statements of purpose were produced from both of those occasions and in a sense the first Breakwater Conference of February 1993 materially influenced the Constitutional Negotiations at Kempton Park during the rest of 1993. Although the proposal to include a right to Administrative Justice even in the Interim Constitution was completely uncontroversial across the political spectrum, the content of that right was controversial. You will know the result was a relatively convoluted right, Section 24 of the Interim Constitution, which is still in place, because in the drafting of the final Constitution as you also would know, the right to Administrative Justice (and I dare say the right of access to information) was under considerable threat of their possible exclusion from the final Constitution.

The result of this threatened elimination of the right and its lowering in status merely to rights under legislation, was the uneasy compromise which we have

in the Final Constitution Section 33, and in regard to access of information Section 32, and the suspension of each of these rights, the continuing validity of the rights under the interim constitution and the command that legislation be drafted within 3 years of final coming into force of the final Constitution. The date then was February the 3rd, therefore February the 4th next year is the cut-off point for the three year invitation or mandate to parliament to draft the legislation.

Failing any legislation being passed through parliament in either the access to information area or the administrative justice area by the 3rd of February next year, the rights in Sections 32 and 33 kick in to their full extent. There can be no doubt about the further possible chaotic effect that that might have on the South African Public Administration for all levels of government.

In regard to open democracy you will know that the drafting process began in 1994 and was essentially completed in 1996 and that the Bill has been kicked around like a football in parliament and the cabinet ever since then.

In regard to Administrative justice, for a number of different reasons which we needn't go into here, the Minister, (the former Minister of Justice), delayed in appointing anybody to consider drafting the Bill which you have before you (in the orange folder) and which has already been referred to at length. Until effectively January this year, the first indication of action was the appointment of a project committee which was convened in December last year, about two weeks before Christmas. When we met therefore on the 15th of January, and I think this is vital to understand, we clearly faced the question 'What do we do?' Four of us are on the project committee, all of whom who are obviously part-time, involved on a part-time basis and we have a part-time researcher. We knew that we'd have to have a Bill ready by late August, so in six weeks time we've got to have a Bill ready if it hopes to make the parliamentary, legislative process cut-off point before February next year.

We then took the decision which you are well aware of, to go right ahead, produce a Bill quickly, but a Bill which wasn't produced either in a weekend or in a couple of weeks, a Bill which was the product, if anybody knows their Administrative law in South Africa, of seven years at least of reform and consideration at many conferences and other events. We decided to put out a Bill as a challenge to those interested in the area in South Africa and get reaction to it, and that reaction came. You have a select number of reasons in your papers, but there were more than 850 pages of comments which came from various people. The reaction that you have in your papers represent one side of, let's call it a bipolar reaction. Generally those in Public Administration and positions of public power said "You guys are mad" and that word was used, "You guys are mad, you've gone too far, we can't possibly do this, this is going to lead to the end of government Public Administration as we know it." On the other side, and these are the papers particularly which you have among your papers for this conference, there is a very strong and a clearly argued consistently put forward proposal from those who represent the interests of groups and people who suffered to varying degrees under the Public Administration in South Africa, saying "You haven't done enough. You

must go further, we need greater safeguards etc. etc.” Those in general terms were the two major thrusts of the reaction but there were very surprising ones as well because we had from any number of government departments and Public Administrative bodies, wholehearted support for example the Sun Setting Proposal, the proposal that all regulations should cease five or ten years after the coming into force of the Bill, cease validity and have to be remade. So we put out the Bill, there was a very short reaction time to the end of March, but there was a substantial reaction and we’ve continued to get reaction and that has all been factored in. We held a series of very well represented, very well attended and thoroughly constructive and useful regional workshops round South Africa in June. We were going to hold them in late May and early June and then the election came around and so we held them in mid June, in Pretoria, Durban, East London and Cape Town, all of which factored in to a major degree in the revision of the Bill into the form that you have in front of you now, the revision of the 21st of June which hasn’t been adopted by the full project committee but reflects the reaction from the public workshops.

Just last week the project committee and a few others met on a private occasion close to London in England which brought together leading Administrative lawyers from many parts of the Commonwealth, the United States as well as Africa, in a closed workshop which again examined this Bill exceedingly critically. As a result of which, I can tell you, without going into any detail, because there isn’t a detailed document ready yet, we are going to try and work on that next week, which is why again input from this forum will be so important, but the Bill is going to be revised much further. I should tell you the particular area which is going to be substantially revised is what is currently chapter 2 in the Bill, clauses 2 to 7. That is the process.

If I can just make three remarks about the Bill, maybe four, following the former speaker. What we endeavoured to do in the Bill was to fulfil the Constitutional mandate. I think that is incredibly important always to keep in mind. Section 33, (1) (2) and (3) of the Constitution demand certain things of this legislation. It doesn’t say you can’t go further, (I am not saying we have gone further), but demands a basic minimum in this Administrative Justice Act. Some people in reactions earlier on said ‘You’ve gone too far’ but in fact their criticism consisted of asking us to do less than the Constitution demands. But what we have attempted to do in the time at our disposal is to create a basic platform which satisfies the Constitutional mandate, while at the same time pointing many fingers or arrows in the direction of a future reform agenda in the area of Administrative justice. How to do this, when you don’t have the basic data at your disposal in terms of, for example Administrative Appeals Tribunals. A suggestion, and it is not a plain lifting from any other legal system, although the name coincides with the Australian example with which we are very familiar, is the Administrative Review Council, seen as the vehicle for further expansion and reform in the Administrative Justice area. A certain mandate has been given (and sometimes time periods have been laid down for the fulfilment of that mandate) to the Administrative Review Council. One of the most important criticisms of the first proposal, which we took absolutely on board, was that it was too much focused on Judicial Review in the High

Court. One of the major areas is the consideration, and perhaps the establishment within the constraints of budget, of Administrative Appeals Tribunals, a network thereof or a general Administrative Appeals Tribunal. You will see in the version of June 21st, those restrictions on budget which we've already been told about by the Department of Justice and which has led to the scrapping of the idea of the central drafting office, you'll notice that. The focus of the workshops was on the scope of the broader definition of administrative action, grounds of review (and we made changes in that regard as a result of the workshops), the giving of reasons, the process for rule making and standard making and the process of public enquiries. We anticipate much further constructive criticism from events such as this and this is probably the last and the best of them to put in constructive criticism which can I say, from our own timetable point of view, from the timetable which is being imposed upon us, must come within the next week or 10 days at the most. With that I'd like to hand over to Andrew Breitenbach to make any further comments he wants to on the Bill. Thank you very much.

MR ANDREW BREITENBACH:

Thank you very much ladies and gentlemen. You have, I see from the bit that I attended this morning, already been given a fair indication of what the Bill contains so I won't take you through it in detail. I think that a better proposal might be if I were to highlight a few issues which I think are important and controversial and then to, with the Chairman's permission, open the floor to questions so that we can have a discussion about the controversial matters and any other matters that you might wish to consider.

There were several important points of departure which the committee has adhered to when drafting this Bill and in revising it. The first is that the right to Administrative Justice doesn't apply only to the public administration but also to important private bodies which exercise public powers or perform public functions, so we have a Bill which focuses both on the Government, the administration and on non-State Actors exercising public powers and performing public functions. Generally speaking that innovation has been welcomed and it is in line with the common law which in various ways has made the same types of norms, particularly in the context of fair hearings applicable to non-State Actors we call public bodies. Consistent with that the definition of administrative action has been kept broad to cover the field. There are some exclusions and there is some debate about those exclusions but as regards the Government or organs of State, the idea was that the Bill should reach across the entire public administration, across the entire Government and should lay down certain basic norms and standards for public administration. Of particular importance then, is the definition of administrative action and its allied definition of administrator.

The second principle was that the Bill would contain a number of substantive provisions establishing what we consider to be a threshold or a minimum, and then, as Prof. Corder has indicated, provide a programme to consider those matters which we consider are essential for a proper balance between legal regulation and freedom of action as regards administrative bodies generally in order to allow for the balance which the constitution sets up between the checks on the administration or on the administrators on the one hand and effective Government on the other. Now that programme is essentially to be found in the functions prescribed or given to the Administrative Review Council in Section 17 of the Bill, a very important section. The reason why the matters which are listed there have not been dealt with directly in the Bill, is that we considered that it would not be possible sensibly to deal with matters such as the viability of establishing administrative appeals tribunals. I'll just refer you to paragraph C2 on independent tribunals to review administrative action without carefully analysing what the current state of play is as regards internal appeals, there are many.

The first Law Commission Report on this matter, (I think it was 1991), Hugh detailed in many pages, I can't remember precisely how many, 15, in the form of a list existing administrative appeals which are created by statutes. All of these will have to be considered and the viability of, for example, establishing a generalised administrative appeals tribunals or a range of specialised

administrative appeals tribunals or other forms of dispute resolution mechanisms must then be investigated in the light of that information. The reason for that is that it's an inherently complex area, the administration spans a vast sphere of human activities and so the subject matter of the decisions which would be appealed against would vary greatly. There would be costs and budgetary implications which would have to be considered and of course Governmental efficiency considerations which would always have to be considered, particularly in the current period where the Government has an enormous task to address the sorts of problems to which Prof. Morgan was referring in his discussion on the whole question of review and appeals towards the end of his speech. So there are substantive matters dealt with in the Bill and then there's a programme for a body which we consider as extremely important, some form of standing commission: an Administrative Review Council is what we've called it. We've indicated that there have been difficulties raised as regards the funding of this, the possibility of its being a specialised unit within the Law Commission has been mooted and that may be its institutional structure but some or other ongoing review of the entire area of administrative law is going to be necessary in order to ensure not only that the substantive parts of this Bill work properly, in other words to review the operation of this Act, and also to deal with matters which have not been dealt with in a substantive way in the Act in order to optimise the balance between the rights of the individuals, checks on the administration and the need for effective Government, the two main competing considerations in this field.

As regards the substantive matters, what the Bill does, firstly, is to provide for judicial review administrative action. As Prof. Morgan has indicated, the central or key provision there is Section 7 which sets out the grounds of review and I'll say something about that in a moment. Allied to that are two provisions dealing with the procedure for review which essentially lays down time limits within which review proceedings must be brought, a controversial matter, and also remedies. Generally uncontroversial, although there are points of dispute about certain of the remedies which have been provided, for example the remedy of damages is a controversial one.

Judicial review, and in particular paragraph C, 71C of that definition, is not detailed. That is the ground which says simply, "The action is procedurally unfair". What the Bill does in Sections 3, 4 and 5 is provide for specific types of administrative procedures. We've styled them administrative investigations for the moment, public enquiries and procedures for making rules with substantive effect in an attempt, in other words, to capture three types of administrative or standard types of administrative decisions and to lay down basic procedures, fair procedures to be followed in relation to each. Again a controversial move. There are those who say that it's not possible to classify administrative action in this way, one over-simplifies or over-generalises when doing so and as Prof. Corder has indicated, this is one of the provisions in particular which received attention at the International Workshop last week (which I didn't attend) and proposals have been made to perhaps soften, make them less rigid but, nevertheless, useful mechanisms conducive to fair administrative procedure. Allied to that is the provision in Section 6 dealing with reasons for administrative action. At common law there has for many

years been a debate whether fair procedure requires that reasons be given, it's a debate which is evidently flawed. The constitution has put the law in South Africa beyond doubt, reasons must be given and this Bill must give effect or this Act must give effect *inter alia* to the right to reasons for administrative action and that's what we seek to do in Section 6 of the Bill.

The last aspect of the Bill which I wish to address briefly before dealing with one substantive matter arising out of the grounds of review and then going to questions, is chapter 4 which deals with rules and standards. This chapter contains a number of provisions (and we won't look at them in detail unless questions arise), the main purpose of which is to make the law accessible. Accessible in the sense that it's intelligible and clear, can be understood, and accessible in the sense that people know where to find it. In this regard we work with two concepts: rules and standards which are defined in the definition section to mean, respectively, norms which have the force of law and norms for guidelines indicating how discretions should be exercised or how the law should be interpreted and applied. In other words, rules of law are rules and standards are the sort of documents, that we all know exist, that informed for example front line administrative offices saying that Department of Home Affairs who may be admitted to the country and who may not be admitted to the country (if that decision can be taken by them, it can't as it happens it's taken by specific Boards in terms of the Alien's Act, Alien's Control Act), but the sort of documents that we know that administrators keep in the drawer which indicate with a great or lesser degree of specificity how they must exercise their discretion or what a particular law means. In practice, that document, that standard we've called it, guideline, circular whatever it may be called by the particular administrator, is a very important yardstick. It's very important from the point of view of the administrator and also from those subject to the authority of the administrator. Now what chapter 4 aims to achieve is to, through registers of rules and standards through provisions aimed at ensuring that the text is intelligible and through a provision which provides for the automatic lapsing of rules and Standards after a particular period to ensure that there isn't any secret law, to ensure that there isn't any unintelligible law, in other words to ensure that all citizens have an opportunity to have access to the law so that they may know what the law is by which they are governed.

The substantive matter relating to the grounds of review which I'd like to address briefly is the very difficult question of the distinction between review and appeal. Prof. Morgan dealt at some length at the end of his presentation with this aspect and I would like to say at the outset that the committee has attempted to maintain the distinction between review and appeal. We do not see judicial review as full-blown appeal in respect of or against the decisions of administrators. Parliament entrusts power to particular administrators and they are the people who must perform the tasks concerned. The Rules of judicial review aim to ensure that when exercising that power or, firstly, that the right bodies exercise the power and secondly, when doing so, that they stick within certain basis rules of fair play and basic rules of rationality and reasonableness. In the common law, that statement has been crystallised into a number of very specific grounds of review and as Prof. Morgan

indicated, what we've attempted to do here is to work with the common law so that the courts can use that, build on that when dealing with this, but at the same time we have sought to address some of the more difficult questions, one of which is: How far courts can go, how hard a look they can take at the substance of administrative decisions. He pointed to paragraph 71D which says that a Court may review administrative action if the action was materially influenced by an error of law or fact and I think with particular reference to the words "or fact" it is argued, and I think correctly that that provision goes too far in the direction of an appeal. It is likely, very likely, that those words "or fact" will be removed from the next draft which the law commission project committee produces. The reason for that is that in review proceedings in this country, depending on the nature of the decision concerned, the standard of review is either whether there is some evidence and that is generally in a discretionary context where there isn't a fixed standard to be applied or in cases which are adjudicative type cases, for instance reviews of court martials or disciplinary proceedings whether there is reasonable evidence. Those are the standards which have emerged over the years in the common law and we have in any event attempted to capture that elsewhere in F3CC where we say as a ground of review that the action itself is not rationally connected to the information before the organ of State or natural juristic person concerned. In other words we have laid down there what I think, properly speaking, is a no-evidence test, a test which requires some evidence but not merely that, all of the evidence must rationally relate to the decision. If there is some evidence which points in favour of the decision and the overwhelming remainder of the evidence doesn't, then one could argue that the decision is not rationally related to the evidence, so one focuses then on the connection between the facts before the decision maker and the decision itself and not necessarily on the factual correctness of the decision. Administrators must be free to make mistakes provided that they act for example rationally or reasonably or fairly when doing so. We will retain the ground materially influenced by an error of law because in this country that has always been a ground of review most recently explained by the Supreme Court of Appeal in the case of HIERA v BOOYSEN. What that has been interpreted to mean by the Supreme Court of Appeal is that the administrator mustn't so misconstrue the provision in terms of which he or she is acting that he asks the wrong question and as a result that the decision is not supported by the evidence. Again we would suggest that that would then be looked at in the way set out in F3CC: that it's not rationally supported by the information before the decision maker simply because the decision maker misconstrued the statutory provision altogether. Thank you very much.

MR JONATHAN KLAAREN:

Thank you. I'm speaking now on the topic I was given of "Grounds of Review". I want to start out with the two different models of Administrative Justice and then go on to speak specifically about Section 7 in the Administrative Justice Bill which is the section that talks about "Grounds of Review".

Just to talk about two different models of Administrative Justice, I think South African Administrative Laws had long had a classic view about what Courts are there in order to do. This is the model that Courts are there to protect citizens against Government and particularly against Government's abusive power by going beyond the mandate that Government executive officials were given by Parliament through legislative statute. This is the *ultra vires* model of Administrative justice and I think this is part of what lies behind a negative view of non-accountable bureaucrats. I think it relates into the discussion that Allison Tilley was having with the panel that came up here before about the difference between negative and positive views of how Government is to operate.

Now this classic model as we all know really didn't work. Courts did not in fact protect citizens against excessive abuse of power during apartheid. Indeed they didn't even recognise many of those persons as citizens and I think that some of these problems have obviously been solved by the Institution of the Bill of Rights. For instance, we now recognise that all persons here are citizens and indeed our Bill of Rights goes further and talks about persons as well as citizens. There really are fundamental problems with this model of Administrative Justice and they relate to the fundamental character of Courts as a way of promoting the Bill of Rights, that Courts are in fact a weak institution for protecting these kinds of Rights. That's why in this conference and discussion we're talking about other ways of promoting Human Rights and we're talking quite a bit about the involved municipal society in so far as Administrative Justice and the right of access to information are concerned. We're also talking about codes of conduct and tribunals, we're talking about external monitors, that's what the Human Rights Commission itself is, a State institution supporting constitutional democracy. We can also, we haven't spoken a whole lot about it, but we also need to remember the political oversight that the whole idea of having a representative Parliament that will make some of these choices and indeed have oversight of Administrative Justice is important to keep in the mix.

Now it's also true that this classic model of Administrative Justice as, I think, Prof. Morgan was pointing out to us this morning, is mostly concerned from the common law point of view with protecting rights such as the rights of property. The involvement of the Courts in terms of socio-economic Rights and Rights of the poor is not something that fits easily within this particular model and I think that's the theoretical point that we actually need to move from this *ultra vires* model to a different model of Administrative Justice. We need to look at a Rights regarding model or a Rights reinforcing model and that says that some of a Court's role can be through the adjudication of the

other fundamental Rights within the Bill of Rights, but that there is also a role that Administrative Justice plays with regards to the Human Right of accessed information and the Human Right of Administrative Justice, so fundamentally what we're doing. I think it's an entire different way of thinking about Government action and Administrative Justice in relation to that Government action in terms of Human Rights. That's an entirely different way of looking at it and I think it's an important way to keep in mind.

Okay, that's the theory, now if I look at our two Bills so far, I think that there's certainly a fair amount of this kind of Rights thinking that's in the Open Democracy Bill, we've talked about that yesterday. The Rights regarding model or theory, however, does not come through as strongly in the Administrative Justice Bill. Now this is particularly the case in the part of the Administrative Justice Bill. I'm looking at which is the Grounds of Review and I'm looking at Section 7 which is essentially a codification of the common law grounds of judicial review or at least that's what it's purporting to do. I think it's worth while to take, to actually go back for a second and say this may be a magnificent intellectual achievement, I don't mean to take those words entirely out of context Prof. Morgan, but we also need to ask why are we doing this. Academics often have magnificent intellectual achievements but they don't go anywhere. We're talking about something that's quite practical and I think we need to keep that in mind especially when we're talking about promoting Human Rights.

I think basically there'll be three reasons why one would codify the Grounds of Review and that would be three practical reasons. One would be to make clear to the administrators what are the constraints that they operate under, what are the Grounds of Review? That would be a principle and a good reason for having a codification of Grounds of Review as we have in Section 7 here. A second reason would be the constitution might require it. It might be that in terms of the 1996 constitution that we're presently operating under that we are in fact required to codify these Grounds of Review and then the third one might be that Parliament, the legislature, wishes to use its power to in fact change the Grounds of Review that they are in some sense dissatisfied with the Grounds of Review as they presently exist and that Parliament wishes to actually change those Grounds of Review. I want to argue that in the present situation, none of those reasons are present or at least that they're not present in any very strong form and that therefore extensive codification such as we have in this Section is not called for.

In respect to the first, the idea of having clarity for administrative officers, I think, picking up from the Black Sash's submission, it is to some extent impossible to actually specify the grounds of judicial review. I think we've had discussions here in the panel about precisely what these words mean and we realise that lawyers can actually debate quite minutely over what or what these words don't mean, so I think if we feel that these Grounds of Review are really capturing the essence for administrators that may not be true. Then in fact we do better to talk about positive commands and to think about codes of conduct or at least phrasing these Grounds of Review positively and perhaps in more simple language.

A second point is that this is an open list of Grounds of Review, okay, there was a big debate about whether this should be a closed list or an open list. It's an open list which basically means that the Courts can add to it at any time that they want to and that fundamentally means that an administrator is not certain of whether they've actually done actions correctly or not. There's always the possibility that the judge, or a Court, is going to review their action.

In terms of the Constitution requiring codification which was the second reason, it's not constitutionally required. There are two decisions by the Constitutional Court, Fedsure Life Assurance and Commissioner of Customs & Excise v Renfreight. The second one is the Supreme Court of Appeal decision delivered at the end of May and it essentially says that the common law grounds of review are not constitutionalised, they continue to exist, so in that sense the legislature is not required as a matter of the constitution to involve itself extensively in this codification of Grounds of Review.

And then the third reason is that Parliament could change the Grounds of Review if they are unhappy with the present Grounds of Review. I think in terms of the discussions that we had this morning with the drafters from the Administrative Justice Bill here, we heard a lot of discussion about, on the one hand, that this was merely codifying what presently exists in terms of the common law or to the extent it was not doing that, it was moving beyond, it was extending judicial review. I think we saw that in relation to the error of "Law in Fact" doctrine, it was also pointed out with respect to the "Rigidity" doctrine by Prof. Morgan. My particular thought there would be to look at the reasonableness grounds. We've got three different definitions of reasonableness, the first one has got four sub-parts, the second one has got three sub-parts and the third one is a catchall phrase. That adds up to eight different ways that a Court could say that administrative action was unreasonable. Now, it may be a magnificent achievement to put that into code but it may also be something that is going too far in terms of extending judicial review and, for precisely some of the reasons Prof. Morgan was pointing out, I think that, that is actually going too far.

I think I've only got a couple of minutes left, so one question: what would I put into its place? I think that in particular in relation to Section 7F and G which are those different definitions of reasonableness, instead of the rather extensive definitions that are there, we could have a more simple definition of unreasonableness. We've already moved from the common law: the Courts have already moved themselves from gross unreasonableness to simple unreasonableness and that's right, we need to do that. That should have happened before but it's now happened in the Constitution. In terms of codification here, I think that the first two points, this is in footnote 27, the first two factors of reasons given for the action and the information before the administrator, those two are important and are good but are not sufficient. I think footnote 27 is talking about a suggestion made by myself and a couple of other persons. I think there are two other factors that we ought to add in, in order to make a Rights regarding model of judicial review and we also need to talk about the degree to which the decision making process encourages

participation by those who are at a disadvantage in the administrative process. It is a factor in looking at the reasonableness of an administrative action. We look at the degree to which there was participation by disadvantaged communities who are usually not able to participate in the administrative process and we send a signal that Administrative Justice should be about Rights reinforcement and not about the classic model of restraining Governmental power in that sense.

The second point, and this is picking up on something that Sandy Liebenberg has suggested so I suppose that's our gender representivity, is a fourth factor is the effect of the decision on the Rights recognised in the Bill of Rights. That would be a fourth factor that one could add to a Court needing to take that into account in its review of the unreasonableness, the potential unreasonableness of an administrative action. I think if we don't do that, if we don't add participation and if we don't add the effect on human rights to this definition within this Bill then what the Administrative Justice Bill is going to lead to is lawyers making fine distinctions about Grounds of Review and not a Human Rights based discussion about how a participatory discussion about how policies will give effect to Human Rights.

PROF PHILLIP IYA:

Thanks Madame Chair. It is certainly a privilege for me to have been invited by the Human Rights Commission to make my contribution to the debate. It's not the first time that the Human Rights Commission has identified me on some of their projects. I remember participating effectively on the equality legislation and we had a lot of debate about customary law and equality and what have you, and for all that I remain very grateful to the Commission.

Coming to the debate of this morning, my role is to talk about the "Right to give Reasons". I must start, first of all, by saying that my personal contribution to this debate originates from the fact that I also serve on the project committee, some of whom were here earlier this morning, and I, as a member of staff at Fort Hare, got involved in this Administrative Justice Bill right from a very long time back. The Minister of Justice then came to our faculty and he made it very clear that Fort Hare must be effectively represented on this project. I guess one of the reasons why we felt we had a role to play as Fort Hare is our consistent commitment to the rights of the disadvantaged people and the struggle that Fort Hare has always identified itself with and so we felt we had a very important contribution to make to this Bill. It is for that reason that at the time I was the Dean of the Faculty I got involved, I participated in the earlier processes when CALS and Fort Hare were given the responsibility of initiating the earlier programmes. I took part in the London conferences, the London workshops and I'm happy to make some contribution, but I want to make it very clear that I'm not here talking on behalf of the committee, I'm only going to raise issues and probably reflect some of the thinking of the committee, but as you heard earlier this morning, the committee is really open. We are looking for ideas, we are looking for views to improve on the Bill that we have before us, so my role will be to highlight the most important issues. I may not give you the answers, but the idea is to provoke your reaction and I hope to raise those issues which I feel can provoke some thought, can provoke some suggestions to improve on the available Bill.

As the preliminary point, talking about the justification, the basis, the principle for the Right to give Reasons, I think I cannot emphasise more what was said to us earlier this morning by Prof. Morgan and then of course Prof. Corder went and gave us the background, the historical background within which we understand the context of the importance of giving reasons. But as the Chairman of the Human Rights Commission said yesterday, this is a constitutional matter, the values, the principles are laid down in the constitution and as he said, there is really nothing you can do, you have to take it as given that there are very sound reasons, there are sound principles laid down, first of all, in Section 33 of the constitution which has to be read together with Section 195 which lays down the fundamental principles and values for good governance. I think those are important aspects of the basis upon which to understand the need to give reasons.

Now I want to raise four main areas and within these four main areas I will highlight the critical issues. The first area that I want to raise is: When does the requirement to give reasons arise? Section 6 of the Bill is really the Section that gives effect to giving reasons. Now Section 6(1) stipulates the

basis of the need, the requirement to give reasons where, as it states, subject of course to the Open Democracy Act, an Administrator takes an administrative action, excluding making rules of standard which adversely affects a person's right. So, in any situation where an administrator, as defined in the definition Section, takes an administrative action which adversely affects a person's right, those are critical words. So, in a situation where those rights are affected, reasons must be given, but let us examine that clause, "Which adversely affects a person's right". Now the issue which has given grounds for debate is the view of the committee to limit what those adversely affects rights are. The argument has been "why only rights?" when certain aspects of the constitution talk about rights, but also talk about interests. Some people even go further to say, why don't we include legitimate expectations, why is it only limited to a person's rights? Now you see the thinking, the current thinking of the committee, which is reflected in the person's rights. Now when we had the workshop in England recently the view now is to move away from this restrictive person's "right" to include interests, to include legitimate expectations, but whether you agree with that or not is something which I thought I should point out as an issue.

Then the second major area is after a person's interest has been affected, what is the administrator required to do? Now again Section 6 sub-section 1 stipulates what the administrator has to do in terms of informing the affected person.

1. The administrator must, at the time of the action is taken or soon thereafter, inform in writing of the administrative action, adequate reasons and, thirdly, the right to apply for judicial review.

Now here a lot of critical issues have been raised which have been brought to the attention of the project committee. First the earlier view of the committee reflected what was known as a non-contemporaneous giving of reasons. In other words, the first position was that you don't have to take a decision and give reasons there and then, if one could give the reasons afterwards. This was criticised. Hence, we now have a new position where we think taking the action must contemporaneously involve giving reasons, that is why they say you must, at the time of the action or soon as possible thereafter, to give effect to the reasons being given preferably contemporaneously and the advantages - I didn't realise the time was so limited. The advantages of that are that the person who is taking the decision is conscientiously also aware of the fact that he has to give reason that will improve, that will guide a proper decision making process.

The other critical issue which was brought to the attention of the committee is the question of giving the information in writing. A lot of concerns were expressed that the majority of our people, 30% or thereabouts, are illiterate, how can you implement this idea of giving this in writing? That was improved by the proviso which you see on page 14 which says that, in particular, "This may be publicly promulgated". In other words the issue of alternative methods of informing the affected party is a critical issue which you might want to consider.

The third point under this major area is the question of what adequate reasons? There was a lot of debate and some people feel that this should be defined - the thinking of the committee was that perhaps we should leave it as it is and leave it to the Courts to build up what is adequate, but recently we were persuaded by the continental legislations by France. We got somebody from France and Germany who tried to give content to what is considered to be adequate reason and their view is that we should include something to the effect of relevant facts, relevant laws, which actually have a bearing on those reasons, so we are thinking of, you know, improving all those words, adequate reasons. So those are a few issues which deal with what the administrator has to do once he has taken an administrative action which adversely affects a person's rights, their interests or legitimate expectations.

The third major area obviously is the situation where the administrator fails to comply. There are two situations which you'll find, it's sub-section 2 and 3 and 4 which deals with the situation where the administrator fails to comply. The critical issue there is the question of the dates, the 90 days which are available to the affected party to want, and to request that administrator to furnish a written reason and the 90 days required of the administrator to respond after such a request have been questioned in terms of whether the 90 days are too short or too long. You might want to express your view on that. What the thinking of the committee is 90 days appears to be quite reasonable under the circumstances.

Then the other aspect of the failure to comply deals with when, in a situation where the affected person requests reasons or adequate reasons, the administrator still fails to comply. What are the reliefs available? Sub-section 4 gives you the relief that is available in a situation where the administrator fails either to furnish the reasons or fails to furnish sufficient reasons. Of course, we have had the debate about this presumption which you'll find on page 15 - I think my Colleague attempted to express the view of the thinking of the committee but certainly if you have very strong feelings about the presumption, this is the time for you to debate the issue and definitely you can advise the project committee to so decide on that particular matter.

MR JODY KOLLAPEN:

Thank you Chairperson. I'm supposed to deal with the Section on Review and Appeal and in a sense that relates to enforcement. I think in looking at enforcement, one would say that there are probably two broad categories of people in our country. There's the category of informed and resource people to whom this piece of legislation probably doesn't mean much because notwithstanding this piece of legislation they're able to enforce their rights whether it's in terms of the common law or under statutes, but then there's the other category of people and it's for them that this piece of legislation must mean something if we're going to have administrative action that is lawful and procedurally fair and I think in looking at remedies we need to look at its efficacy and its accessibility from that point of view.

In terms of the provisions of this Bill, and I think one is sympathetic to the constraints under which drafters had to work and also some of the political decisions that may have been taken, but there are major problems in terms of both efficiency and accessibility. In its current form, the primary and sole form of enforcement is through the Courts. If an applicant or if an aggrieved party does not obtain reasons in terms of Section 6(4) that person's only remedy is to approach a Court and at this stage it will be the High Court - until such time as the Minister of Justice has designated a specified magistrate's Court, the High Court is the only Court of recourse. Once you obtain your Order from the High Court you then would need to go back to Court if you wished to review that decision and the present review processes are to say the least cumbersome in terms of Rule 53. There are no less than three sets of affidavits that need to be exchanged over and above that the record of the proceedings has to be filed with the Registrar. Just from my experience as a practitioner, it could take anything from one year upward to finalise a matter in the High Court under the present rules and that clearly is not efficient nor is it providing the remedies that the law promises. So I do think to the extent that we need to look at other structures, and I'll deal with tribunals and internal processes later, the present system, for example, in not getting reasons, there should be an easier way of ensuring that an administrator is obliged to give reasons rather than having to go to Court, and in this regard perhaps the role of Chapter 9 institutions could be considered, for example, the Public Protector, the Human Rights Commissioner and the Commissioner on Gender Equality could play a particularly important interventionist role there to obviate the need to approach High Court for Orders.

It is interesting also that while generally a six-month time limit is put on bringing applications for review, no time limit appears to be set in terms of when an application for reasons is to be brought. There seems to be a contradiction there because presumably if you don't get reasons you would have the time normally allowed in terms of the common law and at the same time a six-month time period is put in terms of bringing an application for actually reviewing the decision. I think the drafters need to look clearly at that.

With regard to the Rules, the present Bill provides that the Rules Board must within one year promulgate new Rules. My colleague in the chair of this

session serves on that Board and I think that would certainly be useful if the present Rule 53 could be revised to ensure that there's a simpler procedure to ensure that matters of this nature can be re-judicated.

Let's move on to who can bring applications of this nature? Now, there are also some problems. In terms of the present draft, only an aggrieved person can seek and obtain reasons and perhaps it's understandable, but then when you move beyond that, when the Bill deals with who may approach Court, it provides that a qualified litigant may approach the Court. A qualified litigant is defined as in Section 38 of the Constitution and it's quite a wider notion of *locus standi*. Now a qualified litigant in that sense could approach a Court for an Order to compel an administrator to grant reasons, but a qualified litigant could not request such reasons and I think again there's a bit of a contradiction and that may need to be looked at. There may well be a need to allow qualified litigants in that sense to also seek and obtain reasons. It would be consistent with the wording of the Section allowing qualified litigants to approach Court. Another question with regard to qualified litigants is Chapter 9 institutions.

It possibly is arguable that in terms of its current definition chapter 9 institutions would be included under the definition of qualified litigants, in particular the section that says, "Anyone acting in the public interest", but it may not be as clear-cut and as automatic as that. A chapter 9 institution may well have to convince a Court that it does indeed act in the public interest and it may be advisable to review the list of qualified litigants to include the Human Rights Commission, the Commission on Gender Equality and the Commission on Public Protectors so that there's no obligation on them to satisfy the Court that under those circumstances where they do indeed act and intervene they do so in the public interest.

Two or three of the issues that have arisen and have been in submissions as well: the question of internal appeals. In its present formulation when there's a decision, as I've said earlier, the only recourse for an aggrieved party or a qualified litigant is to approach Court. Now the Open Democracy Bill makes provision for quite a sophisticated internal appeals system and that may be something that needs to be looked at. I do understand that the Administrative Council is given that task, the concern, however, is the time that that may take to become a reality. There is a two-year time limit with regard to internal complaint procedures and internal administrative appeals, that is two years to make recommendations. It's not clear how long thereafter those recommendations become law, become binding, it could take another two to three years, who knows. I think if it's going to take five years, and five years is not unrealistic before we have an internal complaints procedure and internal administrative appeals, the credibility and the legitimacy of this piece of legislation may well have by then already fallen by the wayside and I think we need to carefully look at that.

The question of tribunals is something that I suppose concerns all of us in a variety of different fields. At the level of the Human Rights Commission the recommendations that the Commission makes are not binding and if the

Commission seeks to enforce its findings it would have to go to Court to get an Order after having gone through the whole process. Recently with regard to debates around the Equality legislation there have been similar arguments about whether you use the Courts or whether you go for a tribunal system. More and more there's compelling evidence and arguments being presented that a tribunal system does provide for a cheap, effective and quick remedy. If that is indeed the case then I think there is certainly much merit in moving in this direction quicker and perhaps, if the law council, the Administrative Review Council is going to look at that, the Bill could place some clear time limits within which those recommendations should be made. There may be difficulties in having a tribunal dealing with the Administrative Justice Bill, the tribunal dealing with the Equality legislation, maybe an idea would be looking at a chapter 2 tribunal, a tribunal that could make determinations in terms of violations in terms of chapter 2, I don't know, that may be radical but it may be one way of rationalising the somewhat 150 tribunals that Hugh Corder spoke about.

My time is almost up. I think apart from intervening in terms of seeking reasons in terms of litigation, chapter 9 institutions can play a much bigger role. I don't come here to advance their interests, I think they have enough work as it is, but clearly in terms of Section 184(3) of the constitution - 184(2) of the constitution the Human Rights Commission has an obligation and a power to investigate violations of Human Rights and to take steps to secure appropriate redress when rights have been violated.

In our work thus far we've received numerous complaints around the violation of the right to fairness of justice and that is not going to stop notwithstanding what happens to this legislation. I think the legislation could provide an important role perhaps to ensure that the intervention that the Commission can play is recognised and perhaps highlighted. In terms of the Open Democracy Bill an educational process is contemplated, why not in terms of this one? I think it would certainly make sense.

Finally, and I think my time is up, to go to remedies, I'd like to concur with Prof. Morgan in saying that we need to review the wording in Section 9, particularly the use of exceptional cases manifests in justice. I think he's dealt with that, I don't want to go back, but I think what also may be an appropriate remedy is for the Court to have the power, if it believes at a systemic level procedures or methods don't comply with the spirit of the act, to give a directive that a department administration reviews that and within a defined period reports back to Court on steps they've taken.

I think those kind of pro-active measures certainly would be helpful. I think in general, however, this is a very useful contribution to ensuring that we get some legislation by next year. The criticisms I have are intended to be constructive and I would like to also to congratulate the drafters but I do think that at the end of the day we need to keep our eye on those who are affected most. I mean, in the past in this country, millions of people had their rights violated by an army of civil servants who were issued with Government issued pens. Some of that still happens today, be it asylum seekers whose

applications for housing are simply arbitrarily refused. At the end of the day if we want to ensure that those people have a remedy that is efficient, accessible and cheap, then we need to look how we move away from a strictly legalistic approach and an approach that ensures people are able to access, and I speak of people in rural communities who really suffer most. Thank you Chairperson.

MR TSELISO THIPINYANE:

Thank you Chairperson. Mine is actually a very simple task - to highlight the synergies between the two proposed pieces of legislation that will be discussed much more thoroughly in our group discussion. I will therefore highlight a few issues.

First of all, both proposed pieces of legislation are clearly constitutional requirements. The Open Democracy Bill (ODB) mainly deals with issues pertaining to access to information held by the State and to some extent, information held by private parties. The Administrative Justice Bill (AJB) deals with decisions or administrative actions that adversely affect the rights of individuals concerned and the provision of information therein. Both pieces of legislation, as has been highlighted before, have to be passed before the 3rd of February next year as required by the Constitution.

Both Bills equally provide for publicity around the two pieces of legislation. Under the ODB, section 5 actually requires the South African Human Rights Commission (SAHRC) to provide a guide on how this legislation operates. There is also a manual that has to be prepared by Government bodies around the implementation of the ODB. Under the AJB, there's a register and also Rules which have to be prepared by the Government bodies as well as the Administrative Review Council (see section 65 NT.11).

Both Bills provide for a right to affected persons to be furnished with reasons for decisions taken therein. Under the ODB, reasons have to be provided for refusing to give access to information, and of course for the AJB reasons have to be given for the decision or for the administrative action taken by relevant authorities. The ODB also provides that third parties that might be affected by the publication of information requested by a second party have to be notified. While there is no such provision in the AJB a similar provision should be considered. Where an administration decision has been taken which affect one person and that person is entitled to reasons therein, if that information affects the interests of another person, surely, such a person should also be furnished with relevant information.

As far as internal appeals are concerned, the ODB provides very extensive coverage around internal appeals within the departments (section 67 to 71). However, as far as the AJB is concerned the whole issue of internal appeals is mentioned only in passing. The assumption could be that there are already such mechanisms within departments but it's a point that should be considered.

On the monitoring and implementation structures under both Bills. There is the SAHRC –whose role in the ODB has already been outlined. Section 82 gives quite a lot of scope as to the role that the Human Rights Commission should play towards the implementation as well the monitoring of the Bill. Under the AJB, you have the Administrative Review Council which, to some extent, plays more or less the same role as the SAHRC and, of course, both

structures also have to report to the National Assembly. The SAHRC, in terms of Section 83 of the ODB has to present its report to National Assembly and the Administrative Review Council has to present its report to the Minister of Justice, who then has to table the report in Parliament.

One other function of the SAHRC in the ODB is that the SAHRC can assist members of the public in terms of accessing information under the Bill. There is no such provision under the AJB, but of course we all know that this is a function which is being carried out by the Public Protector to some extent. This could be another issue that needs further clarity. Should there not be a similar provision in the AJB?

Under the ODB, apart from internal appeals, already mentioned, the enforcement mechanism entails an approach to the High Court where a person does not get satisfaction from any the relevant authority. Under the AJB, the enforcement mechanism is by way of a judicial review by the High Court and the Magistrate Court. This option could also be considered for the ODB. The issue of tribunals which are referred to under the AJB were mentioned this morning as a possible enforcement mechanism. If I'm not mistaken, there is no reference to tribunals under the ODB and maybe again this is another possible viable option for enforcement of this Bill.

Regarding remedies, the ODB provides for costs as one possible remedy whereas the AJB goes a little bit further - it talks about damages also and one will wonder how come there is no similar provision under the ODB. Unfair or unlawful refusal to provide information to individuals under the ODB could lead to certain inconveniences that would need to be redressed by way of damages.

As far as regulations are concerned, the ODB provides for the promulgation of regulations by the Minister of Justice after consultation with the SAHRC with the approval of Parliament. For the AJB, there's no specific mention of regulations as such but the Rules which are to be passed by the Administrative Review Council are the equivalent of regulations, which also have to be published in the Government Gazette as provided for by sections 11, 12 and 13 of the Bill.

The last point I've looked at are sections dealing with offences. It's quite interesting that the ODB provides for criminal sanctions where certain provisions of the Bill have been violated. The AJB has no such provisions. Some people might feel there's no need to have criminal sanctions for the failure to meet the requirements of what the AJB. However, there is an indirect criminal sanction through contempt of Court, after the Courts have already made their ruling as far as the implementation of the Act is concerned.

In passing, what concerns me slightly is that, with the ODB there is a clear role for the SAHRC, but under the AJB there is no clear role of the Public Protector (save being included as part of the Administrative Review Council). Personally, I wonder what could be the rationale since the Public Protector

also plays a very important role in the promotion of administrative justice in this country.

Thank you.

RECOMMENDATIONS

A. OPEN DEMOCRACY BILL

Commission 1 - Horizontality

Discussion paper for commission on HORIZONTALITY

The Commissions are out-come driven – the discussions must result in a set of recommendations for amendments or additions to the Open Democracy Bill.

It is not necessary to arrive at consensus positions – divergent views may be reflected.

These recommendations will be included in the conference report, and placed before the Portfolio Committee of Justice when they consider and deliberate on the bills.

Delegates are invited to raise any concerns or proposals regarding the horizontal application of the Open Democracy Bill for discussion in the Commission.

The following points are designed to aid discussion. They reflect some of the concerns which have been raised in submissions regarding horizontality.

- Does the Open Democracy Bill as it currently stands pass the “give effect to” test?
- What is the most appropriate way to give “full effect” to section 32 in legislation?
- Is legislative regulation required for access to information in the private sector?
- For the purposes of the time frames, what is the meaning of “enactment”?
- If the horizontal aspect of the right is not included in the bill, how will this aspect be dealt with in practice?

Rapporteur - Ms Allison Tilley

- One of the first issues we looked at is whether the open Democracy Bill as it stands passes the “give effect to” test (in Section 32 (2) of the Constitution). It was agreed that, should Section 32 not be enacted, then 32(2) falls away and the “suspended” clause in the Constitution will come into effect.

- We dealt with the issue of unregulated horizontality and agreed that one of the main functions of the open Democracy Bill was to give some kind of shape and form to the horizontal application of this right to freedom of information.
 - There was also the question of how the Bill will apply to natural persons because there's a question of having to provide information to single individuals who are information requesters.
 - We started to look at practical implementation. There was a strong plea from business that one needed to have some kind of phased implementation of this legislation while others were concerned with the February deadline. There was a really strong call to have some kind of lead-in periods or some sort of phased-in implementation. So there was no consensus on this.
- Comments

Ms Angela Andrews

I wanted to make a comment regarding the possible suspension of provisions of the Open Democracy Act - some of us were very much opposed to suspending the implementation of the full terms of the Constitutional provision.

Mr Rowan Haarhoff

I recommend that, if the bill is extended to cover the private sector, then we avoid copying what was in the governmental sector because the sectors are entirely different.

Commission 2 - Implementation

Discussion paper for commission on IMPLEMENTATION

The Commissions are out-come driven – the discussions must result in a set of recommendations for amendments or additions to the Open Democracy Bill.

It is not necessary to arrive at consensus positions – divergent views may be reflected.

These recommendations will be included in the conference report, and placed before the Portfolio Committee of Justice when they consider and deliberate on the bills.

Delegates are invited to raise any concerns or proposals regarding the implementation of the Open Democracy Bill for discussion in the Commission.

The following points are designed to aid discussion. They reflect some of the concerns which have been raised in submissions regarding the implementation of the bill.

- Is the South African Human Rights Commission (SAHRC) the most appropriate champion for freedom of information?
- Does the SAHRC currently have the capacity to deliver on the duties assigned to it / is it sufficiently empowered / resourced in the bill?
- Should there be a lead-in period, before the Act takes effect to allow agencies make preparations in terms of training and systems implementation?

Who should assist agencies with this transition (i.e. Systems development, records-management, etc.)?

- Should the legislation be implemented through a “lead department”, who then sets standards / establishes procedures for other departments who come on line later?
- How should the government deal with the positive duty to make certain information available (section 6 - manuals and indexes)?

Could this duty not be incorporated into standard annual reporting requirements?

What is the roll of the Government Communication and Information Service (GCIS) in this regard?

- What is the impact of the bill on record-management?

Should this be used as an opportunity to develop uniform and consistent Information Technology, thereby increasing the capacity to deliver freedom of information?

Will other relevant legislation relating to record management, such as the Archives Act or other IT legislation require amendment?

- Should any changes be made to the charging regime (section 24)?

Does it adequately address cases of financial hardship?

Should the charging regime be used to discourage frivolous applications?

Should applications for personal information be free, and only non-personal information be charged for?

- Should the bill apply retrospectively? Full retrospectivity / partial retrospectivity / no retrospectivity?
- Should training of agencies be taken on centrally, by a specialised unit, or should guidelines be developed to assist agencies with their own training?

Is the mandate to the SAHRC (section 82) to train sufficient to cover the enormous number of “governmental bodies” and information officers as defined by the Bill?

Should “heads of governmental bodies” be trained, given their crucial role in determining internal appeals?

- How will “hard-hit” agencies, such as police, health, education, prisons and welfare services, cope with the time and financial burden of applications for information?

Should these agencies be encouraged to develop standard procedures for access, so-called standard or administrative access, which entails simple, standardised, facilitative and expedited access, without using the mechanisms established under the legislation? (Legislative mechanisms can back up administrative access, and kick in when there is a problem.)

- What can be done about drafting the bill in plain language to facilitate a proper understanding of its provisions amongst those accessing information, and those providing it?

Rapporteur - Mr Frankie Jenkins

- We dealt with access to the mechanisms created in the bill - will all citizens, particularly those in rural areas, know about the law and how to use it? Will people be able to reach the necessary governmental bodies in order to make requests for information? We noted the bill contains a fair number of provisions aimed at addressing these problems, such as the training of

information officers by the South African Human Rights Commission (SAHRC), the mandatory assistance by an information officer and the assistance by the SAHRC to illiterate requesters. However, we recommend that the bill also provide for training and instruction to the Heads of Departments in the relevant agencies.

- We recommend that Section 4 be amended to include a provision relating to the suitability of a designated person as information officer. This recommendation addresses the concern that the head of the department might appoint the most junior person as information officer.

- We recommend that licensing of broadcasters by the Independent Broadcasting Authority should contain a requirement that either the broadcaster partake in educational programmes concerning the Open Democracy Bill or should provide free airtime for publication of such programmes. In addition, we recommend that tertiary education institutions should be obliged to partake in street law programmes educating people about the Open Democracy Bill. These recommendations should not necessarily be in the bill, but could be reflected elsewhere.

- We agree that the SAHRC is the appropriate champion for the Open Democracy Bill. However, although the SAHRC has the will to perform the duties assigned, it is seriously under-resourced. Accordingly, there was discussion regarding whether the Public Prosecutor should share some of the public duties assigned to the SAHRC by the bill - however there was no consensus on this issue.

- We considered the exemption contained in section 41 - Records that cannot be found or do not exist. We recommend that the wording of Section 4(2)(1) be reconsidered so as not to provide this as a ground for refusal, or alternatively that the section be scrapped altogether.

- We recommend the strengthening of any archive legislation, in order to create a positive duty to keep accurate records.

- We also recommend that the bill include a penal sanction to be visited upon anybody who willfully destroys a record that has been requested.

- There was a concern that a literal reading of sections 12, 13(1) and 15 prescribe that a request for access to information must be in the form set out in the bill. We recommend that the definition of "record" in section 11(xxiii) be refined to distinguish between information which must be requested in the prescribed form, and other types of information which can be requested in manners other than the prescribed form. The SAHRC should draft a preamble to the bill, which will highlight the history and the purpose of the legislation, in order to prevent a narrow interpretation that may stifle the free-flow of information. It was agreed that hard-hit agencies such as the Police, Defence Force, Health & Welfare should be allowed to develop streamlined procedures and should not be obliged to follow the prescribed procedures of the bill for all requests for information.

- We recommend that the bill require the classification of different types of information in an attempt to prevent over the top bureaucracy. Information could be classified according to its nature into one of three classes.

1. Information for immediate publication without a request;
2. Automatic publication of information after a specified time delay;
3. Information to be made available upon request.

Such a system should prevent extensive bureaucratic involvement in all types of requests for access to information.

- We recommend that the information officer be given discretion to decide whether or not to charge a fee upon a request. The bill should stipulate the criteria applicable in exercising this discretion.

- We believe that the implementation of the bill requires a transitional period, and accordingly recommends that a provision concerning transitional arrangements should be written into the bill, allowing for a staggered implementation. An exemption provision (similar to section 6 (6)) should be made applicable to the entire bill, thereby allowing the SAHRC to decide when certain governmental bodies become bound by the provisions of the legislation.

- We recommend that the bill have full retrospective effect.

- We recommend that the bill be redrafted in plain legal language. However, we do not believe that this should delay the passing of the legislation, and if necessary the legislation could be passed in its current language style and then reworked into plain legal text.

Comments

Mr Rowan Haarhoff

We raised an important issue for the private sector that the minister makes regulations under the Bill in consultation with the SAHRC, and there is no compulsion to consult the private sector at all when making these regulations. There was a thought however that Section 86 makes it obligatory for the regulations so made to be approved by parliament, and some people felt that during the parliamentary process the private sector would have an opportunity to make submissions. However, we are not completely sure of this, and we strongly recommend that it be made, if not compulsory, then highly desirable, that the private sector is consulted during the making of these regulations.

Mr Njonjo Mue

I was in the Commission on Implementation, which has reported on the power granted by Section 6 of the bill to the SAHRC to suspend the operation of the Bill with regard to a particular governmental body. In the commission, we recommended that that same power could be extended to the whole Bill as a

phase-in mechanism, as a transitional arrangement so that the SAHRC will be able to allow certain governmental bodies space to prepare. What came out of the report was that we were recommending that that be available generally to the SAHRC, which was not my understanding. My understanding was that it should actually be given to the SAHRC so that it can be used part of the transitional arrangements bringing the Bill or the Act once it is passed into effect.

Ms Enpie Van Schoor

Yes, this particular question was already raised. We received an opinion from the Department of Justice and our conclusion was that what is required if you look at Section 81 of the Constitution is, the Bill must be passed by Parliament and it must be signed by the President, then it becomes an Act of Parliament. That is sufficient for enactment. It is not necessary that the Act must be in force on the 4th of February 2000.

Mr Mohamad Bham

There are some very serious prohibitions from disclosing information by public servants in terms of both the Public Service Act and the regulations governing the conditions of municipal employees, where provision is made for misconduct charges against officials that disclose information to any person, and which prohibit public servants and officials from disclosing information to outside persons.

Mr Werner Krull

I am concerned about the implementation of the legislation because we seem to have found ourselves in a position where we say we want to enact this bill, but then the actual implementation can take whatever time we feel like. And, to my mind, that would be defeating the purpose of these particular clauses in the Constitution. If we look at the text where it says we have to give effect to the rights, I would argue and submit to you that a delay in the implementation would then nullify giving effect to those rights. One Commission reported that they thought that every government department or sector should first evaluate their capacity to deal with this and then do a financial study. I would like to know what have they been doing the past three years since these rights have been included in the Constitution?

I submit and I do that with respect, that some government institutions might be using financial constraints as a red herring to get out of the obligations that are placed on them and I would urge this Conference to adopt the position that implementation is required very soon after enactment and that we have a full-blown system working as soon as possible.

Commission 3 - Exemptions

Discussion paper for commission on EXEMPTIONS

The Commissions are out-come driven – the discussions must result in a set of recommendations for amendments or additions to the Open Democracy Bill.

It is not necessary to arrive at consensus positions – divergent views may be reflected.

These recommendations will be included in the conference report, and placed before the Portfolio Committee of Justice when they consider and deliberate on the bills.

Delegates are invited to raise any concerns or proposals regarding the exemptions of the Open Democracy Bill for discussion in the Commission.

The following points are designed to aid discussion. They reflect some of the concerns which have been raised in submissions regarding the chapter dealing with grounds of refusal.

- Is there merit in keeping provisions on exemptions as short and concise as possible, in order to honour the spirit of disclosure, rather than the spirit of refusal?
- Stylistically, would the exemption provisions be more appropriately set out in a schedule at the back of the bill, rather than in the body, as the legislation deals with provision of information, and the exemptions are the exceptions to the rule?
- The provisions dealing with exemptions are long and detailed. Would clarity not be enhanced by plain language drafting?
- The bill adopts the categorical approach to exemptions (establishing categories of information which may be exempted); the consequential approach to exemptions places emphasis on the consequences of the release of information. Is this a preferable approach?
- Certain of the sections set out mandatory exemptions (section 29 and section 31). Are mandatory exemptions appropriate? Should consideration be given to making all exemptions discretionary?

(On the mandatory exemption relating to protection of privacy - section 29 – please see note below)

Should the mandatory exemptions be retained, is the public-interest-override section, as contained in section 44 sufficient?

- The cabinet is excluded from the definition of “governmental body”. Is this cabinet exemption appropriate?

Should cabinet confidentiality be made subject to a time limit?

- Is the exemption for requests of a “frivolous and vexatious” nature sufficiently robust (section 40)?

At the same time is the section appropriately worded to prevent it from being unduly wide, and accordingly capable of being abused by agencies?

Could this issue be more effectively approached by an exemption which applies to an unreasonable diversion of resources, but which can only be invoked after the applicant has been given an opportunity to narrow down request?

- Is the “can neither confirm or deny” formulation under section 34 (for use by the police services) appropriate / sufficient?
- Is section 29 – the mandatory privacy exemption – sufficient to protect the right to privacy?

The underlying rationale for privacy and freedom of information are antagonistic: the former system *restricts* access, and the latter *provides* access; should consideration be given to the creation of a Privacy Act to adequately protect the right to privacy (the embryo of which would be this exemption?)

- Are there any other exemption-categories which require attention, either to be widened, or to be narrowed?
- It has been submitted that some of the categories are too wide, and that innocuous information may be placed in the category by an automatically applied test. Is there merit in introducing a provision which calls for the consideration of whether the harm envisaged by the exemption will *in fact* take place - the necessity of harm override?

Rapporteur - Mr Paul Farlam

Generally, I think there was broad consensus in our Commission. There was a fair amount of disagreement over the style, and the drafting of the Bill and I think we were very fortunate to have some of the drafters with us in our Commission to explain certain sections for us.

- An overwhelming recommendation was that an external judicial body other than the High Court should decide disputes about access to information. The adversarial nature of proceedings, and the expense involved were factors that motivated us to recommend that an alternative forum must be utilised.
- A second overwhelming recommendation was that no governmental body should automatically be excluded from the reach of the Open Democracy Bill.

Thus, for example, it was recommended that Cabinet and the Judiciary and others should not be excluded from the definition of “governmental body” in section 1 (5), which is where they are currently excluded. However, the majority also recognised the need for a proviso that would allow information relating to the Cabinet, Judiciaries, etc, to be excluded and thus kept secret in certain circumstances. In this regard, the desirability of a ten-year time limit was discussed, but it was concluded that something like a consequences-based approach should rather be adopted. In other words, an evaluation should be made assessing the consequences or the results of a disclosure of information in a particular context, and decisions should be made on disclosure in that light, rather than just having a blanket time period.

- A further recommendation, probably not best described as overwhelming, was that use should be made of a consequences-based approach, where one looks at the consequences or the results of the release of particular information, rather than having a categories-based approach which decides disclosure on the basis of the category or type of document. In this regard the New Zealand Bill was thought to be a possible model.
- Another overwhelming recommendation was that the mandatory exemption should be removed. For example, in sections 29 and 31 the reference to “must” should be replaced by “may”. It was pointed out that, in any event, they are not mandatory because section 44 can override them, but the terminology could cause some confusion.
- We recommend that the section 44 override should remain, but it was felt that the section 44 (1) test was currently too strenuous. There are currently two tests in 44(1) and 44(2) and it was felt they should be merged.
- We also reached recommendations on a number of specific provisions that were dealt with. I’m not certain this is the best forum for mentioning all of these in much detail now, but I’ll just list them very briefly.
- Section 29(1) deals with privacy. The general opinion was that the bill should not try to cater for privacy concerns. This is not the object of it, but in any event it doesn’t do that sufficiently and so there should be another Bill dealing with privacy, and one should not try and protect privacy exhaustively in this particular Bill. It was also recommended that the reference to an invasion of privacy should be toughened.
- Another recommendation that gained approval was that the reference to “harm” in sections 31 and 38 should be qualified to refer to “unreasonable harm”.
- Section 34, which provides for the possibility of confirmation or denial, was thought to be appropriate, although there was a concern that there should be a free-flow of information between agencies.
- Finally, on section 40 (which relates to frivolous or vexatious requests), there was strong support to retain the provision, although there was some support for a possible rewording along the lines of “an unreasonable diversion of

resources". The other view that was expressed quite strongly was that "frivolous and vexatious" is a term that does have a certain amount of meaning in legal contexts, and therefore the use of that term is sufficient.

- Moving onto the drafting and style of the Open Democracy Bill. There was slightly less unanimity on this. The majority recommendation was that shortness or conciseness was preferable. However, the drafters of the bill, and the Defence and Intelligence sector felt the bill was fine as currently drafted, with the more detailed exemptions. There was a general feeling that the bill was somewhat difficult to follow, and we thought it was particularly inaccessible to lay people and people without much education. It was therefore recommended that the Bill be made more accessible to non-lawyers and our recommendations in this were for the use of foot-notes to clarify the different cross-references, or to provide information of what is contained in other sections when reading a particular section. Another suggestion was that a flow chart could be used, and favourable comparisons were made with the Labour Relations Act, where apparently the flow chart has been used profitably to increase accessibility and readability.
- On the framing of exemptions there was disagreement about whether more specific wording was required, or whether more vague, general terms would be used. However, there was some general support for a consequences-based approach.

Comments

Mr Njonjo Mue

The rapporteur says that they were uncomfortable with exemptions based on class of documents, or a class of information, and there was a preference for exemptions based on likely consequences of the information coming out. I can understand why that would be the case where you want as open a government as possible, but surely there must be a class, however small, where the information is protected because it belongs to a certain category, and not necessarily because of the likely consequences.

Mr David Goldberg

In the open Democracy Bill is there at the back included, what you might call, a consequential repeals section? Because if there isn't, then I think there ought to be. I think it is useful to look at legislation in other jurisdictions in which specific sections would encourage unnecessary secrecy or unnecessary non-disclosures to be repealed - then these specific sections of those other pieces of legislation should be included in the OD Act as consequential repeals.

Commission 4 - Appeal and Review

Discussion paper for commission on APPEAL & REVIEW

The Commissions are out-come driven – the discussions must result in a set of recommendations for amendments or additions to the Open Democracy Bill.

It is not necessary to arrive at consensus positions – divergent views may be reflected.

These recommendations will be included in the conference report, and placed before the Portfolio Committee of Justice when they consider and deliberate on the bills.

Delegates are invited to raise any concerns or proposals regarding the appeal and review mechanisms established in the Open Democracy Bill for discussion in the Commission.

The following points are designed to aid discussion. They reflect some of the concerns which have been raised in submissions regarding the proposed mechanisms established in the bill:

- Is the High Court an appropriate forum for external appeals?

Concerns have been raised regarding its inaccessibility in terms of both costs and geography?

Concerns have also been raised regarding the length of time hearings will take, given the backlogged court rolls, despite the automatic presumption of urgency?

- If the ordinary court system is utilized, what provisions will be made regarding Legal Aid for applicants?

- Is an adversarial model suited to disputes regarding access to information?

- How can appeal and review mechanisms play a constructive roll in facilitating the culture change which is necessary to move from a closed an unco-operative beaurocracy, to open and transparent governance?

- What are the pro's and con's of considering an alternative system, such as a tribunal, a dedicated Commissioner, or an ombudsman to resolve disputes, once internal appeals have been exhausted?

What would the resource implications of setting up a new infrastructure be for the line department?

- What are the synergies between appeal and review mechanisms under this bill, the Administrative Justice Bill, and the Equality legislation?

Rapporteur - Ms Laura Pollecutt

- On the issue of internal appeals one of the concerns that was expressed was that the Head of the Department (as defined in the bill) may not have the time and capacity to hear all internal appeals. Accordingly there was a suggestion that either the Head of Department *or* his or her delegated authority should have the power to consider appeals. This could be defined in the regulations to the act. The regulations should also stipulate that the individual hearing the appeal should be suitably qualified to hear matters relating to access to information, and also should not be in the same line function as the information officer who may have declined or granted the request for information which has been appealed against.
- A further concern was that the notice to a third party requirement by the person considering an appeal, where the record obviously relates to a third person, creates an undue onus on the person considering an appeal. The recommendation was that the harm's test should be re-introduced into this section, stipulating that where, in the opinion of the person considering the appeal, there will be potential prejudice to a third party, that person should notify the third party.
- There was a concern that the SAHRC, as an assisting external body, may not be effective, especially in rural areas where there are no offices. In addition, an individual may not have knowledge of the SAHRC or the assistance they provide. We recommended that there should be a strict duty imposed on all information officers to notify applicants of the role of the SAHRC in cases where access to information is denied.
- A further concern addressed the maximum time prescribed for providing access to information, where an appeal has been successful. This time period may frustrate the request for information, particularly in the arena of media requests, as the bill allows for a long period of time to actually provide the information.
- We recommend that the once decision is made that the information is available, it should be incumbent on the information officers to immediately provide it, should it be easily accessible. The onus should be on the information officer to dispute that the information is *not* immediately accessible. Similarly, where the request is complied with after the maximum period for provision has expired, the information officer must justify why the extended time period was necessary. If these amendments are not effected, there is a real concern that the legislation could actually slow down access to information instead of actually increasing it.
- A further concern was that information officers might be reluctant to comply with requests for information because of a culture of non-transparency, and because of a lack of experience on the part of the officer responsible for determining access to information. Our recommendation here is that information officers should be properly trained. Part of this training must address the existing mind set, and set out to change attitudes.

- Although the section on internal appeals is very long and detailed, it lacks guidance on how the internal appeals should be conducted. We recommend that basic guidelines regarding norms and standards for the procedure of internal appeals should be stipulated in the bill. These could relate to whether or not legal representation is permissible, whether representations should be written or oral, etc.
- A view was expressed that the internal appeal should be done away with completely, as the applicant would still be dealing with the same cultural mindset. This view was not shared by all delegates, many of whom felt that internal remedies must be exhausted. However, there was a view that applicants should have immediate access to external appeal mechanisms.
- There was consensus that locating external appeals within the High Court was a problem, as it resulted in lengthy and costly processes, thereby making it inaccessible to the poor and disempowered. In addition, the adversarial nature of the proceedings in the High Court is extremely intimidating. We looked at alternatives to the High Court, and recommended a new body for considering appeals, premised on the following principles. A tribunal, which is an intermediate body, should consider appeals. It should be a tribunal that aims to be conciliatory, and based on existing infrastructure, which could be developed. We looked at a number of models based on what is already in existence. We also considered the possibility of increasing the functions and resources of the Public Protector, but were concerned about locating the enforcement of access to information within the office of the Public Protector, because of the lack of enforceable powers of the Public Protector.

The model that seemed to have the most support in the group, was the locating of external appeal within a specialised section of the Magistrate's Court. This was viewed as a viable alternative to the High Court. The courts would be roving courts, with the same basic characteristics as the Magistrates Court. Each Magistrate Court would have a trained Information Clerk, and the Presiding Officers could be roving presiding officers on a regular basis. Appointments would be made from amongst individuals who satisfied basic criteria, such as expertise or experience in access-to-information issues, administration of justice or alternative dispute resolution. The powers of presiding officers would include the power to conciliate, arbitrate and make orders. Orders would include punitive damages, in cases where the provision of the information is obstructed. These orders are final, and can be taken on review. The Magistrate Court rules would not apply, and rules and procedure would be more informal, within the context of the basic rules of natural justice. Legal representation would be permissible only where both parties agreed thereto.

B. ADMINISTRATIVE JUSTICE BILL

Commission 1 - Positive duties

Discussion paper for commission on POSITIVE DUTIES OF GOVERNMENT

Which agencies does the definition of “administrative action” include?

Are the definitions of “standard” and “rule” appropriate?

What are the pros and cons of public enquiries and administrative investigations?

Could the purpose and function of these be made any clearer?

Is it clear when the necessity of these procedures is triggered?

What are the views on the “sunsetting” provisions for published rules and standards?

Is the notice and comment regime for the making of rules appropriate?

Could different regimes not be established for different types / categories of rules, rather than a set approach for all rules?

Are some of the obligations on the state overly onerous? How could this be mitigated, in the interests of promoting an efficient administration?

How will this notice and comment regime relate to other processes which are already established in other legislation?

How effective is this system taking into account rates of literacy?

The Central Drafting Office has been replaced by the Chief State Law Advisor’s duty to scrutinize and comment on all rules and standards? Is this appropriate? Is there capacity?

Is there merit in re-framing the grounds of review into positive duties of government?

Rapporteur - Advocate Lois Kok

- As far as positive duties on government is concerned we did not have a very strong feeling concerning the necessity to rephrase the particular portions into positive duties. However, we did have some understanding for the need that the language of the legislation should be easily interpretable by the official as well as by the people concerned and who might be affected by the measures.

- We went into the different agencies that had to be covered by the definition of administrative action and there were some sentiments expressed that even

the decision to prosecute should perhaps be reconsidered for possible inclusion. However, it was also mooted that there is a specific dispensation in place involving private prosecutions and that this dispensation should obviously be dealt with in co-operation with the relevant authorities involved in the prosecution of offenders.

- It was felt that some of the duties of the President and of Premiers should perhaps also be included. Some examples were cited of decisions by the President and the Premiers that would be excluded as the Bill currently stands that should be reconsidered for inclusion as well.

- A very important point raised in our group was the financial and practical considerations with regard to the implementation of this legislation. It was felt that implementation of this legislation on a global scale in all government sectors and departments would probably cause a breakdown of this whole process and it would also eventually perhaps even destroy the system if it is not done properly and with due consideration to the infra structures and financial planning that has to precede such implementation. It was widely accepted in our group that a process of phasing in of the legislation should be recommended. A proper financial investigation and proper budgeting for the implementation of these measures in the specific sector concerned should precede such a phasing in. If it is not done, it was felt that this is a worthy effort that might then be degraded by insurmountable practical and financial problems that might result.

- Another aspect, which is of great concern, is the possibility that the current draft could be interpreted to include actions falling outside the sphere of the public law such as Contractual and Labour matters. It is recommended that such matters falling outside the sphere of public law should be explicitly excluded from this legislation. Some of the departments, especially the large departments and the departments involved in a particular type of operational matter, have mooted that they depend on the immediate authority of their orders and instructions. This is specifically true of the South African National Defence Force, especially in operational circumstances, and it would not be appropriate for such a department to be bogged down by Administrative procedures before it can issue authoritative instructions and orders that must immediately be complied with.

It is equally true of the South African Police Service, which is involved day to day in similarly serious and important operational matters where such instructions and orders should be effective immediately. So this is a specific sphere where a specific dispensation would probably be more appropriate. Just for administrative purposes we also noted that on page 6 the word council should obviously read legislature because we don't have Provincial Councils anymore.

- As far as rules and standards are concerned, the present wording might lead to some lack of clarity. The distinction between rules and standards should perhaps once again be reviewed, since it is always going to be a problem to find something that is exactly appropriate in these circumstances.

- As far as enquiries and public enquiries and administrative investigations are concerned, the floodgates argument was raised in our group. However, some doubt about its validity was also expressed. This is obviously a problem that can lead to much debate and there was no explicit unanimity in our group as far as that is concerned.
- It was also mooted that some duty should be imposed upon the person conducting the investigation to take this ambition seriously because it was felt that it is a real danger that a specific public functionary might easily go over such an investigation in such a way that the submissions are actually not taken seriously.
- As far as the “sunset” provisions are concerned, serious doubts were expressed. These were considered to be a very dangerous type of provision and it was strongly recommended by our group that they be scrapped. The situation is aggravated by the fact that no fallback position is provided for. There is an absence of a warning and appropriate time to address *lacunae* that may appear to be there. It was also expressed by people from various spheres of public administration that there may be a lack of capacity in the Civil Service at the moment with regard to the necessary expertise and manpower to review and republish the numerous measures that are already in place all over the public sector. So, it was felt that the sunset provisions would be particularly grave in these circumstances.
- As far as notice and comment is concerned, there are different regimes which need different rule types and categories of rules and a different approach should be developed with regard to these different types of categories of rules and a blanket approach would give rise to serious difficulties.
- Some of the obligations of the State are considered to be too onerous. Our group recommended that the phased implementation process should be able to solve many of the problems that we encountered.
- Many sectoral-specific systems of oversight and supervision are presently in force and these would overlap substantially with the present legislation intended here and it would also in many instances be in conflict with it. Once again it was mooted in our group that a phased implementation process in consultation with the sectors involved, would also present a solution to this dilemma.
- It would be advisable to involve alternative communication media (like the radio) as far as notice and comment is concerned to address the problems of illiteracy. It was noted very explicitly, nevertheless, that it would be too costly and impractical to attempt communication of all details on other alternative media. Therefore, it was felt that a compromise should be reached in some way to at least communicate a certain minimum of information in a certain number of important language groups so that the illiterate people can be made aware of measures that might affect them.

- It was noted in our group that the State Law Advisors do not have the capacity to deal with the workload of scrutinising and commenting on all rules and standards and this is so not even with regard to the central sphere of government, let alone the Provincial and other spheres of government. Therefore, if this dispensation is opted for in the 30 day period after which the rules and standards would go through, it would be an essential safeguard that would play a very important role if the State Law Advisors are involved in this sphere.
- We did not feel strongly about re-framing the grounds of review into positive duties of government. It is recommended further from our group that the length of time available to the public sector for the taking of, for instance, an administrative decision, should be dealt with positively in this legislation.
- It is recommended that a specific result should automatically come into effect after the lapse of a specific time period after the decision has been called for. The request or whatever is applicable, should then automatically be regarded either as having been granted, or as having been rejected. This would enable the individual to proceed, either by acting with the authorisation he or she had requested, or by proceeding against the State for having refused to grant it so that there must be some finality which automatically comes into place.
- It was recommended that the concepts of “rational” and “reasonable” should not be split in the legislation. The split between these concepts causes confusion because it leads to an attempt to distinguish artificially between what is rational and what is reasonable while only one mean would be more appropriate.

Commission 2 - Right to reasons and grounds of review

Discussion paper for commission on REASONS & GROUNDS OF REVIEW

- Should there be a closed list of the legislated grounds of review?

Should there be a general “open-ended” category?

Should there be as much detail in the listed grounds, or a more general statement (i.e. is it necessary to codify existing grounds of review?)

Could the grounds, as set out in the current bill, be set out any more clearly?

- Is the definition of “administrative action” too narrow or too wide?

Is the new definition (21 June 1999) sufficiently clear?

Should there be any further excluded grounds?

- Is it appropriate to limit the right to written reasons only to those whose rights have been adversely affected?

Could the right to reasons not have a more general application, linked to transparency and accountability, rather than as a precursor to judicial review? Are the sections dealing with right to reasons overly judicial?

- Are the 90-day periods for requesting written reasons, and the providing thereof appropriate?

- Is the presumption contained in Section 6 (b) (in the event of failure to provide reasons, action will be presumed to have been taken without good reason) appropriate? May it not be too harsh / drastic upon organs of state?

- Should there not be an interim measure to obtain written reasons, before having to approach the courts, such as some form of internal appeal?

- How does the drafting of the section dealing with right to reasons prevent a dual duty (via the legislation and via the constitution) to provide reasons falling upon agencies?

- Is it feasible to consider the possibility of provision of reasons “in real time”, so as to create an ethic of accountability and justification in actual decision-making?

- How will illiterate applicants be accommodated?

(Exemptions / exclusions in terms of the Open Democracy Bill will be dealt with by another Commission)

Rapporteur - Liesl Gerntholz

There was consensus that this is a particularly well drafted piece of legislation, but there was concern as to whether the drafters had kept a sharp enough focus on those who should be the major beneficiaries of this legislation - the poor and the disempowered, and that issue ran as a theme throughout our discussion and re-emerged in many of the questions that we tried to answer.

- The majority of the group recommended strongly that an open-ended list for the grounds of review was certainly more desirable; however, there were some government representatives who argued strongly in favour of a closed list. It was felt that the detail in the sections dealing with the grounds of review provided a good trouble shooting guide, and that the list would be helpful to the administrators. A recommendation was that Section E(4) could provide a mechanism whereby an administrator could deviate from the provisions, and that there should be a clause that obliges the State to comply with a standard, and which then sets out the circumstances under which deviations may be made.

Possible drafting of this section could follow the Black Sash submission which recommends broadly that standards which have been published must be followed by the actor unless (1) deviation will not adversely affect a person, and (2) the affected person has been given due notice and an adequate opportunity to respond.

- There was no consensus as to whether or not the grounds of review should be framed positively in the bill. Concerns were raised about the inaccessibility of the language of negative framing for non-lawyers and users of the legislation. However, there were concerns that positive phrasing may not necessarily resolve this problem. Some delegates thought that the negative framing was more legally appropriate, and expressed concerns about plain language and the issues that this raises for the interpretations of statutes.
- The possibility of placing positive duties in the code-of-conduct was discussed. Concerns were raised regarding the creation of another closed list in this code, and the resources and capacity of the Administrative Review Council to draft and administer it. It was agreed that positive framing was really an issue about transformation, and the fundamental shift in emphasis towards a culture of accountability in organs of state.
- It was recommended that further clarity on the distinction between appeal and review was required.
- It was recommended that definitions of “public power” and “public function” were required. However, there was not consensus as to whether this should be effected by the bill, or by the courts.
- We recommend that the exclusion of legislative authority of a Municipality in the definition section of the bill needs to be looked at. Those representing the South African Police Services thought that the decision to arrest should be

included as one of the exclusions in the same the way that a decision to prosecute is; however, there was no consensus on that proposal.

- Another concern was raised as to whether public enterprises can be excluded - the question being whether the business decision should and can be subject to Administrative action. Another concern was raised around the fact that specific cognisance had not been taken of *quasi*-judicial actions and whether these should specifically be included in the definition.

- Other concerns were raised about areas of law that have their own kinds of appeal and whether these should be excluded again from the definition. The broad consensus was that the definition needs to be re-looked at. There was no consensus on whether the definition needs to be developed further in the legislation or whether this is again something that can be left to the court.

- On the issue of reasons, one of the main questions was whether the legislation should provide additional rights to those that have already been given in the Constitution - specifically, where the reasons should be extended to interests and legitimate expectations. One suggestion was that legitimate expectations need not be expressly included, but that in all likelihood the courts will read it in anyway. There was also a lot of debate around the issue of whether the fact that the final and interim Constitutions had differed with regard to the phrasing of the provision on Administrative Justice - whether the Constitution was manifesting a specific concern about interests and had deliberately excluded it from the final Constitution. There was a strong feeling from the NGO sector that if you don't include legitimate expectations and interests, you really shrink the application of the clause down to nothing. If you can't get reasons, you really can't access how the administrative action which may have affected your interests was taken, so there was a very strong feeling from the NGO sector that you must include interest and legitimate expectations.

There was then a suggestion that came from the legal drafters that perhaps the clause could be phrased around rights and legal interests, and another suggestion was that the phrasing could read, rights, be they based on statute, common law or constitution.

- A strong recommendation from the NGO sector is that the legislation specifically needs to acknowledge application cases as a specific category since these may not necessarily be covered by the present definition. Professor Snell looked at the Australian position, which was helpful. There was quite a lot of consensus on the Australian position which has kept the definition quite wide, but then in terms of reducing the resource intensity of giving reasons in hundreds and hundreds of cases, reasons would only be given on application. The broad consensus was that a balance must be struck - we need to acknowledge that giving of reasons in cases that would relate to rights, legitimate expectations and reasons would be particularly resource intensive and limitations could possibly be looked at by seeing how reasons would be given, regulations could develop certain standard forms etc. etc.

- One issue that we really didn't discuss but was thought to be important was the incorporation of the concept of *bona fides*, both in terms of how reasons were sought and who was seeking the reasons and in terms of how reasons were given.
- We looked at whether or not giving reasons on their own was sufficient or whether people should also be given material findings on fact. No consensus was reached.
- We then examined when reasons must be given. The NGO sector felt that the periods were long, while government representatives felt that you did need to give government bureaucracy sufficient time to put the wheels in motion. We agreed that essentially the time periods are arbitrary and that we are not really going to be able to understand what the best time period is immediately. The broad recommendation was that, whatever the time periods are that are decided upon, it may be desirable to remove them from the legislation and place them in regulations. A period of monitoring should be built into these regulations so that, at the end of a certain period, the time periods can be assessed to see whether they can be shortened or whether they need to be lengthened.
- A specific concern was raised about urgent cases - there is no provisions such as is common in judicial cases where an appeal can stop the execution of the judgement. Concern was particularly expressed about cases where an applicant might not be able to wait for 90 days before reasons are given. The recommendation is that drafters need to consider whether it is necessary to develop some criteria around urgent cases.
- Then we dealt with the question as to whether reasons should be furnished automatically or on request. One of the suggestions that was made, was that it should be on request and that this would be appropriate if positive measures are put in place to ensure that people know that they have the right to request reasons. Concerns were expressed again as to how the disempowered would access the legislation if they did not know that they had a right to request reasons. Concerns were also specifically raised about the position of rural woman, if they were not given reasons automatically. The broad recommendation was that this is really a question of resources.

It was thought that what could be developed was that a positive obligation should be placed upon government officials to give the person a simple yes or no answer. A positive obligation should be placed on government to inform people as soon as possible as to whether the answer was a simple yes or no and, in that communication, people could be informed that they had the right to request reasons.

- We then looked at what would constitute adequate reasons. There was clear consensus that the definition must be fleshed out. What would constitute adequate reasons? We looked at the Australian and Irish positions which include all findings of material fact and we noted that there is a good definition in the Open Democracy Bill. It was also felt that it was important to look at the

purposes and reasons, because this will largely dictate what constitutes adequate reasons, and that what constitutes adequate reasons should be linked to the three constitutional criteria.

- The legislation needs urgently to look at the issue of retrospectivity.
- There is certain incongruence in some of the time periods in other legislation. For example, where other legislation places an obligation on government to give reasons, the time periods may be longer or shorter. Some provision needs to be included that says, where other legislation specified time periods where the period is shorter, that legislation would prevail and where it is longer, the Administrative Justice legislation would prevail. It was thought important that some kind of scan of the legislation needs to take place to see where these other periods exist and some kind of harmonisation needs to take place.
- There was a recommendation around flexibility and developing criteria around urgent cases. It was also seen important to have some kind sanction for non-compliance. There is an incongruence between Section 6(2) and 6(3) we thought that that needed to be looked at because it seemed that Section 6(3) could dilute the efficacy of Section 6(2).
- We looked very briefly at the presumptions in Section 6(4)(b) and there was general consensus that there is no problem with these.
- One of the issues raised is whether or not the Bill should deal with evidential rules. For example, what would happen in the case of reasons being given by a junior official of a particular department and when the matter got to court, the department was able to advance different or new reasons and we felt that it was important that those kinds of situations need to be clarified. One of the suggestions was made that there could be a test of adequacy.
- With regard to exemption, we thought that too much power had been given to the minister and we thought that it was important to flesh out what consultations should mean. We thought that there were issues of constitutionality if that provision could be interpreted to say that the minister was assuming legislative power. A recommendation was made that perhaps that particular provision could be redrafted to say that the minister would act on recommendation of the council or with the concurrence of the council.

Commission 3 - Synergies and Appeal and Review

Discussion paper for commission on SYNERGIES BETWEEN THE BILLS

Are there any synergies between the publication burdens in the Administrative Justice Bill, and those in the Open Democracy Bill?

In terms of the requirement to keep registers and indexes of rules and standards, what does “*subject to the Open Democracy Act*” mean in section 14?

Earlier drafts of the Open Democracy Bill included a section entitled “*Disclosure of governmental decision-making guidelines*” which compelled governmental bodies to make available for inspection any guidelines which are used to make decisions or recommendations to confer rights, privileges, grants or benefits, or to impose obligations, liabilities, penalties or detriments, including objectives, rules, criteria, precedents, procedures, or interpretations. There was great concern that this section was excluded in later drafts. Are these provisions adequately subsumed into the Administrative Justice Bill?

What is the roll of the SAHRC in the implementation / monitoring of the Administrative Justice Bill?

Discussion paper for commission on APPEAL & REVIEW

What does the extension of the definition of “court” to Magistrates Courts mean practically for the general jurisdiction of Magistrate’s Courts?

How could Magistrate’s Courts capacity be enhanced?

Should the extension be more restricted, for example limited to local government issues only?

Are the High Courts or the Magistrate’s Courts an appropriate forum for judicial review, in terms of procedures, costs and accessibility?

How will Legal Aid work for these matters?

What are the merits of establishing an alternative forum for judicial review, such as a tribunal?

Should there not be a more specific mandate to the Administrative Review Council in terms of the nature of the judicial review mechanisms that could be developed?

Should the time frame of the research be shortened, given the urgency of access to justice?

Is there merit in providing guidelines to for the nature of the procedures for judicial review which will be developed by the Rules Board in terms of section 8(2)?

Is the 6-month “prescription” time period in section 8(1)(a) appropriate? Could this not be regulated by a clause such as “within a reasonable time”?

Rapporteur - Mr Galieb Galant

Our group looked at the appeal and review mechanisms and came up with a lot of concerns rather than strong recommendations:

- Do internal appeal mechanisms have to be exhausted before you can take the remedies provided in the bill into account? We recommend that a specialist division of the Magistrate’s Court be developed to review administrative decisions. New rules for that division that would allow for a measure of alternative dispute resolution would move away from the adversarial nature of our judicial system. Also, a measure of training would have to go into the officers of the courts. There also ought to be an express right of appeal to the High Court.

Alternative option - a tribunal to be set up to deal with administrative justice, which would have a conciliation, mediation and alternative dispute resolution function, to try and settle the dispute, after which it would make a final decision. There would obviously be some recourse to the judicial system in the process. We didn’t follow this discussion very far, because the Administrative Review Council has two years in which to consider this option!

Some of the concerns we raised in this area were resource constraints, the specialist knowledge I spoke about. The question that where you have alternative bodies, there is the very real danger of forum shopping and that could then lead to legal uncertainty, confusion in us trying to develop a jurisprudence around this very new area.

- Concerns were raised regarding the conflict of laws and the existence of a new forum and it’s relationship with other tribunals or bodies which deal with administrative actions, and how this would be handled, but there were no recommendations.
- The group was divided on the question of alternative dispute resolution. Some felt that any dispute can be resolved and can be settled and there were others who equally strongly felt this area of law is about right and wrong.
- An interesting suggestion was a provision for voluntary arbitration at the internal level.
- We recommend that there ought to be monitoring of the implementation of this Act and that there be a review of the process and the efficiency of the system after two years by parliament.
- We recommend that the role of Chapter 9 institutions (particularly the SAHRC and Public Protector) must be clarified and beefed up. However, the place to do this is not in these pieces of legislation, but in their own Acts. We should really remove Part 7 of the Open Democracy Bill which talks about the

South African Human Rights Commission and look at amending the SAHRC's own founding legislation.

- We recommend that there should be no Chapter 9 represented in the Administrative Review Council because it is necessary for them to retain their independence.
- A concern is the question of substantive review, in that there has been a shift in terms of this notion of review. It has been touched on in one of the other Commissions.
- With regard to the question of the reasons for a decision - the justifiability of the reasons opens up a whole new range of questions, particularly whether the reviewing mechanism, in this case perhaps the Magistrate's Court can impose its decision and override that of the internal body. There is jurisprudence already on the topic in various areas of law outside of constitutional administrative law, particularly in the area of Labour Law.
- Regarding the synergy and symmetry between the Open democracy Bill and the Administrative Justice Bill - we eventually concluded that there had to be a synergy between them and that they had to work together and need to work together well.
- We talked about the whole question of publications and registers. One of the key concerns was the issue of financial and human resources. A key concern was whether in the sections dealing with publications the Bill is dealing with access to the information or the actual information.
- In terms of the working together of the Administrative Justice Bill and the Open Democracy Bill, all references to "subject to the Open Democracy Bill" in Sections 6(3) and Sections 14 of the Administrative Justice Bill should be deleted. If they are to work together and not be subjugated to one another, then we needed to remove that reference.
- In terms of Section 6(2) of the Open Democracy Bill, the index of Rules and Standards of a Government Department should be included in the manual. We also need to look at and do an audit of the Administrative Justice Legislation, about where this notion of practice would be appropriate to work into Rules and Standards.
- The feeling in the group was that the Administrative Review Council (ARC) isn't necessarily a *sine qua non* for the operation of the legislation. The functions of the ARC could be taken up by different institutions. While it is useful to locate it in a central place, if resource constraints were a major problem, we could look at devising or devolving those responsibilities and obligations elsewhere. Perhaps the South African Law Commission and some of the Chapter 9 institutions could do this.
- Regarding commencement - the whole question around commencement and the symmetry between the Open Democracy Bill and the Administrative

Justice Bill needs to be looked at and the notion of enactment needed to be similar.

- A really good preamble is required, firmly locating the legislation in terms of giving effect to the Bill of Rights in the Constitution.

Comments

Mr Jonathan Klaaren

This is a comment on the Positive Duties Commission. I wasn't exactly clear if there was a recommendation that was coming out of that Commission that matters of Government Contracts and Labour Relations not be included in the Administrative Justice Bill. If that was the recommendation, then I would want to register a point at the censors, certainly on the contractual point.

In academic circles we occasionally use the phrase of "The Contracting State" and that is a description of what is going on in part with the government at the moment. Government is downsizing and shrinking in terms of its size, but also in terms of its form. It is outsourcing and using more kinds of contracts. I think if the general point of the Administrative Justice Bill is to provide general principles for regulating public administration in an accountable manner, we need to recognise that the government is using forms of contracting. Now that may mean that there are different ways of making it accountable, but we certainly need to keep that within the ambits. I wouldn't want to have a recommendation that said that it was not part of the Administrative Justice Bill. Perhaps it is an area that is right for further research, but certainly not to be accepted.