



Genetically Modified Organisms Amendment Bill

Submission to the Department of Agriculture, November 2004.

Introduction

The *Genetically Modified Organisms Act 15/97 (the Act)* directly impacts on a number of rights enshrined in our Constitution, including: the right of access to sufficient food (Section 27), the right of children to basic nutrition (section 28(1)(c)); the right to an environment that is not harmful and for the environment to be protected (section 24), the right of access to information (section 32); the right to just administrative action (section 32) and the right to bodily integrity (section 12(2)). It is for this reason that the South African Human Rights Commission (SAHRC) has chosen to comment on the *Genetically Modified Organisms Amendment Bill (the Amendment Bill)*.

The mandate of the SAHRC

The SAHRC is one of the institutions created in terms of Chapter 9 of the Constitution to support democracy in South Africa. The SAHRC is mandated by section 184 of the Constitution to:

- (a) Promote respect for human rights and a culture of human rights;
- (b) Promote the protection, development and attainment of human rights; and
- (c) Monitor and assess the observance of human rights in the Republic.

The SAHRC has chosen as its focus areas the alleviation of poverty and the elimination of discrimination. In focussing on the alleviation of poverty, the SAHRC uses its constitutional mandate to promote, protect and monitor the economic and social rights that are enshrined in our constitution.

The SAHRC has not at this stage formulated a policy position regarding genetically modified organisms (GMO's) and their impact on the right to an environment that is not harmful and the right to sufficient food. However, we do recognise that the international community has sought fit to draft and negotiate the Cartagena Protocol on Biosafety (Cartagena Protocol), which sets out minimum guidelines on how GMO's can be imported and exported. The existence of this Protocol recognises that there is a need to regulate and control the use of GMO's in order that the potential and unknown risks that their use may contain is avoided and minimised. This is based on the international environmental principle – the Precautionary Principle. It is welcomed that the *Amendment Bill* seeks to incorporate the provisions of the

Cartagena Protocol. In so doing, our legislation ought to comply with the minimum standards and requirements set out in this international instrument.

However, in addition to these minimum standards the legislation must also comply with our constitution, being the supreme law of the land. In particular, the Act contains provisions that are subject to the right of access to information and the right to just administrative action. The SAHRC is responsible for monitoring the implementation of the Promotion of Access to Information Act 2/2000 (PAIA) and thus has a special interest in these matters.

The Amendment Bill

In accordance with our mandate the SAHRC makes the following submissions on the *Amendment Bill*:

Clause 2

This clause replaces human gene therapy with germ line therapy. In the Act gene therapy is defined. The *Amendment Bill* does not define germ line therapy.

It is submitted that a definition of germ line therapy be added to the *Amendment Bill*.

It is also not clear whether germ line therapy includes human germ line therapy. This is a contentious area of science. Without entering into these debates it is questionable whether human germ line therapy can be legislated for in agricultural legislation.

Clause 7

This amendment stipulates that the two persons from the public sector who sit on the Advisory Council must “have a non-prejudicial position, with regard to genetically modified organisms.”

It is not clear what the intention of the drafters is in including these words. What is a prejudicial, harmful or detrimental position to GMO's? The interpretation of the wording of this section is potentially open to the abuse of ensuring that political decisions are taken in deciding who may sit on the Board.

The Act

The SAHRC is aware that the civil society sector has a number of concerns with the Act. Some have even argued that the Act is fundamentally flawed. It does not appear that these concerns have been addressed in the Amendment Bill. Many of these concerns appear to have sufficient merit to at least prompt the establishment of a process to more fully explore the concerns. Of particular concern to the SAHRC are those criticisms of the Act that impact directly on constitutional rights. Some examples of these concerns include:

The right to sufficient food, basic nutrition and an environment that is not harmful

Liability on end user

Section 17 of the Act (Determination of risks and liability) places liability for the damage caused by the use or release of GMO's on the end user (e.g. the farmer). This liability ought to be extended to the manufacturers and producers of GMO's. In certain instances it may be more appropriate to hold the manufacturer liable rather than the end user.

Access to information

Section 18 of the Act (Confidentiality) is unclear as to when information may and may not be disclosed. It is understood that these sections currently form the subject of litigation. The fact that the sections are being litigated upon points further to the lack of clarity. There is a duty upon the legislator to ensure that legislation is clear.

The Amendment Bill would provide an opportunity for the department to clarify these sections in greater detail.

Section 21 of the Act (Offences and Penalties) does not provide any penalties against applicants who supply false information during the application procedure.

The Act ought sufficiently to address the right to be informed about GMO's in order that individuals consent with knowledge to consuming GMO food. This flows from an individuals right to access to information and the right to bodily integrity.

Fair administrative action

Reasons for decisions

In terms of section 19(6) (Appeals) the decision of the Appeal Board is to be made available to the Minister. The Act does not state that these reasons must also be made available to the Appellant.

Section 33(2) of the constitution states: "Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

Section 5 of the Promotion of Administrative Justice Act 3/2000 (PAJA) sets out in further detail the content of the right enshrined in section 33(2) of the constitution.

There is thus an argument to be made that the Act does not comply with the constitution or PAJA in that it fails to stipulate that an Applicant in the appeals process shall be provided with the written reasons of the Appeal Board.

Public participation

Concerns have also been raised that public participation processes provided for in the Act may well fall short of PAJA (see section 4 of PAJA).

Right of Appeal

When an appeal is lodged in terms of the Act, there are no provisions which state what will occur in the interim, who must sit on the Appeal Board and what will happen if the Appeal Board fails to render a decision within 30 days.

There is a need for interim relief to be granted pending the appeal process. If no interim relief is granted then the seeds are planted, the plants grown and the decision of the appeal becomes academic.

Conclusion

There is a need for the Act to be subjected to a process of evaluation as to whether it complies with the constitution, PAJA and PAIA.