

FREEDOM FRONT

4. RIGHT TO PRIVACY (ADDITIONAL SUBMISSION)

1. Content of the right

1.1 Constitutional Principle IX (freedom of information) should be added to the short list, as publication of information can infringe the privacy of individuals concerned.

1.2 Controversial issues

See comment under Application of the Right below.

2. Application of the right

2.1 Nature of the duty to be imposed on the state. The State should be obliged by law to respect the privacy of the individual to the maximum extent that can be reconciled with effective and democratic government.

2.2 Common law and customary law provisions protecting the right to privacy should not be repealed, subject to the qualification that contemporary generally accepted rules relating to privacy in a modern democratic society must necessarily supersede any outdated concepts.

2.3 No, a right to privacy should not, in the bill of rights, impose a constitutional duty on actors other than the state. The common law, customary law and ordinary statute law (as opposed to the bill of rights) should provide adequate protection and remedies in the event of invasion of privacy by private persons. The reason why invasion of privacy by the state should be protected in all bill of rights is that the state is in a very strong position as against the individual capable in many instances of subjecting the citizen to its will, and possibly abusing its position of power. For this reason the privacy of the individual should be entrenched in a bill of rights, which would be the only effective bulwark against invasion by the state of the right of privacy of the individual.

2.4 All natural persons, whether they be citizens or persons admitted to lawful residence in South Africa, should be bearers of the right to privacy. Suspected unlawful immigrants should not have this right, as

(i) such a right might impede any inquiry into the legality of their sojourn in South Africa; and

(ii) the unlawfulness of their entry into South Africa should entitle them to be treated only with dignity (as opposed to privacy).

Juristic persons should also have a right of privacy, but this right would naturally differ in content from the right of privacy of a natural person and its ambit would be dictated by the nature and functions of the juristic person concerned.

- 2.5 The answer to the question whether the right to privacy should be capable of limitation by the legislature depends on
- (i) principle; and
 - (ii) the scope of the limitation clause in the new constitution (at present section 33(1) of the transitional Constitution, which provides "The rights entrenched in this chapter may be limited by law of general application, provided...')

As far as principle is concerned it is at least arguable that legislation should be able to limit or curtail a right to privacy, as the circumstances in which privacy may be in issue are diverse.

As far as the scope of the limitation clause is concerned it should be noted that at present all the fundamental rights in the present chapter 3 are capable of limitation. If the same premise is to apply to the limitation clause of the new constitution the question 'Should the right under discussion be capable of limitation by the legislature?' should not be answered in respect of each individual right at this stage, but at the stage when the limitation clause is discussed.