



THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Submission to the

Ad Hoc Committee on Protection of State Information Bill (National Council of Provinces)

On the

Protection of State Information Bill [B6B-2010]

10 February 2012

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SECTION A: INTRODUCTION AND SUMMARY

1. Introduction

The South African Human Rights Commission ("the Commission") makes this submission on the Protection of State Information Bill [B6B-2010] ("the Bill"), in response to the call for written submissions issued by Mr R.J. Tau, Chairperson of the Ad Hoc Committee on the Protection of State Information Bill (National Council of Provinces) ("the NCOP").

2. Mandate

The Commission is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996 ("the Constitution"). The Commission is specifically mandated to: promote respect for human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic of South Africa.

Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country. Further, section 184 (2)(c) and (d) vests in the Commission the responsibility to carry out research and to educate on human rights related matters.

The broad constitutional mandate is further amplified by the South African Human Rights Commission Act, 54 of 1994, the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ("PEPUDA") and the Promotion of Access to Information Act, 2 of 2000 ("PAIA") which confer further powers, responsibilities and duties on the Commission in executing its mandate. It is on the basis of this mandate that the Commission monitors and responds to legislative developments which impact on human rights in the Republic. Where necessary, the Commission responds to requests for comments and submissions on proposed legislation, regulations, and policies.

3. The Commission's participation in the legislative process

The Commission has previously made two submissions to the Ad Hoc Committee on Intelligence in relation to the Protection of Information Bill [28-2008] and Bill [6-2010] respectively. The impact of the bills on human rights in general, and the right to access information in particular, were central to the submissions. These concerns were reiterated by the Commission in its oral presentations to Parliament.

The Commission has noted the amendments made to the Bill during its passage through the National Assembly, and notes the public hearings currently held across the country by the Ad Hoc Committee on the Protection of State Information Bill of the NCOP.

The Commission's previous submissions as referred to above included concerns over the concentration of power in the state security apparatus, the chilling effect of specific sections (as they were then formulated) in their impact on the rights to access information

and freedom of expression rights, and the negating of the principles of openness central to the rule of law. The Commission has noted that a number of its earlier recommendations have been responded to, in varying degrees, through the excision and amendment of the Bill in an attempt to reconcile these with constitutional injunctions in the working draft.

In the process of engaging in its own consultation process, the Commission posed a number of questions to experts in soliciting their views in respect of the Bill in its later versions. This consultation process and further review of the Bill has significantly informed the Commission's present response to the Bill as set out herein.

4. Summary of the Commission's central submissions

The Commission's central submissions to the Ad Hoc Committee on the Protection of State Information Bill of the NCOP, as more fully set out in **Section B** below, are summarized as follows:

- 4.1 The right to freedom of expression (paragraph 5 below): While national security concerns constitutes a legitimate and reasonable basis for the limitation of the right to freedom of expression, to satisfy the safeguards provided in the Constitution for the protection of human rights, the limitation on freedom of expression needs to be formulated to ensure it is not unduly restrictive and does not constitute the least restrictive means to achieve its purported purpose. For this reason, the provisions of the Bill may not survive the limitations analysis contemplated in section 36 of the Constitution.

4.2 The right of access to information (paragraph 6 below): The Commission's view is that the provisions of the Bill may fall foul of the Constitution insofar as it conflicts with the provisions of PAIA (which gives effect to the constitutional right of access to information) and disproportionately (and therefore unjustifiably) limits the right of access to information. Furthermore, with regard to issues of transparency, corruption and public participation by the citizenry in government, the rights to freedom of expression and access to information are "gateway rights", and are of vital importance in enabling individuals to exercise other constitutional rights. The framework for rights assertion as it is contained in the Bill severely impedes the right to access justice for the citizenry and through further limitations on time frames for responses will limit the right to freedom of expression and access to information as well.

4.3 The classification regime in the Bill (paragraph 7 below): The Commission submits that in order for the classification regime contained in the Bill to comply with constitutional requirements; including the limitations clause in section 36; the classification regime must be restricted. . The ultimate question in the context of the Bill is whether the legislation indicates with reasonable certainty to those who are bound by it what is required of them, and it is the Commission's view that the Bill may not meet this requirement of the principle of legality. The law must be sufficiently clear to enable the public to adapt their behaviour to prevent falling foul of the provisions of the law. A more reasonable approach is therefore to limit the functionaries that can classify state information. However, despite the aforementioned, when considering the offences created by the Bill, we return to the question as to how an individual in the possession of information will know the category in which the information in his or her possession the information

falls. The Bill then becomes circular in its reasoning and application, and may fall foul of the principle of legality.

4.4 The public interest defence and the sanctions imposed by the Bill (paragraph 8 below): The Commission submits that a public interest override would constitute a "reasonable publication" defence and would overcome the chilling effect created by the provisions of Chapter 11 of the Bill. The Courts and any official implementing the Bill will be hard-pressed to give effect to the principles set out in section 6: without a public interest override or similar equitable, reasonable defence, the Courts and officials will have little scope to engage in the balancing exercise (between openness and the needs of security) contemplated in section 6 and will be bound by the otherwise strongly prescriptive provisions of the Bill. The combination of the harsh sanctions which can be imposed in terms of the Bill, such as unclearly defined offences and the absence of any particularly-crafted defence will unavoidably have a chilling effect on the exercise of the rights of access to information and free expression, as ordinary citizens, researchers, academics and journalists balk at the prospect of long gaol spells stemming from their attempts to access and publicise State information and the absence of any reliable legal defence.

4.5 The impact upon research and institutions of learning (paragraph 9 below): The Bill raises 2 (two) areas of concern when its impact on research and institutions of learning is considered. The first area of concern in the Bill is the impact of the broad definition of an "organ of state" on higher education institutions and other research-orientated bodies established by statute. The second area of concern is the impact of the Bill on research and the ability to obtain information from the organs of state. The Commission proposes the following amendments: the

definition of an organ of state should expressly exclude Academic and research-based institutions; further protection should be afforded to researchers seeking information from organs of state; and there should be parity in the sanction for the offence of improper classification and unlawful possession of information.

SECTION B: THE COMMISSION'S SUBMISSIONS

5. The right to freedom of expression

Accepted interpretation of the right to freedom of expression

- 5.1 The Commission commences its submission by dealing with the constitutional right to freedom of expression, and the concern as to whether this right is limited by the Bill and if so, whether the anticipated limitation is justifiable under section 36 of the Constitution. The Commission's concern is that, while national security concerns may constitute a legitimate and reasonable basis for the limitation of the right to freedom of expression, the provisions of the Bill are unduly restrictive and do not constitute the least restrictive means to achieve its purported purpose. For this reason, the provisions of the Bill may not survive the limitations analysis contemplated in section 36 of the Constitution and for this reason, could be impugned as unconstitutional.
- 5.2 Section 16 of the Constitution governs the right to freedom of expression generally and specifically protects, *inter alia*, the freedom of the press and other media and the freedom to receive and impart information and ideas. In terms of section 16(2), the right to freedom of expression does not extend to (a) propaganda for war; (b) incitement of imminent violence; (c) or advocacy of hatred based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

- 5.3 In *Laugh it off Promotions CC v South African Breweries International (Finance) B.V t/a Sabmark International and Freedom of Expression Institution as Amicus Curiae*¹ the Court elucidated the manner in which section 16 should be interpreted –

*"We are obliged to delineate the bounds of the constitutional guarantee to free expression generously. Section 16 is in two parts: the first subsection sets out expression protected under the Constitution. It indeed has an expansive reach which encompasses freedom of the press and other media, freedom to receive and impart information and ideas.... The second part contains three categories of expression which are expressly excluded from constitutional protection. It follows clearly that unless an expressive act is excluded by section 16(2) it is protected expression . . . In appropriate circumstances authorised by the Constitution itself, a law of general application may limit freedom of expression."*²

- 5.4 The case of *Islamic Unity Convention v the Independent Broadcasting Authority and Others*³ went further to discuss the in-built limitation of the free expression right in section 16 –

"Implicit in [section 16's] provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. . . Any regulation of expression that falls within the categories enumerated in section 16(2) would not be a limitation of the right in section 16. . . . where the state extends the scope of regulation beyond expression envisaged in section

¹ 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC).

² Id at para 47.

³ 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC).

16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution."⁴

5.5 As indicated above, the Constitution expressly recognises the media's role in advancing freedom of expression and the courts have fostered this position. In *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others*,⁵ the Constitutional Court held:

*"Freedom of expression is another of the fundamental rights entrenched in Chapter 2 of the Constitution. This Court has frequently emphasised that freedom of expression lies at the heart of democracy The Constitution recognises that individuals need to be able to hear, form and express opinions and views freely on a wide range of matters. . . . This Court has also highlighted the particular role in the protection of freedom of expression in our society that the print and electronic media play. Thus everyone has the right to freedom of expression and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. The media thus rely on freedom of expression and must foster it. In this sense, they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression."*⁶

⁴ Id at paras 32-34.

⁵ 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC).

⁶ Id at paras 23-24.

5.6 In *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*,⁷ the SCA noted:

*"It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press. . . . To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself."*⁸

5.7 The impact of the Bill on the right to freedom of expression

Against the backdrop of the above-mentioned dicta, as well as the provisions of section 16 of the Constitution, the following bears mentioning in relation to the Bill –

5.7.1 It is beyond dispute that the Bill limits the freedom of the press and other media and the freedom to receive or impart information, which freedoms fall within the umbrella of the right to freedom of expression enshrined in section 16(1) of the Constitution. This is so as the Bill provides for a statutory regime governing the classification and concomitant censorship of state information, which places state information that would otherwise be accessible to the media and the public beyond their reach. It is also important to note the impact that the Bill is anticipated to have on the activities of the media and other recipients of information under threat of criminal prosecution. This would likely infringe upon not only the rights of the media to investigate matters with a view to imparting information,

⁷ 2007 (5) SA 540 (SCA).

⁸ Id at para 6.

but also the rights of citizens to receive information regarding the institutions that govern them.

5.7.2 The relevant question is whether, under section 16(2) of the Constitution, the state information that is classified and accordingly protected from unlawful disclosure, constitutes "unprotected expression" such that the censorship thereof would not constitute a limitation of the right to freedom of expression (See the dicta in the cases of *Islamic Unity and Laugh it Off Promotions* above). In this regard, the following points bear mentioning –

5.7.3 It does not appear likely that the information that forms the subject matter of the classification (which renders the information inaccessible to the media and the public) would constitute propaganda for war, incitement of imminent violence or advocacy of hatred based on race, ethnicity, gender or religion (and which constitutes incitement to cause harm). **It is telling that the drafters of the Constitution did not expressly render as unprotected expression in section 16(2), information that is ostensibly adverse to the interests of national security.** Accordingly, it would seem that information, the disclosure of which would purportedly implicate national security concerns, does not fall within the categories of unprotected expression contemplated in section 16(2) of the Constitution.

5.7.4 Even if the disclosure of the information has the potential to fall within the categories of information contemplated in section 16(2) of the Constitution such that it is rendered "unprotected", the classification

regime as currently envisaged in the Bill does not create an objective mechanism by which the limitation of the right to receive information can be situated in any of the section 16(2) categories. In other words, the classification mechanisms contemplated in the Bill create a situation in respect of which the media and the public "do not know what they do not know" and it is therefore not possible for potential recipients of the information to objectively assess whether access to the information is refused due to any of the factors contained in section 16(2).

5.8 For the reasons enumerated above, we conclude that the provisions of the Bill may constitute a limitation of the right to freedom of protected expression enshrined in section 16 of the Constitution.

5.9 Limitation beyond the protections offered in the freedom of expression provision of the Bill of Rights?

As indicated in the *Islamic Unity* decision of the Constitutional Court (see above), where the state extends the scope of regulation beyond the factors in section 16(2), it limits the right to freedom of expression and can only do so if it meets the justification criteria contained in section 36 of the Constitution. Accordingly, we turn to determine whether the provisions of the Bill can be construed as a reasonable and justifiable limitation of the constitutionally protected right to freedom of expression (which includes the right to receive information).

5.10 Even beyond the in-built restrictions placed within section 16 itself, the right to freedom of expression can be limited if it meets the criteria contained in section 36 of the Constitution. The Constitutional Court in the *Islamic Unity* decision explained this as follows:

"The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself . . . open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself. . . . There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other state interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under section 36(1) of the Constitution. Determining its parameters in any given case is therefore important, particularly where its exercise might intersect with other interests."

- 5.11 The case of *Midi Television*⁹ gives content to the meaning of "law of general application" in section 36 of the Constitution as well as the way in which the limitations analysis should be conducted –

"Law of general application that purports to curtail the full exercise of a constitutionally protected right might take the form of legislation, or a rule of the common law, or even a provision of the Constitution itself. In each case the extent to which the intrusion that it purports to make upon a protected right is constitutionally valid is to be evaluated against the standard that is set by the provisions of s 36 because there are no other grounds upon which it is permissible to limit protected rights. Where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa – a court must necessarily

⁹ 2007 (5) SA 540 (SCA).

*reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by s 36."*¹⁰

5.12 In the following cases, the Courts gave some indication as to when the freedom of expression right would be limited –

5.12.1 *"... a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place."*¹¹ – *Midi Television*

5.12.2 *"The right to freedom of expression (as is the case with all rights in the Bill of Rights) is not and should not be regarded as absolute. The s 16(1) right may be limited by a law of general application that complies with section 36 of the Constitution. In other words, the Constitution expressly allows the limitation of expression that is 'repulsive, degrading, offensive or unacceptable' to the extent that the*

¹⁰ Id at paras 8-9.

¹¹ Id at para 19.

*limitation is justifiable in 'an open and democratic society based on human dignity, equality and freedom.' - Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others.*¹²

5.12.3 *"In neither case did any of the counsel who argued it before us contend or suggest that such censorship was always and in principle repugnant to the Constitution, no matter how vile, depraved and bereft of redeeming features the material thus suppressed might happen ever to be. They all accepted, on the contrary, that the production of material so egregious, its dissemination and sometimes even its possession could justifiably be prohibited or restricted in the public interest whenever those activities were shown to have a truly pernicious effect." - J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others.*¹³

5.12.4 In the case between *Independent Newspapers (Pty) Ltd v Minister for Intelligent Services and Another In re: Billy Lesedi Masethla v President of the Republic of South Africa and Another*,¹⁴ the majority of the Constitutional Court upheld classifications on grounds of national security [our emphasis].

¹² 2003 (3) SA 345 (CC).

¹³ 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC).

¹⁴ [2008] ZACC 6.

5.13 Is the fundamental right to freedom of expression reasonably and justifiably limited?

Against the background of the case law expounded above, the Commission draws the following conclusions –

- 5.13.1 It is accepted that, once promulgated, the Bill would constitute a law of general application. The more relevant question is whether, as a law of general application, its provisions could be construed as reasonably and justifiably limiting the constitutional enshrined right to freedom of expression.
- 5.13.2 While the principles underpinning the protection of state information are premised on the upholding of national security (and in essence, the safety of the public), the relevant question is whether the limitation of freedom of expression on this basis constitutes a reasonable and justifiable limitation of the right.
- 5.13.3 While it is conceivable that: (i) state information may be so sensitive that the dissemination of such information may have an adverse impact on the security of the public; and (ii) national security constitutes a basis for justifying the limitation of the right to receive information, the relevant question is ***whether the provisions of the Bill constitute the least restrictive means to achieve the upholding of national security***, at the expense of freedom of expression guarantees. The Commission's view is that the provisions of the Bill are unduly restrictive for the following reasons –

5.13.3.1 The imposition of onerous criminal sanctions for the mere receipt of information (whether or not any harm is, in fact, caused by the mishandling or disclosure of classified information), without exceptions that advance the public interest, is likely to hinder the extent to which the media may rigorously investigate matters of public concern. It requires emphasising that the Bill does not contemplate a public interest defence and therefore categorically sanctions individuals in contravention of its provisions without regard for overarching public interest concerns. The threat of criminal prosecution is likely to have a widespread and unduly burdensome effect on the media and concomitantly, on the right to receive information (all of which impact negatively and disproportionately on the right to freedom of expression). The public interest defence, classification of information and relevance of the sanctions imposed are considered further in paragraphs 7 and 8 below.

5.13.3.2 As intimated above, while the basis for the limitation of the right is essentially national security concerns, it is not possible to objectively and exhaustively interrogate the basis upon which the information is classified without instituting a direct and urgent court application (the internal review and appeal mechanisms do not provide an impartial interrogation or expeditious basis for the

classification imposed). Accordingly, while Chapter 5 of the Bill outlines the principles according to which officials must classify information, the Bill does not contemplate an effective and expeditious system of checks and balances to ensure that the rights of the media (and the citizenry) are not unjustifiably impinged upon.

5.13.3.3 As indicated above, state information cannot be classified for a period longer than twenty years and must be reviewed at least once every ten years. This ignores the reality that the circumstances under which the document was classified may no longer prevail and sensitivities prompting its classification may change. While the initial classification of the information may have been in the interests of national security, the continued classification of the document may undermine such interest (given that transparency is generally construed to advance public interest concerns). The ten year review period and the twenty year classification period are therefore unnecessarily lengthy given the transient significance that classifications may have (this is dealt with further in paragraph 7 below).

5.14 For the reasons highlighted above, the Commission's view is that, while national security concerns constitutes a legitimate and reasonable basis for the limitation of the right to freedom of expression, the provisions of the Bill are unduly restrictive and do not constitute the least restrictive means to achieve its

purported purpose. For this reason, it is likely that the provisions of the Bill will not survive the limitations analysis contemplated in section 36 of the Constitution and for this reason, would be impugned as unconstitutional.

6. The right of access to information

6.1 The Commission's view is that the provisions of the Bill may fall foul of the Constitution insofar as it conflicts with the provisions of PAIA (which gives effect to the constitutional right of access to information) and disproportionately (and therefore unjustifiably) limits the right of access to information.

6.2 Section 32 of the Constitution states –

"(1) Everyone has the right of access to –

(a) any information held by the state...

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state"

6.3 As was enunciated by Cameron J in *Van Niekerk v Pretoria City Council*:¹⁵

"In my view, s 23 [the predecessor to section 32 of the Constitution] entails that public authorities are no longer permitted to "play possum" with members of the public ... The purpose of the Constitution, as manifested in s 23, is to subordinate the organs of State . . . to a new regime of openness and fair dealing with the public."

6.4 PAIA gives effect to the right to access to information contained in section 32 of the Constitution. In this regard and at the outset, it bears emphasising that the constitutionality of the Bill, insofar as it impacts on the right of access to

¹⁵ 1997 (3) SA 839 (T) at 850.

information, must be assessed by reference to whether it conflicts with the provisions of PAIA. In this regard, the decision of the Constitutional Court in the case of *MEC for Education: KwaZulu – Natal and others v Pillay and Others*,¹⁶ albeit in the context of the PEPUDA, is instructive -

"...a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to 'fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights'...Absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins."

6.5 Accordingly, it is necessary to consider whether the provisions of the Bill conflict with the right of access to information, which right is given effect to by PAIA.

6.6 PAIA establishes the right to request information and a concomitant duty to provide information that has been requested –

6.6.1 unless there is a ground for refusing access to the information; and

6.6.2 provided the requester complies with all the Act's procedural requirements.

6.7 As mentioned above, PAIA requires access to a record to be granted on request unless refusal is mandated by one or more of the grounds of refusal listed in PAIA. The relevant grounds of refusal listed in PAIA are as follows –

¹⁶ Case CCT 51/06 at paragraph 40.

"38. *The information officer of a public body –*

(a) *must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual;*

(b) *may refuse a request for access to a record of the body if its disclosure would be likely to prejudice or impair –*

...

(ii) *methods, systems, plans or procedures for the protection of –*

...

(bb) *the safety of the public, or any part of the public...*

41(1) *The information officer of a public body may refuse a request for access to a record of the body if its disclosure –*

(a) *could reasonably be expected to cause prejudice to –*

(i) *the defence of the Republic;*

(ii) *the security of the Republic;*

(iii) *subject to subsection (3), the international relations of the Republic...*

...

41(3) *A record may not be refused in terms of subsection (1)(a)(iii) if it came into existence more than 20 years before the request."*

6.8 Despite the provisions reproduced above, an information officer of a public body must grant a request for access to a record of the body contemplated in, *inter alia*, sections 38(a) – (b) and 41(1)(a) of PAIA if –

"46 (a) *the disclosure of the record would reveal evidence of-*

(i) *a substantial contravention of, or failure to comply with, the law; or*

(ii) *an imminent and serious public safety or environmental risk; and*

(b) *the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question"*

6.9 Against the backdrop of the relevant provisions of PAIA, read with the provisions of the Bill, the following bears emphasising –

6.9.1 First and foremost, it bears mentioning that, in the absence of a constitutional challenge to PAIA, its provisions constitute the legislative articulation of the constitutionally protected right to access to information. Accordingly, the presumption is that PAIA not only gives effect to a constitutional guarantee, but is also consistent with the Constitution. Accordingly, an attempt to render PAIA subordinate to the Bill in instances of a conflict between the provisions of PAIA and the Bill effectively renders the Constitution subordinate to the Bill. This undermines one of the fundamental and founding provisions of the Constitution encapsulated in section 1(c) read with section 2, being the

supremacy of the Constitution. It follows that any provision rendering PAIA subordinate to the Bill is inconsistent with the provisions of the Constitution and, in the result, ought to be impugned as constitutionally invalid.

6.9.2 In the Commission's view, these tensions clearly arise in relation to section 1(4) which states that "in respect of classified information and despite section 5 of the Promotion of Access to Information Act, this Act prevails if there is a conflict between a provision of this Act and a provision of another Act of Parliament that regulates access to classified information". In essence, PAIA processes are therefore excluded with regard to requests for access to classified information based on grounds of national security, in favour of more onerous processes defined in the Bill. This renders the Constitution subordinate to the Bill, as the right of access to information given effect to in PAIA as enabling legislation is excluded from application in in this regard.

6.9.3 The classification regime contemplated in the Bill imposes onerous obligations on parties seeking to assert their right to access publicly held information. In effect, the classification regime (and the concomitant review and appeal mechanisms) subordinates not only the right of access to information but also the overarching principles of openness and transparency in favour of a regime of secrecy and censorship. This the Bill advances in the interests of national security, although it can be applied to any information in the hands of the state, whether or not the information constitutes security information as there is no prior means of knowing or establishing whether information has been properly

classified. The classification test will only ever be invoked when classification is reviewed on application to the Classification Review Panel [CRP]. The far reaching effects of the Bill, insofar as it has the potential to apply to information that transcends security information, is disproportionately burdensome on the right to access information freely and has the likely potential to censor information for reasons unrelated to the purpose for which the censorship is imposed. On this basis, it is the Commission's view that the classification system contemplated in the Bill unjustifiably impinges on access to information rights.

- 6.9.4 Section 41(1)(a) of PAIA affords an information officer a discretion to refuse access to a record pursuant to the maintenance of national security. In other words, PAIA does not render it mandatory to refuse access to public records on the basis of national security. In point of fact, section 46 of PAIA mandates (in peremptory language) the disclosure of a record contemplated in section 41(1)(a) where, *inter alia*, the public interest in disclosure outweighs the harm that disclosure will cause. The effect of this is that public records may be released in the public interest under PAIA, despite the threat that the contents may pose to national security, while the provisions of the Bill elevate the interests of national security above those of access to information in the public interest. The manifest tension between PAIA and the Bill renders the provisions of the Bill unconstitutional as it conflicts with legislative provisions that directly give effect to a constitutionally entrenched right. On this basis, the Commission's view is that the Bill could be impugned as unconstitutional.

- 6.9.5 The public interest override as it is referred to in PAIA, although restrictive in its nature, enforces the principle of openness over that of secrecy. It permits an exceptional basis for release. The Bill however, does the opposite, not only does it remove the right of persons to access records which may be protected on the basis of national security from the purview of PAIA, but it assumes the power to regulate and penalise such access in the absence of any public interest ground. Seen in this way the right to access information and expression are unduly restricted.
- 6.10 On the basis of the reasons outlined above, the Commission's view is that the provisions of the Bill may fall foul of the Constitution insofar as it conflicts with the provisions of PAIA (which gives effect to the constitutional right of access to information) and disproportionately (and therefore unjustifiably) limits the right of access to information.
- 6.11 The Bill also proposes a process of application to a CRP where a requestor wishes to have the classification status of a record reviewed. After a decision has been made by the CRP, a requestor may then approach the courts. The time frames and processes applicable will adversely impact upon the right of access to information, as this right is premised on such access to information being quick, efficient and inexpensive.
- 6.12 In this regard the Bill also does not speak to the reality of power imbalances between the citizenry to assert rights and that of information holders and classifiers of information. The processes for rights assertion as prescribed in the Bill are extremely onerous and beyond the reach of the majority of people in the

country. In this respect the Bill poses a further unreasonable and unjustifiable limitation on the right to access information.

6.13 With regard to issues of transparency, corruption and public participation by the citizenry in government, the rights of access to information and free expression constitute "gateway rights": they are of vital importance in enabling individuals to exercise their other constitutional rights –

6.13.1 individuals cannot properly exercise their political rights, including the rights stemming from the participatory nature of our democracy,¹⁷ unless they are properly informed of what the government of the day is doing;

6.13.2 individuals cannot properly vindicate their socio-economic rights if they do not know the details of what steps the government has taken (or failed to take) to give effect to those rights; and

6.13.3 individuals cannot insist on open, accountable and transparent government if some of society's key investigative structures – research units, think tanks, academics and journalists – are unable to access the information they require in order to discharge their functions.

¹⁷ See *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

7. The classification regime in the Bill

7.1. The Bill envisages that once information is classified, its accessibility to the public and its disclosure are limited. The main problem at the centre of the Bill; that is the test which classifiers, the heads of organs of state or their delegates, will be authorised to employ to classify information. Various definitions central to the Bill are so wide that they are impractical and invasive to the principle of legality; as well as the right to free speech and access to information as discussed above. The principle of legality inherent in the rule of law applies to the guarantee of just administrative action; access to justice and access to information. This means that administrative organs may only perform actions that have been authorised by law, and that they must heed any statutory requirements or preconditions attached to the exercise of a particular power; and must ensure that the Constitution and the rights therein are upheld.¹⁸

7.1.1. The principle doctrine of legality, a foundational and fundamental principle in our Constitution, requires laws to be clear and accessible. The Courts, including the Constitutional Court, have endorsed the proposition that laws must be drafted with sufficient precision to allow those responsible for their implementation to have reasonable certainty in regards to the conduct required of them.

7.1.2. The Bill, in its present form sets the threshold for classification at a level that is too low.¹⁹ The first problem with this threshold is that the harm threshold required is speculative; and documents that **"may"** [our

¹⁸ See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*.

1998 (12) BCLR 1458 (CC) case.

¹⁹ Section 14 and 16 of Bill.

emphasis] be harmful to security can thus qualify for classification. A greater and more accurate measure of certainty should be envisaged in order to infringe less on private individuals' rights.

7.1.3. The second concern regarding this classification is that the definition of national security is may be too broad. In the *Dawood* judgment²⁰ the Court held that to grant or refuse a temporary permit or an extension thereof was a matter dependent on the exercise of discretion. It further found that to expect an official, in the absence of direct guidance, to exercise this discretion would not be regarded as constitutionally compliant with what is required in order to be consistent with the provisions of the Bill of Rights. In this regard the Court held that if broad discretionary powers contained no express constraints, those who were affected by their exercise would not know what was relevant to the exercise of those powers or in what circumstances they were entitled to seek relief for an adverse decision. It is for this reason that section 36 of the Constitution requires that the limitation of rights will be justifiable only if they were authorised by a law of general application.

7.1.4. The Bill further envisages that once information is classified, its accessibility to members of the public and its disclosure is limited. Section 12 allows various organs of state; including the military, the police, the intelligence services and any other government department given permission to do so; to classify documents which could cause harm to South Africa's national security. Apart from the initial problem that the definition of "national security" is too broad; the fact that many

²⁰ See *Dawood and Another v Minister of Home Affairs and Other 2000 (8) BCLR 837 (C)* case.

different parties are empowered to classify such information further infringes basic rights included in the Bill of Rights in a manner that is not constitutionally compliant; the test and parameters are subjective and the limitation is not reasonable. In the case of *Minister of Health v Treatment Action Campaign and others* 2002 (5) SA 721(CC) the manner in which policy is implemented by organs of state came under scrutiny. The Court held, *inter alia*, that it is a consequence of our new constitutional dispensation that the exercise of all state power is monitored and must comply with constitutional requirements to be valid and further be upheld when the exercise of public power is under challenge.

7.2. Provisions in the Bill, such as sections 7(1), 14(2) and section 16 provide for broad categories of information, files, integral file blocks, file series and/or categories of information to be classified. They further permit all individual items that fall within such a classified group of documents to be automatically classified.

7.2.1. This bulk classification approach is too restrictive and encroaches on various rights of individuals, such as the right of access to information and free speech. To classify any document that does not have the potential to harm national security and national interests is unconstitutional and cannot be justified.

7.2.2. Any attempt to justify this bulk classification as being used merely for expedience or to be administratively efficient will not pass constitutional scrutiny and is not sufficient justification for the limitation of fundamental rights. Such a justification is not reasonable as it places administrative

processes as more important than the preservation and protection of citizens basic rights to, *inter alia*, access public documents; and thus the right to information is unreasonably limited to achieve a purpose that can be achieved through less restrictive methods.

- 7.3. The Commission submits that in order for the classification regime to comply with constitutional requirements; including the limitations clause in section 36; application range for classification must be restricted and the regime itself must be restricted. The application of the classification regime must be limited primarily to state security services. Thus only state security services would have the authority to classify information.

7.4. The principle of legality and the classification of information

The principle of legality itself requires further consideration, with specific reference to the classification of information in terms of the Bill as discussed above.

- 7.4.1. The commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is subject to constitutional control. The doctrine of legality is an incident of rule of law and one of the constitutional controls through which the exercise of public power is regulated by the Constitution.²¹ The doctrine of legality means that the Legislature and Executive are constrained by the principle that they may exercise no more power than that which has been conferred on them by

²¹ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) ("Affordable Medicines") at para 48.

law.²² Implicit in the aforementioned is the requirement that for laws to be obeyed or for people to act within the confines of the law, the law itself needs to be clear and certain. Where laws are clear and certain, it helps an organ of state not to misconstrue the extent of the authority conferred upon it by the empowering legislation. It also allows members of the public to conduct their affairs in such a manner so as to avoid contravention of the legislation. Our courts have interpreted the role of legislative enactments as serving to give fair warning of their effect so as to allow individuals to rely on their meaning until the meaning has been explicitly changed.²³ The doctrine of vagueness is one of the principles of common law that was developed by the courts to regulate the exercise of public power. The exercise of public power is now regulated by the Constitution and the doctrine of vagueness is founded on the rule of law, a foundational value of the Constitution. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity.²⁴ The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The ultimate question is whether the regulation or legislation indicates with reasonable certainty to those who are bound by it what is required of them.

²² Affordable Medicines at para 48.

²³ *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC).

²⁴ Affordable Medicines at para 107.

- 7.4.2. In order to ensure effective law-making the Legislature is empowered by section 37 of the Constitution²⁵ to delegate its law-making authority to the organ of state that will be responsible for the implementation thereof. As discussed above, section 54 of the Bill empowers the Minister to make regulations on *inter alia* the broad categories and sub-categories of state information that may be classified, downgraded and declassified; categories and subcategories of state information that may not be protected; national information security standards and procedures for categorisation, classification, downgrading and declassification of state information.
- 7.4.3. The wording of section 54 confers discretion on the Minister to determine standards and procedures. The importance of discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner.²⁶ In most cases an organ of state is equipped with the necessary skills and experience to legislate on its area of competence more effectively than the Legislature. Therefore the organ of state is conferred with the authority to legislate within its area of competence in order to ensure effective law-making.
- 7.4.4. As noted above our courts have welcomed the delegation of powers, however the courts have warned against broad or vague delegation such that the authority to which the power is delegated is unable to

²⁵ Constitution of the Republic of South Africa.

²⁶ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) [2000 (8) BCLR 837] at par 53.

ascertain the nature and scope of the powers conferred and as a result acts *ultra vires*. Our courts have held that where broad discretionary powers are conferred, there must be some constraints on the exercise of such powers so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute.²⁷ The importance of certainty with regard to delegated power cannot be gainsaid. For an organ of State to legislate effectively, certainty with regard to the nature and scope of the delegated power is necessary. Affected individuals require certainty with regard to the guidelines or considerations that are applicable to the exercise of that power by the organ of state. This enables the individual or individuals as the case may be to scrutinise the conduct of the organ of state with the standards set out in the legislation. The Constitution²⁸ places an obligation to consider international law when interpreting any legislation. To this end the Canadian Supreme Court addressing the issue of delegated law-making held that:

“Indeed laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the flexibility, and it might

²⁷ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC).

²⁸ Section 39(1)(b) Constitution of the Republic of South Africa.

*furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one".*²⁹

- 7.4.5. The ultimate question in the context of the Bill is whether the legislation indicates with reasonable certainty to those who are bound by it what is required of them. Admittedly the Bill confers a wide discretion on the Minister to enact regulations that will have a significant impact on the implementation of the Bill. However, section 54(5) states that before the Minister makes regulations regarding any categories of state information in terms of section 54(4)(a) the Minister must by notice in the Gazette provide an opportunity for interested persons to submit comments and that the Minister may take such comments into consideration. In addition, any draft regulations (regardless of what it deals with) must be tabled before Parliament for approval at least 30 (thirty) days before the

²⁹ *R V Nova Scotia Pharmaceutical Society* (1992) 93DLR (4th) 36 (SCC) ((1992) 10 CRR (2d) 34) at 58 (CRR).

regulations are promulgated. The power of the Minister to implement regulations is therefore constrained by the requirement to publish the regulations for comment (depending on the scope of the regulations) and tabling the regulations before Parliament for approval. However, the requirement to publish the regulations for public comment is limited to regulations issued in terms of section 54(4)(a) i.e. regarding the broad categories and subcategories of state information that may be classified, downgraded and declassified and protected against destruction, alteration or loss. There is no public comment procedure prescribed for regulations issued in terms of the remaining empowering provision in section 54. To this end the Minister is afforded a wide discretion to issue regulations (only subject to parliamentary approval) that would determine, amongst other things, national information security standards and procedures for the categorisation, classification, downgrading and declassification of state information. This wide discretion could result in two possible consequences – first, the standards and procedures prescribed by the Minister may be too stringent and therefore result in the unconstitutional limitation of the right to freedom of expression and access to information as enshrined in the Constitution³⁰ and second, the standards and procedures prescribed may be too permissive and therefore lead to national security being compromised and thereby defeating the purpose and objects of the Bill.

- 7.4.6. The only guidance that is provided for by the Bill is found in section 12 and section 14 of the Bill. Section 12 provides that information will be

³⁰ Sections 16 and 32 Constitution of the Republic of South Africa.

classified on three levels namely; confidential, secret and top secret. Section 14 sets out the conditions for classification and declassification of state information. As noted above, it is important that law-making, when necessary, be left to the organ of state tasked with implementing the legislation. However it is equally important that the law is sufficiently clear to enable the public to adapt their behaviour to prevent falling foul of the provisions of the law. The Bill empowers a range of functionaries to classify information as confidential, secret or top secret. Thus the more functionaries that are empowered to classify information the more possibilities exist for information to be classified. Given the extensive offences and penalties and clauses captured in sections 36 and 37 a more reasonable approach is to limit the functionaries that can classify state information.

- 7.4.7. The Bill makes it an offence to unlawfully and intentionally receive classified information which the individual knows or ought reasonably to have known that such information would benefit a foreign State.³¹ The peculiar aspect of the offence lies not in the information held but the nature of the information held. This goes back to the question of how does an individual in possession of information know the category in which the information in his or her possession falls? The short answer is that an individual may not always be in a position to determine the category of information that may be in his or her possession because the subjective mind of a number of heads of state or their delegates.

³¹ Section 37 of the Bill.

- 7.5. In conclusion, the classification regime imposed by the Bill may not comply with the principle of legality.

8. Public interest and the sanctions imposed by the Bill

8.1 The Commission submits that a public interest override would constitute a "reasonable publication" defence and would overcome the chilling effect created by the provisions of Chapter 11 of the Bill. In considering the absence of a "public interest override" as well as the penalties envisioned by the Bill for contravention of its provisions, it is appropriate to consider relevant comparative law.

8.2 Europe

8.2.1 Article 3(2) of the Council of Europe Convention on Access to official Documents (2009) ("European Convention") provides for the public interest as a justification for disclosure of information that might otherwise be classified:

"[a]ccess to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure (emphasis added)."

8.3 The United Kingdom

8.3.1 Although the United Kingdom's Official Secrets Act (1989) ("UK Secrets Act") allows absence of fault (in the form of intention or negligence) and genuine or putative authority (ie a *bona fide* belief by the disclosing party that he or she was authorised to make the disclosure) as defences

against the alleged contravention of its provisions, it contains no public interest defence.

8.3.2 Notwithstanding the fact that particular information is classified as exempt, the United Kingdom's Freedom of Information Act (2000) ("UK Freedom Act") generally allows for such information to be disclosed if "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". However, this public interest provision only applies to certain categories of ordinarily exempt information, excluding State security information and information relating to the conduct of public affairs held by Parliament. This latter category is potentially of very wide application given the parliamentary system of government in the UK.

8.4 **Canada**

8.4.1 Section 15 of the Canadian Security of Information Act (1985) ("Canadian Information Act") establishes a public interest defence –

Public interest defence

15. (1) No person is guilty of an offence under section 13 or 14 if the person establishes that he or she acted in the public interest.

Acting in the public interest

(2) Subject to subsection (4), a person acts in the public interest if

(a) the person acts for the purpose of disclosing an offence under an Act of Parliament that he or she reasonably believes has been,

is being or is about to be committed by another person in the purported performance of that person's duties and functions for, or on behalf of, the Government of Canada; and

(b) the public interest in the disclosure outweighs the public interest in non-disclosure.

8.4.1.1 It should be noted, however, that the public interest defence contained in section 15(1) is of quite limited application –

8.4.1.1.1 it only applies with regard to offences in terms of section 13 and 14 of the Act ie the intentional, unauthorised communication of "special operational information" (confidential, military and intelligence-related information);

8.4.1.1.2 it only applies with regard to persons who are "permanently bound to secrecy" (ie a current or former federal public servant or a person who has been specifically designated as permanently bound due to his access to special operational information and issues of national security); and it does not apply to the more general statutory offences relating to the unauthorised communication, the unauthorised retention and the failure to take reasonable care of information sourced from the State, as well as the use of such information "in any manner prejudicial to the

safety or interests of the State".

- 8.4.2 The Canadian Access to information Act (1985) ("Canadian Access Act") only makes provision for the public interest to override a classification if the information amounts to "third party information" as set out above.

8.5 The United States of America

- 8.5.1 To a limited extent Executive 13526 of 2009 ("EO 13526"), promulgated within the framework of the Freedom of Information Act (1966) as amended by the Openness Promotes Effectiveness in our National Government Act (2007), provides for the public interest as a justification for disclosure of classified information. Section 3(1)(b)(4)(d) thereof states that –

"[i]n some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure (emphasis added)."

- 8.6 In the premises it is therefore clear that leading democratic states consider a "public interest" analysis to be important when determining whether information ought to be disclosed. However, it is equally apparent that, in the jurisdictions considered, there is often no mandatory, express public interest analysis that

must be engaged in with regard to information disclosures in the context of national security.

8.7 The South African Context

8.7.1 PAIA stipulates that, notwithstanding the existence of any statutory basis for refusing access to a record, an information officer must disclose the information sought by an individual if –

(a) *the disclosure of the record would reveal evidence of -*

(i) *a substantial contravention of, or failure to comply with, the law; or*

(ii) *an imminent and serious public safety or environmental risk;*
and

(b) *the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question (emphasis added).*³²

8.7.2 The Protected Disclosures Act, No 26 of 2000 ("PDA") establishes mechanisms to protect private and public sector employees from workplace retribution in the event of such employees making disclosures

³² Section 46 (with regard to public bodies); section 70 (with regard to private bodies).

with regard to their employer's unlawful conduct.

8.7.2.1 In terms of section 9 of the PDA, any employee may make a good faith disclosure to any third party with regard to his or her employer's activities, provided *inter alia* that the disclosure was reasonable in the circumstances.

8.7.2.2 One of the factors to be considered when determining whether the disclosure was reasonable is "the public interest".³³

8.7.3 The South African common law recognises that certain publications which might otherwise be wrongful are nevertheless lawful and justifiable as they constitute reasonable publication in the public interest. Thus it is well-established that publications that might otherwise be wrongful for the purposes of the law of delict are nevertheless lawful if (a) they constitute true statements that are in the public interest or (b) if the publisher acted reasonably in publishing information that is in the public interest.³⁴

8.7.4 In the premises it may therefore be concluded that, with regard to the disclosure and publication of information, South African legal institutions make strong provision for the protection of those who disclose and publish information in the public interest. This is consistent both with the constitutional entrenchment of the rights of access to information and

³³ Section 9(3)(g).

³⁴ See, for example, *Gold Reef City Theme Park (Pty) Ltd v Electronic Media Network Ltd and Another; Akani Egoli (Pty) Ltd v Electronic Media Network Ltd and Another* 2011 (3) SA 208 (GSJ) at para 65 - 101.

freedom of expression, as well as the constitutional commitment to an open, accountable and transparent society.

8.8 The Bill

8.8.1 The Bill provides for *inter alia* the following offences –

- 8.8.1.1 the intentional communication or making available of classified information which the communicator knew or ought to have known would benefit a foreign state;
- 8.8.1.2 the intentional receipt of classified information which the communicator knew or ought to have known would benefit a foreign state;
- 8.8.1.3 the intentional communication or making available of classified information which the communicator knew or ought to have known would prejudice national security or benefit a non-state actor engaged in hostile activity;
- 8.8.1.4 the intentional collection or copying of classified information which the person knew or ought to have known would prejudice national security or benefit a non-state actor engaged in hostile activity;
- 8.8.1.5 the intentional disclosure of classified information, unless such disclosure is authorised or protected under another law;
- 8.8.1.6 the intentional interception of classified information;

8.8.1.7 the failure to report possession of classified information; and

8.8.1.8 the attempting, conspiracy with regard to, aiding or abetting of any of the aforementioned.

8.8.2 The Bill provides for unusually harsh sanctions with regard to the infringement of its provisions –

8.8.2.1 an individual who unlawfully communicates classified information which he or she knew or ought to have known would benefit a foreign state may receive a gaol sentence of between 5 years (if the information was classified as "confidential", the lowest ranking provided for in the Bill) and 25 years (if the information was classified as "top secret", the highest ranking provided for in the Bill);

8.8.2.2 an individual who intentionally intercepts classified information may receive a gaol sentence of up to 10 years;

8.8.2.3 an individual who fails to report possession of classified information may receive a gaol sentence of up to 15 years;

8.8.2.4 an individual who intentionally discloses classified information may receive a gaol sentence of up to 5 years;
and

8.8.2.5 the attempting, conspiracy with regard to, aiding or abetting of any of the aforementioned carries the same penalty as if the actual offence had been committed.

8.8.3 By comparative standards the above sanctions are unusually strong –

8.8.3.1 the Canadian Information Act provides for maximum sentences of between 2 and 14 years;

8.8.3.2 the UK Secrets Act provides for maximum sentences of between 3 months and 2 years.

8.8.4 It should be noted that, although the Bill states that only the intentional commission of the relevant conduct constitutes an offence, it appears to impose criminal liability for negligence too: with regard to many of the sanction provisions the relevant individual will be held criminally liable if he or she "knows or ought reasonably to have known" that the relevant prejudice would result.

8.8.5 It should further be noted that, generally, the Bill makes no provision for particular defences on which anyone accused of the aforementioned offences may rely.

8.8.5.1 Section 43 of the Bill, however, provides that an individual is not liable for the intentional disclosure of classified information if such a disclosure is protected under the PDA or the Companies Act, No 71 of 2008 ("Companies Act"), or "authorised under any other law".

8.8.5.2 The Bill therefore does provide *inter alia* for employees to be protected from criminal sanctions in the event of a genuine protected disclosure in terms of the PDA.

8.8.5.3 The provisions of PAIA could also offer some protection to an information officer who discloses what would otherwise constitute classified information pursuant to a legitimate information request.

8.8.5.3.1 However, any such protection may be stripped away by section 1(4) of the Bill, which provides that "despite section 5 of the PAIA, [the Bill] prevails if there is a conflict between a provision of [the Bill] and [a] provision of another Act of Parliament that regulates access to classified information".

8.8.5.4 In any event the Bill –

8.8.5.4.1 makes no provision for interceptors, possessors or recipients of classified information to receive the protection of any other statute;

8.8.5.4.2 does not define what it means to "disclose" classified information – it is therefore not apparent whether a disclosure includes any communication or publication of the classified information by any party, or only the initial communication by the individual authorised to possess (but not disseminate) the information; and

8.8.5.4.3 does not define what it means that classified information will "directly or indirectly benefit a foreign state" – this is a critical distinction as it determines whether the disclosing party will be liable for a 5-year or 25-year gaol sentence and further determines whether an individual may be criminally liable for receiving the information.

8.9 It is noteworthy that, even though no public interest defence was ever officially recognised during the Apartheid era with regard to the Protection of Information Act 84 of 1982 ("POIA"), there is some evidence that even prior to the advent of democracy in 1994 the Courts were alive to the notion that the disclosure of sensitive government information may be in the public interest and therefore not unlawful.

8.9.1 In *Council of Review, South African Defence Force and Others v Monnig and Others*³⁵ three armed services personnel (conscripts) were charged with contravening the POIA in that they disclosed certain confidential military information to unauthorised persons.

8.9.1.1 The South African Defence Force ("SADF") had undertaken a covert campaign to vilify and discredit the End Conscription Campaign, which campaign it considered hostile.

8.9.1.2 When the respondents discovered the covert campaign they sought to expose the SADF's involvement therein by disclosing certain information. They were, however,

³⁵ 1992 (3) SA 482 (A).

entrapped by intelligence officials, arraigned before a court martial and convicted of *inter alia* contravention of the POIA.

8.9.1.3 The decision was taken on appeal to both a Full Bench of the Cape High Court and then to the Appellate Division. The matter was disposed of on the basis that the court martial ought to have recused itself and that failure to do so rendered the proceedings against the respondents fatally flawed.

8.9.1.4 However, the second respondent had also raised what was effectively a "public interest justification" defence: he averred that "his reaction was one of 'moral outrage' because these acts were aimed at a legitimate organisation and the means employed seemed to him both illegal and immoral".³⁶

8.9.1.5 With regard to this defence, Corbett CJ held as follows –

*[s]econd respondent's defence was based upon the contention that he acted as he did in defence of the rights of the ECC against attack thereon by the Defence Force. Crucial to this defence was a finding that the conduct of the Defence Force was unlawful. The defence, whether good or bad, was not a frivolous one and had sufficient substance to merit the serious consideration of the court martial.*³⁷

³⁶ Ibid 489E-F.

³⁷ Ibid 490F-G.

8.9.1.6 In a similar vein Conradie J, for the Full Bench, held that –

[t]he issue which the second applicant says entitled him to demand the third respondent's recusal was the one of private defence. In broad outline, the defence was presented along these lines. The SADF was waging a campaign of harassment and vilification against the ECC which it regarded as hostile to the SADF and aligned with revolutionary movements.

The methods used in the campaign were not sanctioned by law. The conduct of the SADF was therefore unlawful. It nevertheless did not, once the 'covert operation' had been revealed in an application for an interdict by the ECC, acknowledge that its conduct had been unlawful; instead, it sought to justify it by contending that a state of war existed in the Republic... A finding that the SADF's conduct was unlawful was crucial to the second applicant's defence. The second applicant contended that he had, as he avers he was in law entitled to have done, acted in defence of the rights of the ECC by employing such reasonable means as were open to him to prevent harm to that organisation...

I do not propose to discuss the merits of this defence. It may or may not be a good defence, in fact or in law. It is not in my view a frivolous defence; and although an applicant may have difficulty in persuading a Court that a tribunal should

*have recused itself because its ability to adjudicate impartially upon a frivolous defence was in doubt, this is not such a case. The second applicant's case has sufficient substance to merit serious consideration by an impartial tribunal.*³⁸

8.9.1.7 Thus, although there was no ruling on the substantive validity of the defence, both the Appellate Division and a Full Bench of the Cape High Court recognised that an extended version of the criminal law notion of private defence (which in the circumstances essentially amounts to a defence negating lawfulness on the basis of justified disclosure) was, at the very least, a plausible defence to a charge of contravening the POIA.

8.10 A public interest override would be consistent with the fundamental principles relating to State information as set out in section 6 of the Bill, including –

- "(a) [u]nless restricted by law that clearly sets out reasonable and objectively justified public or private considerations, state information should be available and accessible to all persons;*
- (b) state information that is accessible to all is the basis of a transparent, open and democratic society;*

³⁸ *Monnig and others v Council of Review and Others* [1989] 4 All SA 885 (C) at 899.

- (c) *access to state information is a basic human right and promotes human dignity, freedom and the achievement of equality;*
- (d) *the free flow of state information promotes openness, responsiveness, informed debate, accountability and good governance;*
- (e) *the free flow of state information can promote safety and security;*
- (f) *accessible state information builds knowledge and understanding and promotes creativity, education, research, the exchange of ideas and economic growth;*
- (g) *some confidentiality and secrecy is however vital to save lives, to enhance and to protect the freedom and security of persons, bring criminals to justice, protect the national security and to engage in effective government and diplomacy;*
- (h) *measures to protect state information should not infringe unduly on personal rights and liberties or make the rights and liberties of citizens unduly dependent on administrative decisions;*
- (i) *measures taken in terms of this Act must—*
 - (i) *have regard to the freedom of expression, the right of access to information and the other rights and freedoms enshrined in the Bill of Rights; and*
 - (ii) *be consistent with article 19 of the International Covenant on Civil and Political Rights and have regard to South Africa's international obligations; and*

(j) in balancing the legitimate interests referred to in paragraphs (a)–(i) the relevant Minister, a relevant official or a court must have due regard to the security of the Republic, in that the national security of the Republic may not be compromised

(emphasis added);"

8.10.1 The Courts and any official implementing the Bill will be hard-pressed to give effect to the principles set out in section 6: without a public interest override or similar equitable, reasonable defence, the Courts and officials will have little scope to engage in the balancing exercise (between openness and the needs of security) contemplated in section 6 and will be bound by the otherwise strongly prescriptive provisions of the Bill.

8.11 The Commission submits that –

8.11.1 the Bill has the potential to impose a wide range of criminal liability, with notably harsh sanctions for both intentional and negligent infringements;

8.11.2 the Bill makes provision for the protection of employees and, possibly, information officers;

8.11.3 the Bill, however, could be used to impose criminal liability on *inter alia* ordinary individuals seeking classified State information for the exercise of their rights, researchers and academics seeking classified State information to pursue their work and journalists seeking classified State information to discharge their constitutional duty of holding the government to account;

8.11.4 much of the undesirable liability referred to above could be avoided with the inclusion of a "public interest" override, which would be consistent with both the South African commitment to the disclosure and publication of information in the public interest and with international best practice as evidenced by the European Convention and the Canadian legislation referred to above; and

8.11.5 a public interest override would be consistent with, and would allow Courts and officials to give effect to, section 6 of the Bill.

8.12 Although great strides have been made in limiting the scope of the Bill and the discretion with which officials are empowered thereunder, it remains the case that the criminal sanctions provided therein are harsh, somewhat unclear and potentially of wide application. The offences are drafted in the form of regulatory offences which do not take substantive harm into account. The Commission refers further in this regard to the principle of legality as discussed in paragraph 7.3 above.

8.12.1 Particular regard must be had to sections 36, 38 and 43, which appear to criminalise almost any communication or disclosure of classified information, with sanctions ranging from 5 to 25 years in gaol.

8.12.2 The combination of such harsh sanctions, such unclearly defined offences and the absence of any particularly-crafted defence will unavoidably have a chilling effect on the exercise of the rights of access to information, free expression and the rights to a fair trial and just administrative action, as ordinary citizens, researchers, academics and journalists balk at the prospect of long gaol spells stemming from their

attempts to access and publicise State information and the absence of any reliable legal defence.

8.12.3 The undesirability of such a chilling effect is well-recognised in our law.³⁹

However, it is also well-recognised that the creation of a reasonable publication defence is an effective counter to this chilling effect:

*[b]ut this chilling effect is reduced considerably by the defence of reasonable publication established in Bogoshi's case. For it permits a publisher who is uncertain of proving the truth of a defamatory statement nevertheless to publish where he or she can establish that it is reasonable [and in the public interest to do so] (emphasis added).*⁴⁰

8.12.4 A public interest override would constitute a "reasonable publication" defence and would overcome the chilling effect created by the provisions of Chapter 11 of the Bill expressly in relation the right to freedom of expression and indirectly on the right to access information.

9. The impact of the Bill on research and institutions of learning

9.1. The Bill raises 2 (two) areas of concern when its impact on intellectual property, research and institutions of learning is considered. The first area of concern in the Bill is the impact of the broad definition of an "organ of state" on higher education institutions and other research-orientated bodies established by statute. The second area of concern is the impact of the Bill on research and the ability to obtain information from the organs of state. We deal with these in turn.

³⁹ *Khumalo v Holomisa* (note 31) at para 39.

⁴⁰ *Ibid.*

- 9.2. The starting point of the concerns relating to research and institutes of learning in general is the potential inclusion of universities and other institutions of higher learning in the definition of "organs of state". The Bill defines an organ of state as *"any organ of state defined in section 239 of the Constitution, including, but not limited to, any public entity defined in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999) and section 3 of the Municipal Finance Management Act, 2003 (Act No. 56 of 2003) or any facility or installation declared as a Nation Key Point in terms of the National Key Points Act, 1980 (Act 102 of 1980)."*
- 9.3. Section 239 of the Constitution defines an organ of state as *inter alia* *"...any other functionary or institution exercising a public power or performing a public function in terms of any legislation, but does not include a judicial officer."*
- 9.4. The Higher Education Act 101 of 1997 seeks to establish a single system of higher education. In this system, provision is made for private and public higher education institutions and a broad framework is provided for the administration of these bodies. There is scope for the argument that institutions of higher learning fit neatly into the definition of an organ of state in the Constitution because they are institutions which exercise public power and perform a public function, namely education and they are institutions which, arguably, government has ultimate control of.⁴¹
- 9.5. If this is the case, then institutions of higher learning might be required to comply with the requirements of the Bill if it is passed in its current form. Thus, the head

⁴¹ See *Mittalsteel SA Ltd (previously known as Iscor Ltd) v Hlatshwayo* 2007 (4) BCLR 386 (SCA).

of each institution of higher learning, as the head of an organ of state, will be required to establish policies and directives for classifying information.

- 9.6. It is difficult to contemplate the precise types of information in the possession of an institution of higher learning which the Bill seeks to have protected in the broad sense.⁴² There is no indication of what interest the state would have in protecting this information and to what extent the individual institutions are currently failing to protect this information.
- 9.7. In the narrow sense, it is difficult to contemplate which information in the possession of institutions of higher learning can be classified and the precise reason for such classification, especially given that the very business of such institutions is to facilitate research into complicated and sometimes controversial areas and sharing the results of that research by either publishing it in journals or with other students from the same university for further development. In summary, protection of information from the state seems to go against the grain of sharing information for the greater, common good which is the *raison d'être* of institutions of higher learning.
- 9.8. The inclusion of tertiary institutions does not seem to be in line with the intention of Bill. Firstly in the preamble, the Bill seeks to "*promote the free flow of information within an open and democratic society without compromising the security of the Republic.*"⁴³ Further, as a general principle to assist in the interpretation of the Bill it is recognised that "*accessible state information builds*

⁴² Protection in the broad sense refers to the manner in which valuable information (information which should be protected from destruction or alteration) should be stored. Protection in the narrow sense refers to the classification of information.

⁴³ Preamble to the Bill.

knowledge and understanding and promotes creativity, education, research, the exchange of ideas and economic growth..."⁴⁴

9.9. The Bill itself recognises that free flow of information is vital to any democracy and should be encouraged to promote *inter alia* research, creativity and the exchange of ideas. This reading is also supported in the Preamble to the Higher Education Act, which provides "*...and whereas it is desirable for higher education institutions to enjoy freedom and autonomy in their relationship with the State within the context of public accountability and the national need for advanced skills and scientific knowledge...*"

9.10. This set of values is incongruent with the very notion of institutions of higher learning which may be required to protect information by classifying it. However, this does not only affect institutions of higher learning. In line with the development mandate of the state, several statutory research-orientated institutions have also been created. Examples of these include –

9.10.1. The Technology Innovation Agency is a creature of statute created in terms of the Technology Innovation Agency Act 26 of 2008 whose mandate is to "*...support the State in stimulating and intensifying technological innovation in order to improve economic growth and the quality of life of all South Africans by developing and exploiting technological innovations.*"⁴⁵ This agency seeks to "*to translate a greater proportion of local research and development into commercial technology products and services.*"⁴⁶

⁴⁴ Section 6(1) of the Bill.

⁴⁵ Section 3 of the Technology Innovation Agency Act 26 of 2008.

⁴⁶ <http://www.tia.org.za/>.

9.10.2. The Human Sciences Research Council is a creature of statute created in terms of the Human Sciences Research Council Act 17 of 2008, whose aims include *"initiate, undertake and foster strategic basic research and applied research in human sciences, and to gather, analyse and publish data relevant to developmental challenges in the Republic, elsewhere in Africa and in the rest of the world, especially by means of projects linked to public sector oriented collaborative programmes..."*⁴⁷ The stated intention of this Act is also to *"stimulate public debate through the effective dissemination of fact-based results of research."*⁴⁸

9.11. The common thread among these institutions is that they are all captured in the definition of an organ of state in the Bill. Like institutions of higher learning, they will all be required to implement the provisions of the Bill. However, the same paradox which haunts institutions of higher learning also applies to these institutions. The core purpose of these institutions is to share and generate information – these institutions thrive on it. Any limitation of this aspect of the institutions' goals, is an indirect limitation to the free flow of information in the country and ultimately on South Africa's ability to develop.

9.12. In this regard the definition of the Bill is overbroad and should be curtailed.

9.13. The second area of concern is the impact of the Bill on research and the ability to obtain information from the organs of state. The concern is that protection of information might unjustifiably limit the ability of researchers to conduct effective research into various aspects of organs of state, to the extent that such research

⁴⁷ Section 3(a) of the Human Sciences Research Council Act 17 of 2008.

⁴⁸ Id.

pertains to information that is classified. Below is an exposition of the manner in which the Bill achieves this.

- 9.14. Section 14(1) of the Bill provides that classification must be based solely on the conditions set out in that section. The conditions and guidelines are set out in section 14(2) of the Bill. According to section 14(2)(a) "*Secrecy is justifiable only when necessary to protect national security*". Section 14(2)(h) provides that "*Scientific and research information not clearly related to national security may not be classified.*" There is no definition of what precisely is meant by "*scientific and research information*".
- 9.15. Section 10 of the Bill defines the nature of classified information. If a document is classified as confidential, secret or top secret, according to section 12, then in terms of section 10 the mere disclosure of that document is an offence. Further, the person who receives the classified document knowing it to be so classified is required to report his possession of the document to the South African Police Services or the National Intelligence Agency for it to be dealt with in the prescribed manner. Section 37 makes it an offence to unlawfully receive state information which has been classified. The punishment for these offences is harsh.
- 9.16. Section 47(1) appears incomplete. Section 47(2) gives content to section 47(1). The net effect of these sections is that any person who intentionally classifies information for a purpose ulterior to the purpose stated in the Bill commits an offence. Thus notionally, if a person classifies a document which could and should be used for research improperly then that person commits an offence.

9.17. This broad framework of rules and offences presents the following challenges for researchers:

9.17.1. The greatest challenge is that of the potential for improper classification of information in order to avoid embarrassment or to prevent its publication. The danger is that as soon as information has been classified, then it should not even come to the attention of a person conducting research. If it does, then that person is guilty of an offence and must surrender the document.

9.17.2. It is also not enough to merely state that scientific and research information not clearly related to national security may not be classified. Often when conducting research, requests for information are made in broad terms to cover as much as possible in the hope of narrowing down what is unnecessary. The regime of protection around state information makes it illegal to even possess it. There is thus no way to tell what the contents are or whether they can in fact be useful for the research project.

9.17.3. The only manner to gain access to classified documents is to engage the mechanisms in the Bill for access to that information. Even if the internal mechanisms are engaged successfully and access is granted to the information, there is no express permission to publish that information and there is no indication of the manner in which it can be used.

9.17.4. It is likely that engaging the internal mechanisms will result in failure because the ultimate arbiter of who is allowed access will be the person

who classified it in the first place and possibly the CPR Panel. After this step, the only external recourse is to the courts, which is often a lengthy, complex and prohibitively expensive option.

9.17.5. The obligation to seek redress from the courts after engaging in the process prescribed in the Bill, goes against the grain of the principle articulated in 6(h) of the Bill itself, PAIA and a general commitment in the public service framework to facilitate quick, efficient and easy access to information.

9.17.6. The remedies for unlawful possession of state information are pro-active and preventative. They seek to prevent the disclosure of state information. There are no measures to prevent improper classification of information, which is arguably as great a form of mischief as unlawful possession of classified information. The remedies are retrospective and, if the provisions of the Bill are properly implemented it would be impossible to punish a person for improperly classifying a document because that information will not come to the public's attention. There is insufficient protection granted to the researcher in these circumstances.

9.18. The Commission proposes the following amendments:

9.18.1. the definition of an organ of state should expressly exclude academic and research-based institutions;

9.18.2. further protection should be afforded to researchers seeking or acquiring information from organs of state; and

9.18.3. there should be parity in the sanction for the offence of improper classification and unlawful possession of information.

SECTION C: CONCLUSION

10. Conclusion

10.1. In conclusion, the Commission emphasises the principles of public accountability and the importance of participation by the public in the legislative process.

10.2. With regard to public accountability, section 195(1) of the Constitution, which establishes the basic principles governing public service, states *inter alia* that –

"[p]ublic administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

...

(e) *[p]eople's needs must be responded to, and the public must be encouraged to participate in policy-making;*

(f) *[p]ublic administration must be accountable;*

(g) *[t]ransparency must be fostered by providing the public with timely, accessible and accurate information...*

(emphasis added)."

10.3. Any classification regime that is not, at the very least, premised on a presumption of disclosure and openness will fail to meet the standard of accountability, transparency, accessibility, responsiveness and dedication to public involvement established by section 195 of the Constitution.

- 10.4. Secondly, the Commission emphasises the importance of public participation in the legislative process, captured in section 59(1)(a) and 72(1)(a) of the Constitution. There are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.”⁴⁹ Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available.⁵⁰
- 10.5. The Commission thanks the Ad Hoc Committee for the opportunity to make this submission in execution of the Commission's mandate.

⁴⁹ *Doctors for Life v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at para 129.

⁵⁰ *Id* at para 131.