

# **In Pursuit of an Open Democracy**

## A South African Campaign Case Study

By Doug Tilton & Richard Calland

*[M]eaningful participation in democratic processes requires informed participants. Secrecy reduces the information available to the citizenry, hobbling their ability to participate meaningfully... We often speak of government being accountable to the people. But if effective democratic oversight is to be achieved then the voters have to be informed...*

– Joseph Stiglitz, Former Senior Vice-President and Chief Economist of the World Bank<sup>1</sup>

Throughout the *apartheid* era, South Africa's increasingly-paranoid white minority government suppressed access to information--on social, economic, and security matters--in an effort to stifle opposition to its policies of racial supremacy. Security operations were shrouded in secrecy. Government officials frequently responded to queries either with hostility or with misinformation. Press freedom was habitually compromised, either through prior censorship of stories or through the banning and confiscation of publications. Information became a crucial resource for the country's liberation forces and their allies in international solidarity movements as they sought to expose the brutality of the *apartheid* regime and hasten its collapse.

Consequently, opposition groups came to see unrestricted access to information as a cornerstone of transparent, participatory and accountable governance. Two major conferences in *apartheid's* dying days explored the legal aspects of information freedom.<sup>2</sup> These consolidated the political will to make access to information a fundamental principle of a new democratic dispensation and helped to define the scope and content of the right.

This consensus was ultimately captured in South Africa's new constitution. A democratic parliament then gave further shape to the right of access to information by enacting enabling legislation – a process in which civil society organisations played an unusually influential role. This article traces the history of South Africa's new Promotion of Access to Information Act, 2000, assesses the strengths and weaknesses of the advocacy efforts of a key coalition of civil society organisations, and pinpoints some critical lessons that emerge from that coalition's experience.

### **Legislative history**

In 1993, the South African government and extra-parliamentary political parties, including the previously banned African National Congress (ANC) led by Nelson Mandela, met to hammer out a new, democratic political order. These talks produced a constitution requiring the creation of open and accountable political institutions and the election of a new

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<sup>1</sup>Joseph Stiglitz, 'On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life,' Oxford Amnesty Lecture, Oxford University, United Kingdom, January 27, 1999.

<sup>2</sup>The Breakwater Conference on Administrative Law for a Future South Africa in early 1993 and Ensuring Government Accountability, Accessibility and Transparency in the New South Africa in early 1994.

government on the basis of universal suffrage.<sup>3</sup> The constitution was intended to serve as an interim instrument, until such time as a democratic government with a popular mandate could draft a final document.

*Bill of Rights guarantees access to information*

One of the most important aspects of the interim constitution was the introduction of a Bill of Rights designed to ensure equal protection of a broad range of human, socio-economic and civil rights, irrespective of race, gender, sexual orientation, disability, belief, and other factors.<sup>4</sup> Among the rights upheld was that of access to publicly-held information. Section 23 of the interim constitution stated: 'Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.' By entrenching an independent right of access to information – rather than leaving it to be protected by the right to freedom of expression, as has generally been the case in international human rights instruments – the drafters underscored its significance in South Africa's constitutional order.<sup>5</sup> Without this constitutional 'anchor' and the broad political consensus that underpinned it, the subsequent civil society campaign for freedom of information legislation would likely have been stillborn.

Following the historic general election of 1994, the interim constitution's broad right of access to information was expanded further. Section 32(1) of the final constitution, enacted by the National Assembly in 1996<sup>6</sup>, guarantees 'everyone ... the right of access to any information held by the state **and** any information that is held by another person and that is required for the exercise or protection of any rights.' [Emphasis added.] Not only is the right of access to publicly-held information no longer qualified by the stipulation that the information be needed for the exercise or protection of a right, but a qualified right of access to information has also been established with respect to private bodies and individuals.

Although the revised formulation of the right is more permissive in some respects than the interim right had been, the new wording indicated that early idealism was already giving way to a more pragmatic or 'hard-nosed' attitude. This was evident in the final constitution's stipulation that the general right may be limited in two ways.

First, this right – and any of the rights identified in the Bill of Rights – may be restricted in terms of the constitution's generic limitations clause (sec. 36). As in the interim constitution, the limitations clause permits a right to be circumscribed only by legislation that applies equally to all – and then only if the limitation is 'reasonable and justifiable in an open and

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<sup>3</sup>Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>4</sup>Section 8(2) of the interim constitution stated: 'No person shall be unfairly discriminated against, directly or indirectly ... on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.' The final constitution added pregnancy, marital status and birth to the list of grounds [section 9(3)].

<sup>5</sup>Johathan Klaaren, *Access to Information*, in *Constitutional Law of South Africa*, ed. Matthew Chaskalson (Pretoria: Juta & Co. Ltd., 1996), 24-1.

<sup>6</sup>Constitution of the Republic of South Africa, Act 108 of 1996.

democratic society based on human dignity, equality and freedom.’ In making the latter assessment, a number of factors must be taken into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether there are less restrictive ways to achieve the purpose.

### *Enabling legislation gives effect to the right*

In addition, the final constitution provides for the right to be limited in terms of enabling legislation. The constitution that came into effect on 3 February 1997 gave Parliament three years to enact legislation to give effect to the right articulated in section 32(1) and to regulate its application.<sup>7</sup> The legislation was permitted to include ‘reasonable measures to alleviate the administrative and financial burden on the state’ – to balance, in other words, the state's potentially competing obligations to protect citizens' information rights and to provide fair, efficient, and cost-effective administration.

Shortly after the democratic government took office in 1994, it appointed a five-member Task Group on Open Democracy headed by then-Deputy President Thabo Mbeki's legal advisor, Advocate Mojanku Gumbi, to draft appropriate enabling legislation. The Task Group issued a preliminary report early in 1995 setting out in detail their legislative intentions and the principles underlying their approach to drafting. By August 1995, they had produced a draft bill.

It took nearly five more years – and revisions so extensive that not even the bill's original name survived – before the legislation was enacted. At a seminar on the eve of the draft's initial publication, participants were warned that ‘we must act fast because once the government gets used to doing things in secret ways their enthusiasm for access to information will drain away’. This was a prescient observation. Over the next two years, the executive arm of government chipped away at the draft proposals before releasing a much-altered bill.

### *Executive concerns narrow the legislation's scope*

The reaction to the early drafts of the bill of one minister, Kader Asmal, probably mirrored that of most of his colleagues in the Cabinet. Asmal spoke with particular authority on

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<sup>7</sup>Until the required enabling legislation was enacted, the general right of access to information contained in Section 32(1) of the new constitution was suspended, and the more limited right of access to publicly-held information found in the interim constitution applied. The interim constitution (sec. 71) required that the Constitutional Court review the final constitution to certify that it was in compliance with a set of fundamental principles (listed in Schedule 4 of the interim constitution). Constitutional Principle IX read: ‘Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.’ In its First Certification Judgement, *In re: Certification of the Constitution of the Republic of South Africa, 1996* [1996 (10) BCLR 1253 (CC)], the court ruled that although the interim right did not comply with the constitutional principles, the right of access to information was not a ‘universally accepted fundamental human right’. It therefore held that the temporary suspension of section 32(1) was reasonable if it was for the purposes of drafting and enacting legislation establishing ‘the practical requirements for the enforcement of the right and the definition of its limits’. However, the Justices clearly linked the concept of ‘reasonableness’ in this case to the temporary nature of the suspension. They ruled that, should the required enabling legislation not be passed within the designated three-year window, the interim right would fall away and the expanded right in section 32(1) would become operative.

matters of transparency and accountability given his position as Chair of the Parliamentary Ad Hoc Committee on Ethics, and his own history as Professor of Human Rights Law at Trinity College, Dublin. According to Cabinet sources, during the Cabinet's first review of the draft bill, Asmal argued for the blanket exemption of Cabinet records and warned of the dangers of unrestricted access to information. He articulated his position in a more public setting a year later:

On the one hand, people must not feel powerless at the hands of those who temporarily or permanently control their destinies. On the other, the duly elected democratic government must not be rendered powerless in carrying out its mandate. Lord Acton, as we all know, said that power corrupts. It is necessary to adapt Acton and to point out that powerlessness is equally corrupting, for individuals and for the state. The former leads to individual frustration and helplessness. The latter causes governmental drift leading to chaos – with the state unable to perform the functions expected of it.<sup>8</sup>

It must be remembered that these words were delivered at a crucial juncture in the history of the new government. Having delivered a peaceful transition and an internationally-admired constitution, the government was now struggling to reform an inherited public service that was in places obstructing its efforts to transform South Africa's economy and society. There was growing frustration with the apparent inability to implement good policy. Issues such as access to information were increasingly seen as 'unnecessary luxuries' or, worse, as further impediments to rapid progress. Ministers such as Asmal were especially mindful of such considerations. They would have been familiar with the Canadian experience, for example, where there is an ongoing debate about the way in which its bill of rights has been hijacked by conservative forces to constrain progressive law and policy.

As a consequence, each government department that reviewed the bill contributed to a growing series of changes. The bill was diluted in very obvious fashion – the removal of the whole chapter dealing with open meetings, the blanket exclusion of all Cabinet records, the removal of a 'necessity of harm' over-ride clause, the excision of provisions creating an Open Democracy Commission and an Information Court – and in more subtle ways, such as the tightening of exemptions concerning third party confidentiality and commercial activity.

The acute irony of this process was that, in essence, it went underground. It became harder and harder to elicit information about both the process of revision and the specific content changes made by the Executive. In part this was due to changes in the governmental Task Group. One of the two academics on the committee (who was the primary author of the first draft) died; a second took up a senior position in the Independent Electoral Commission. A third member of the Task Group went on sabbatical to the United States, leaving one rather cautious bureaucrat to run the show once the co-ordinator of the group became distracted by other concerns such as South Africa's bid for the 2004 Olympics.

This secrecy and foot-dragging was a cause of increasingly frustration to civil society organisations monitoring the bill's progress. They began to plead desperately for the bill to be tabled in Parliament, due largely to their confidence in the South African parliament's

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<sup>8</sup>Asmal, K. "A View from Within", in Administrative Justice in Southern Africa. Corder H. & Maluwa T. (eds). University of Cape Town. 1997.

capacity to address the bill in an open and consultative manner. Eventually, the much-revised draft legislation – known as the Open Democracy Bill<sup>9</sup> – was published for comment in October 1997 before being introduced in Parliament in July 1998.

Responsibility for the passage of the bill lay with the National Assembly's Portfolio Committee on Justice, one of Parliament's most dynamic committees with a reputation for legislative competence and careful attention to public submissions. The Portfolio Committee eventually took up the bill in March 1999 when it held two days of public hearings. This process was interrupted by South Africa's second democratic general election in June. When the new Parliament reconvened in August, the 4 February 2000 deadline for adoption of the enabling legislation was looming. To expedite the parliamentary process, an *ad hoc* joint committee of both Houses was created solely to deal with the legislation.<sup>10</sup> This held a second round of public hearings in October 1999, then worked well into the December-January holiday recess to ready a bill for final passage at the beginning of the new parliamentary session in February 2000.

### **The Open Democracy Campaign Group**

Civil society played an extensive and influential role in helping Members of Parliament to craft the final Act. From the outset, civil society organisations took a keen interest in open democracy legislation, including its information access provisions. Despite the challenges of transition to democracy, which included diminishing foreign donor support, South Africa enjoys a large and thriving civil society sector, a substantial segment of which emerged from popular campaigns against *apartheid* and the socio-economic disparities it generated. Having worked for the realisation of a democratic vision, many of these groups saw Open Democracy legislation as a crucial mechanism for the consolidation of participatory democracy, grassroots advocacy, and accountable government in South Africa.

As early as July 1995, the Johannesburg-based Freedom of Expression Institute (FXI) convened at the invitation of Mbeki's Task Group an Open Democracy Advisory Forum (ODAF) of civil society groups to monitor the legislative drafting process, facilitate public debate on the bill, and interact with government departments. It was, in some respects, an impressive initiative. It ultimately foundered, however, as it had neither the coherence nor

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<sup>9</sup>Although the Open Democracy Bill was primarily intended to give effect to section 32(1) of the constitution, it had been conceived from the outset as a broader bill. Section 195 of the constitution sets out a number of basic principles and values that are meant to govern public administration. These include the encouragement of public participation in policy-making, the accountability of public administration, and the promotion of transparency through the provision of 'timely, accessible and accurate information'. National legislation was also required to 'ensure the promotion' of these values. The Open Democracy Bill initially sought also to respond to this mandate. Advocate Justine White, who was involved in early efforts to develop a Freedom of Information Act, has written that the original draft of the Open Democracy Bill 'performed the work of four separate pieces of legislation, namely, a Freedom of Information Act, a Privacy Act, and Open Meetings Act and a Whistleblower Protection Act.' [Justine White, 'Open Democracy: Has the Window of Opportunity Closed?' *South African Journal on Human Rights* 14 (1998), 69.] By the time the bill was approved by Parliament, it had been stripped of these other components and renamed accordingly: the Promotion of Access to Information Act.

<sup>10</sup>The Ad Hoc Committee on the Open Democracy Bill included most of the members of the Portfolio Committee on Justice and was co-chaired by the Portfolio Committee Chair, Advocate Johnny de Lange, and the chair of the NCOP Select Committee on Security and Justice, J. Mahlangu.

the resources to sustain it through the process that followed. In contrast to the smaller, more tightly-drawn Open Democracy Campaign Group, ODAF tried to involve too large and diverse a range of organisations, without the funding to underwrite their travel to Johannesburg for workshops and campaign meetings. For many of the organisations, the issues involved were probably too far removed from their primary agendas – such as development or housing – to permit them to devote sufficient attention or resources to the protracted and complex process that subsequently unfolded. FXI went on to organise an important conference on the bill in January 1996, and continued to play a useful role in critiquing the bill and facilitating responses from civil society organisations based in and around Johannesburg, but ODAF soon vanished from the scene.

In Cape Town, the Parliamentary Information and Monitoring Service (PIMS) of the Institute for Democracy in South Africa (Idasa) launched a parallel initiative. In October 1996, PIMS hosted a workshop entitled ‘Making a Difference: The Challenge for Civil Society Advocacy in South Africa’ that brought together representatives of roughly thirty civil society organisations involved in social justice advocacy, as well as ten international delegates. The workshop participants identified access to information as one of the pivotal issues for effective advocacy in the democratic era. They acknowledged a need for timely information both about the content of policy debates – the policy options being considered by government officials and the data used to assess these options – and about the structures and processes used to decide policy. At the conclusion of the workshop, three organisations – the Human Rights Committee, the Black Sash, and Idasa’s PIMS – were charged with investigating the status of the (then-stalled) Open Democracy Bill, analysing the contents of the most recent draft of the Bill, and designing a campaign to promote enactment of strong information access legislation. In addition, the group was asked to ‘find ways to test the new system in relation to government openness and freedom of information generally, given its importance to effective advocacy.’<sup>11</sup>

These three organisations formed the core of an Open Democracy Campaign Group which ultimately grew to include the Parliamentary Office of the Congress of South African Trade Unions (COSATU), the Legal Resources Centre, the National Association of Democratic Lawyers, the Public Policy Liaison Office of the South African Council of Churches, the Parliamentary Liaison Office of the Southern African Catholic Bishops’ Conference, the South African NGO Coalition, and the Environmental Justice Networking Forum. The Campaign Group also benefited from the regular participation of the parliamentary monitor of the South African Human Rights Commission, one of a handful of constitutionally-established state-supported bodies responsible for promoting democracy.

In contrast to ODAF, the Campaign Group endured and thrived. Over time, the coalition developed a high level of cohesiveness and trust which allowed it to overlook minor differences and focus on core issues. The group also developed a collective expertise that made it an asset to member organisations, the media, and parliamentarians alike. Its members made numerous submissions – both individually and collectively – to the various parliamentary committees that considered the bill and monitored the legislation’s progress closely. It continues to track the implementation of the final Act and has commented extensively on proposed regulations associated with the legislation.

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<sup>11</sup>[Open Democracy Campaign Group], ‘The Open Democracy Bill: A Critical Review,’ December 1997, p.8.

### *Building a Campaign: Fostering a strong coalition*

Although the Campaign Group was not as disparate a grouping as ODAF had been, it enjoyed substantial diversity. With representation from labour, churches, human rights groups and the legal community, the coalition brought together prominent organisations from several key sectors of civil society. Participants were exclusively Cape Town-based (although FXI was present at a couple of the coalition's workshops), but most represented organisations that operate nationwide. Most of the groups involved were engaged in work on multiple issues and therefore saw open and accountable government as a central thread linking many of their concerns. The Campaign Group's breadth enriched its perspective and enabled it to speak with a great deal of moral authority.

This diversity was not free of pitfalls, however. The coalition needed to manage and accommodate the differing priorities, political perspectives, and organisational cultures of its members. Large organisations, such as COSATU, South Africa's giant labour federation, often required much more time to secure formal endorsement for specific policy proposals than smaller groups. In some instances, certain members felt that they needed to put their own 'stamp' on coalition submissions through the inclusion of a particular motivating argument or formulation of a policy proposal.

Fortunately, the Campaign Group had sufficient time to work through any difficulties. While the sluggish pace of the drafting process was a disadvantage insofar as it made room for the erosion of the government's enthusiasm for the bill, it was a boon to the cohesiveness and expertise of the Campaign Group. The coalition met regularly for four years with a fairly stable group of personnel. During that period, some organisational representatives moved on to other positions, but their successors were typically well-briefed and rapidly integrated into the group. This regular contact helped to dissipate the early doubts that some organisational representatives had about the political motivations of their counterparts from other agencies. Continuity bred familiarity and trust and helped to promote consensus. Over time, we also developed a shared base of information, which contributed to a certain convergence of perspective on the legislation and the key issues arising out of it; as the group became more expert, so its confidence but also its cohesiveness grew.

This is not to say that there were no disagreements among members. To the contrary, there were often protracted and even heated debates both inside and outside of coalition meetings. But the mutual trust and respect which Campaign Group members developed for one another had two important consequences. First, coalition members were generally willing to overlook petty differences and reserve their passion for more central concerns. Second, conflicts never generated lasting tensions that might otherwise have jeopardised the coalition's survival.

The Campaign Group's diversity had an additional benefit in that it enabled a division of labour. Various members of the group brought different skills, interests and expertise to the coalition. This allowed for specialisation, as one or two members focussed on particular aspects of the bill: the appeal and enforcement mechanisms, the horizontal application of the right to information held by private bodies, the introduction of a 'right to know' approach to handling state records, the exemption clauses, and so on.

This complementarity meant that the Campaign Group became greater than the sum of its parts. It also made the coalition a valuable resource to member organisations with limited staff, time and research capacity. Members recognised that the bill was long, complex and difficult. Individually, they were unlikely to be able to juggle all of the issues raised by the legislation. The Campaign Group offered assurance that all of their organisation's primary concerns would be addressed without having to duplicate the research and analysis undertaken by their colleagues.

The value of this approach was particularly evident in the coalition's advocacy strategy. Campaign Group members designed their written and oral submissions to be interlocking, with each witness endorsing the positions advanced by other coalition members, then devoting the bulk of her or his time to elaborating a further theme. We dubbed this tactic the 'Twelve Days of Christmas' approach; where time allowed, each individual making a submission would quickly run through the 'headline' points of the previous submissions made by the Campaign Group members before making her or his own, detailed submission. The purpose of this was to hammer home the key points to the MPs.

On several occasions, the group also prepared joint submissions, with each member contributing a section on her or his area of expertise.<sup>12</sup> During the protracted committee deliberations, the group made an effort to ensure that the relevant 'expert' was on hand to monitor the discussion of provisions of particular concern to the coalition.

The legislation's stately pace not only allowed time for the coalition to gel, it also provided invaluable opportunities for research. By the end of 1997, the Campaign Group had produced a detailed analysis of the content of the draft Open Democracy Bill, including information on the ways in which central problems had been resolved in other countries. Eventually, seven key issue areas crystallised:

- Ensuring that the legislation gave full effect to the 'horizontal' right to access privately-held information<sup>13</sup>;
- Ensuring that the enforcement mechanisms established by the new law would be accessible, inexpensive and speedy;
- Promoting a 'right-to-know' approach to government-held information, in order to

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<sup>12</sup>All joint and individual submissions of Campaign Group members are available electronically on the Parliamentary Monitoring Group website, [www.pmg.org.za](http://www.pmg.org.za).

<sup>13</sup>The freedom of information clause included in the final constitution is unique in that it not only guarantees access to information in the possession of the state, but it also provides limited access to information held by "private persons" (whether individuals or organisations) *to the extent that such information is required for the protection or exercise of any right*. To the best of our knowledge, South Africa is the only country that has attempted to establish such a comprehensive right of access to information.

The Open Democracy Bill, as introduced, failed to address fully the right of access to privately-held information. It required only that individuals be permitted to review and correct *personal* information (such as contact details, etc.) about themselves recorded in any "personal information bank" from which data could be retrieved using a name or other unique personal identifier. This was a much narrower right than envisaged in the constitutional provision.

The enormous gap between the constitutional and the legislative language was due in part to the fact that the original task team had completed its initial draft before the freedom of information clause was finalised. The interim constitution made no mention of privately-held information. However, no effort was made to capture the intent of the new constitutional clause before the draft bill was published in October 1997 or before a final bill was introduced in July 1998.

change government attitudes about the disclosure of state records and to maximise the amount of information released without prior review by government officials;

- Reconceptualising and redrafting in separate legislation provisions intended to protect whistle-blowers;
- Narrowing the scope of the disclosure exemptions
- Contesting the blanket exemption of all cabinet records
- Reinstating an early chapter promoting Open Meetings in the public sector.

Each one of these key issue areas was adopted by one or more members of the group, who then took the lead in co-ordinating the research, the formulation of policy proposals, and the lobbying around the particular topic. The Campaign Group organised one-day workshops at important junctures, drawing in academics and other professional experts to inform the group's discussion and strategic planning. On two occasions, it also commissioned legal opinions from counsel to support or ventilate various arguments.

Consequently, the Campaign Group developed a collective expertise, which became an asset to its members, to parliamentarians, and to the media. As the legislative debate on the bill progressed, a number of journalists began to look to members of the coalition for comment, analysis and background. On the eve of the first parliamentary committee hearing, *Business Day*, one of South Africa's most respected daily newspapers, ran a front-page story saying that the Campaign Group was going to alert the Committee to the dangers of failing to flesh out the 'horizontal' part of the constitutional right. The piece not only recited the main issues of concern to the group, but also referred to the Campaign Group as the 'ten organisation Open Democracy Campaign Group'. At the meeting the next day, one MP referred to the Campaign Group as 'the Group of Ten' and it stuck; from then on, generally that was how the committee referred to us. It gave us a sense of presence and persona, of cohesion and achievement. Campaign Group participants also received positive feedback and encouragement from within their own organisations in the wake of these media reports. This enhanced members' commitment to the campaign and gave it further momentum.

### **Developing the Campaign; Building Trust within the Legislature**

Once the bill was finally tabled in parliament, after years of slow progress, there was suddenly a great urgency to meet the constitutional deadline of 4 February 2000. As a Campaign Group, the information and knowledge we had accumulated served us well in our lobbying; under pressure, the committee welcomed our expertise and came to see it as a resource. We also had to build trust, however. The chairperson of the Justice Committee is a prominent advocate and a formidable parliamentarian. He is not easily persuaded and does not suffer fools gladly. If we failed to win his respect, our efforts would have come to naught.

Hence, we were careful to find a balance in our submissions between the ideal (as we saw it) and the realistic (as they were likely to see it). To pitch a submission too far in one direction would be to risk losing respect for being 'unrealistic' (and therefore unreasonable); to lean too far in the other direction would be to concede too much ground. In preparing submissions we tried also to be as 'professional' as possible, in terms of presentation and style, aiming to make the submissions clear and accessible. In this, we had to guard against the danger that our combined knowledge would overflow into over-long submissions. We

decided to keep submissions short and offer longer, more detailed versions to those MPs that wanted them.

It was a hard rule to keep; where we breached it, we would often prepare a short two or three page document summarising our main points, with headlines and key 'sound bites'. The reality is that most MPs face a losing battle against a paper mountain. Advocacy groups add to the mountain at their peril. Short, sharp, concise submissions are a relief to most MPs. If they want more detail then they will ask for it – during the presentation, in questions or afterward.

One particular lesson we learnt the hard way was (to borrow the language of the 1992 Clinton US Presidential Campaign) the need for 'instant rebuttal'. During the committee hearings, a number of public officials gave evidence. One witness was the then Director-General of Land Affairs, Geoff Budlender, a man of impeccable reputation and credibility. He told the committee that he feared that the version of the bill then under consideration would paralyse his department and make it impossible for them to do their work. He did so on the mistaken basis that requests for information could constitute, in effect, requests for 'research to be done'. In other words, Budlender interpreted the bill to grant a right not only to *access* records but to compel departments to construct or *compile* records. The effect of Budlender's evidence was profound, less in relation to the specifics of how the bill defined a record – it was already clear that it did not extend as far as Budlender's interpretation – but more in intensifying committee concerns about the bill's capacity to impede 'delivery' by government.

Our response should have been immediate: a short, clear letter to the chair of the committee, copied to the committee members politely pointing out the error of the interpretation. This could have been supported, perhaps, by a gentle rebuke in the media. Later, it was difficult to dispel the perception that the bill had the potential to paralyse government. When similar incidents occurred we learned to respond more quickly – hence the importance of having members of the campaign group present to monitor proceedings.

The most important aspect of our strategy was our determination to offer constructive alternatives where we had complaints. There is little that is more irritating to a lawmaker than to be faced by a moaning lobbyist who is unwilling or unprepared to offer a better way of doing things. Hence, when presenting our primary concerns, we not only offered policy options, but also alternative legislative language to achieve our proposal.

Although the South African committee system has come a long way, it is still very short of resources. There are no lawyers to assist the committees, who have to rely on the expertise – and the bona fides – of the executive's lawyers. Hence, the need to help the committee with its work by offering actual drafting. We did this in a number of cases: with the drafting of the whole chapter on the horizontal application, the 'right to know' provisions and, in the case of whistle-blowing, the drafting of a whole new bill, once the committee agreed to excise it and totally re-conceptualise the legislative approach.

One or two other further factors helped us to gain the trust of the lawmakers. Firstly, we stuck doggedly to our task and demonstrated that we were there for the long haul. Secondly, our presence at the committee enabled us to build up good personal relations with many of the MPs. Although the chairperson of the Portfolio Committee on Justice is a charismatic and

influential politician and our relationship with him was, therefore, pivotal, we did not neglect the other members of the committee both in the ruling party and in the main opposition parties. The ANC enjoys a very substantial majority in the South African parliament and so clearly our main task was to persuade the ANC members of the Committee. However, we sought to build strategic relations with one or two members of the opposition. This requires that a different sort of trust be built. It is advisable only to deal with opposition members who understand and respect the fact that it may damage a Campaign to have an opposition party member recite, parrot fashion, your arguments. Fortunately, the South African parliament is an exceptionally open one, where tea is shared at the breaks by MPs, lobbyists and media all together. Such breaks provided us with opportunities to raise points, respond to issues before the committee and promote our views quietly.

Finally, the media can play a pivotal role in any legislative campaign. Not all media coverage of a campaign will be good and it needs to be handled with care. For example, coverage in a newspaper which has lost the respect of the ruling party carries the same health warning associated with clumsy support by an opposition party member. Our comments to the media therefore focussed on the issues, rather than the politics and the personalities. While it was hard to get the mainstream media to take up the access to information issue and we had to work hard to think of 'real life' examples to help journalists bring the issue to life, we were fortunate that a small group of very dedicated journalists decided to follow the story the whole way through. Accordingly, we sought out and built good relations with them.

Using the media to support a campaign is as specialist a task as, for example, preparing alternative clauses to the draft law. Division of labour is, once again, a useful thing for a campaign group, we discovered. Fortunately, the diversity of our campaign group gave us one or two individuals who had a good understanding of how media operate, what they need and demand, and how to build a good relationship with a journalist. Over a period of time a mutual dependency can grow. Sometimes the journalist needs an 'expert' quote to complete the story; other times the campaigner will want the journalist to cover a particular issue in order for the campaign groups' line to acquire greater credibility, or to put more pressure on lawmakers. If handled carefully, media coverage can complement and enhance the other components of an effective campaign.

### **Conclusion: Key Lessons**

Many of the lessons identified here are applicable to any legislative lobbying, while some are of particular relevance to access to information campaigns.

**First** of all, all legislative lobbying requires expertise and knowledge. This is especially so in the case of access to information legislation, which tends to be complex and intricate. There are, therefore, many advantages in building a coalition of some sort. There is no substitute for convincing, well-researched and -reasoned arguments; and, in the case of access to information, there is a huge quantity of comparative research. The South African committee was especially interested in models from the different Australian States – so the Campaign Group helped persuade the Australian government to finance a study trip by four members of the parliamentary committee.

**Second**, work together – establish a broad coalition of forces, across both disciplines and regions. We benefitted from having legal, good governance, religious, labour,

environmental, and human and civil rights groups all working together. At the same time it was valuable to have a fairly stable core group.

**Third**, communicate. This helps to keep the coalition together. Trans-regional communication was especially important for us. Although there was some exchange between the Johannesburg and Cape Town groups, this could have been more extensive and fruitful. Regrettably, we did not have the resources to develop good networks in other important regions like KwaZulu-Natal or the Eastern Cape.

**Fourth**, share tasks. Consider whether specialisation makes sense; it worked well for us.

**Fifth**, identify and utilise outside expertise. Sympathetic lawyers can make especially valuable contributions to analysis and debate, provided they are not given undue deference or allowed to hijack the coalition. Lawyers often adopt a cautious, even conservative approach to legislative issues, and this should be factored into any planning informed by their advice. One way of retaining strategic control of the campaign is to bring lawyers in as consultants on specific issues by commissioning legal opinions.

**Sixth**, cultivate contacts in government. These can be important for getting documents or other intelligence on the government's plans. For us in South Africa – where we enjoy a relatively strong and independent legislature – cordial ties with parliamentary leaders who recognised the value of civil society input were particularly important for allowing our voice to be heard and getting our proposals before legislators.

**Seventh**, be prepared to offer solutions, even if they aren't perfect. The Campaign Group provided basic language to fill several gaps in the legislation. This was often adapted – sometimes beyond recognition – by legislators, but it helped to frame the issues and provided legislators with a starting point, thereby reducing resistance to exploring new themes.

**Eighth**, be prepared for the long haul. The struggle is not over when the legislation is enacted. One needs to monitor and comment on implementation, regulations, etc.

**Ninth**, identify unique advantages. In addition to our strong constitutional grounding, the political and institutional fluidity of the transitional state created an openness to input, in part because new MPs often had limited access to research and a propensity to take on board civil society proposals. Other countries may not have these specific characteristics, but may have other advantages unique to their situations.

**Finally** – and perhaps most important – there must be political will. In our case, the political momentum was captured in the country's constitution, which lent both moral and legal authority to the campaign even if the political will of some individual public officials began to flag.

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