ORAL PRESENTATION: PARLIAMENT – 27th March 2012

The Commission has submitted two prior objections and provided oral submissions to the committee at National Parliament level during the period 2008 to 2011 on this Bill. These submissions have centred on the framework of the Bill, its impact on basic human rights of access to information, freedom of expression and access to justice.

The Commission notes at the outset the need at this time for a framework for the protection of information in the interests of the people of South Africa but records its formal objections to the Bill in both its written submissions and current engagement with the honourable committee.

Commissions Approach

Commissions approach has been to consider the bill in the context of human rights and the South African landscape. This contextual background has been cogently demonstrated by the Deputy Chair of the Commission as one which is located within a landscape of deep inequalities and poverty. What follows is a technical legal consideration of the bill in the context of the right to freedom of expression and access to information.

We consider briefly the rights to freedom of expression and access to information not because they are the only rights impacted but because if we can limit adverse impact on them we also limit impact on related rights. Our consideration focuses on limitations to each of the rights, the principle of legality and the chapter 11 offences and penalties.

The Constitution and guidance of the constitutional courts have expanded on both the value of these rights and exceptional instances when they may be conservatively limited lawfully. These cases have been detailed in our written submissions.

In general the reasoning of the courts may be distilled to provide the following guidance:

The courts have stated that any information classification regime adopted by the state must be

- consistent with the constitutional vision of an accountable, responsive and open government
- in terms of which any restriction of basic human rights and any sanction for failure to comply therewith must be
- rationally and adequately justified.

Some rights in our bill of rights already possess limitations recognized by the drafters as necessary, others are indirectly limited e.g. the rights to personal privacy of persons in public office become weaker than the rights of other individuals.

It is noteworthy that the right to access information

- has **no internal limitation** on the grounds of national security in terms of section 32.
- This entrenches the constitutional importance of openness and transparency with regard to state information and the corresponding need to minimize any limitation on the right to access information in the name of security.
- And this is reinforced by section 195 of the constitution which obliges public bodies to provide timely, accessible and accurate information

To this end the enabling legislation PAIA provides

- specific instances when national security may be raised as a ground for refusal.
- In the same breath PAIA in the interests of maximum information flows also allows for release of records otherwise protected in the interests of national security or international relations to be released in the public interest.
- PAIA expressly provides **how this must happen and the time frames within which it must happen**.

Freedom of expression is however limited conservatively in the Constitution. We also looked beyond our courts to assess the approach in other jurisdictions.

Comparatively we found that:

It is clear that in jurisdictions which have had freedom of information and national security legislation prior to us

- the information classifications systems **create presumptions in favour of granting access to state information** but limit to varying degrees access where national security matters are at issue.
- It is also noteworthy that many have struggled to create more openness through legislation **which came after their state** protection laws were affected.
- **The opportunity therefore exists for us to address the issue of limitations to basic rights comprehensively and cautiously and conservatively through this bill as opposed to piecemeal approaches once the flaws in this bill begin to work to negate constitutional gains we have made.**

Indeed the gist of the more recent **Council of Europe Convention** on Access to Official Documents 2009 article 3(2) which states that

- access to information contained in an official document may be refused… unless there is an overriding public interest in the disclosure.

  Comparatively it should also be noted that other jurisdictions like **Canada and the UK provide for sanctions which are far less severe** than our Bill does – Canada 2- to 14 yrs, UK 3 months and 2yrs
- and many jurisdictions do not expressly punish possession

Freedom of Expression courts approach; limitations test, scheme of assessment and impact

Our concern is that the Bill in its current form limits the right to freedom of expression which is allowed **but** it limits the right **unduly** in other words it could limit the right much less and still achieve its purpose. This approach would bring it in line with the directives of the constitutional court when basic rights have to be limited.

In the case of expression, the court has often cautioned that the rights of the media are not for the special needs of the media but is a **protection of the ability of each citizen to be a responsible and effective member of society** …– the media in this sense are both bearers of rights and the bearers of constitutional obligations. Unjustifiable limitations on the rights of the media to conduct their work freely therefore also limit the rights of people and warrants very careful consideration.

The general principle to be adopted when the right to freedom of expression and access to information are concerned is expressed in the " laugh it off" case and that is to interpret the right generously (maximum freedom) limit it as little as possible (minimum restriction).

At a technical level it is clear that the current bill imposes limitations which:

- do not fall within the provisions of section 16(2) which allows for expression advancing war propaganda and incitement to be expressly prohibited. In other words the constitution does not regard the protection of state information as an express limitation of the right to freedom of expression.
- it would in any event not be possible for potential recipients to assess whether access to the information is refused to due to any of the factors contained in 16 2.

We therefore regard the bill as extending beyond what is permissible limitation/regulation in terms of section 16. 2.

When legislation **extends beyond what is expressly provided** for, the constitution requires that the limitation which the legislation creates to meet certain **basic criteria** which raise the enquiry whether the right has been **reasonably and justifiably limited**:

In making this assessment one of the most important questions to be answered is

- whether the provisions of the bill aim to uphold national security **through means which are least restrictive on the right** to expression.
- This usually **looks at the scheme of the bill and its impact** in this case sanctions it imposes where its processes have not been followed. If the impact of its provisions are such that the right is **negatively impacted and such negative impact could be lessened through some other means** then those provisions of the bill are not constitutionally acceptable.
- Apart from the **onerous provisions** to obtain release of information, it is the view of the Commission that the severe **sanctions which the bill imposes for receipt/possession and communication of classified information** regardless of intent will clearly limit the core actions and functions of media.
- Similarly the **absence of independent checks and balances to ensure that the rights of the media and public are not unjustifiably impinged** upon means that the only means through which the media for example can obtain objective assessments of correctness of classification which would limit expediency is through the **courts**.
- In other words there are insufficient means to prevent improper classification at the time of classification and **the remedies for such improper classification are retrospective.** There is potential for discovery of

improper classification only during the review process or if on application a classified record is called up and classification is challenged through the courts

- If classified; individuals will be hard pressed to expose the improper classification simply by virtue of the fact that it has already been classified and will therefore not come to the public's attention.
- That said the remedies for unlawful possession are proactive – they seek to prevent something happening i.e. disclosure. But only retrospective remedies for improper classification – it is submitted therefore that this scheme is reversed. It would be more appropriate if improper classification and release where sanctioned within the area of its control instead be approached proactively. (at its source) this avoids the situation where individuals are penalized for poor administration.

On this basis, it is clear that while national security is a legitimate and reasonable basis to limit the rights of fxi and a2i the provisions are unduly restrictive and can be achieved in a less restrictive way.

Right to access information: subordination

Again the Commission is of the view that the bill **unduly and disproportionately limits** the right of access to information.

- In the case of the **MEC for Education Kwa Zulu Natal and Others v Pillay** and others albeit in the context of PEPUDA the concourt stated …absent a direct challenge to the act, the courts **must assume that the equality act is consistent with the constitution and claims must be decided within its margins**.
- What does this mean in this instance - **NO direct challenge has made to the validity of PAIA and it is therefore consistent with the constitution**
- an attempt to render PAIA subordinate will occur in instances where **the bill overrides PAIA**- in instances of a conflict between PAIA and the bill therefore effectively renders the constitution subordinate to the Bill!
- It follows that **any provision which conflicts with PAIA subordinates it to the** Bill and is inconsistent and constitutionally invalid.
- **Section 1 .4 which in essence excludes PAIA in instances of requests for classified information** based on national security grounds is a far **more onerous** provision of the bill than that of PAIA.
- The framework for access to information in the bill, save for the public interest provision in s19 are far too onerous on individuals. In this sense it subordinates access to information in the form of PAIA, the principles of openness and access to justice.
- In PAIA an information officer has discretion to refuse access it is **not a mandatory refusal of requests for information relating to national security/classified** information. In the bill classified information will be refused unless a public interest is established or the initial refusal is reviewed by the body which initially refused the information.
- Similarly the **timeframes** for such review are not stipulated and applicants face a subjective assessment of what constitutes a reasonable time for a response as opposed to the clearly defined and regulated 30 days in PAIA.
- In this way the bill conflicts with PAIA and therefore with the Constitution

The bill also does not speak to the **power imbalances** between the state and the citizenry. The process of rights assertion goes from a one sided review **absent any objective assessment** directly to the courts. 19.5 allows for recourse to the courts is in fact requiring individuals to undertake complex, time-consuming and expensive routes

to rights assertion. This in itself is **burdensome to researchers, media and the public in general, reducing any proactive or interest based interrogation of knowledge sources**

The bill in this way limits

- **buttressing rights like access to information and freedom of expression,**
- **limits rights stemming from the participatory nature of our democracy,**
- **lessens the ability to vindicate socio economic rights particularly as societies key investigative structures – research units, think tanks, academics and journalists are unable to readily access the information they require to discharge their functions.**

The Commission in this regard strongly recommends an alignment with the PAIA provisions, specific exclusion of research bodies from having to classify information and protections for researchers, and increased independence and powers for the CPR.

Classification regime in the bill

Doctrine of legality

A fundamental principle of our constitution is that **laws must be clear and accessible to allow those responsible for their implementation to have reasonable certainty for their actions and to allow members of the public to adapt their conduct accordingly.**

Sections 14 and 16 of the bill

- sets the **threshold for classification at too low a level** – so that documents that **MAY** be harmful can qualify for classification.
- A greater **and more accurate measure of certainty** is required to lessen the scope of classification and lessen the impact it will have on a2i

This is exacerbated by the fact that

- **the legislation permits bulk classification by permitting individual items that fall within a classified group of documents to be automatically classified.**
- **Where legislation on the face of it has the objective of restricting fundamental rights the scope of its application should as a matter of course be limited to lessen its negative impact on fundamental rights.**
- **In this instance the bill places administrative efficiency which limits a number of rights above the duty to transparent and accountable state operation and access to information.**
- **It is recommended that this flaw may be limited by limiting the number of functionaries permitted to classify very specifically**
- **The range of actors that may classify on the basis if national security is too broad –**

- **police, military and intelligence services**
- **and if in the ministers view on good cause (which is not defined this is unduly broad should only be done exceptionally on the basis of compelling reasons) can be extended to any organ of state (s13) which**
- **would in fact amount to a delegation of the powers to classify to other ministers. The power that is vested in the Ministers from the minister who obtains this power through an act of parliament is not insubstantial, since it involves material functions in terms of the bill.**
- **Difficulties around such delegation and questions on the issue of accountability arise**
- **again in s48 in relation to failures by the head of an organ of state head who willfully or in a grossly negligent manner fails to comply with the act – provision sets out a sanction but who institutes such action and holds accountable for negligence**
  and
- **it is recommended that any information which needs to be classified is assessed each on its own with recorded reasons for its classification.**
- **This recommendation is supported when the onerous provisions for access to information in the bill are considered.**

Classification opportunities are otherwise open to a wide range of actors absent compelling reasons for this range and objective checks and balances for the actions.

The bill also places an exceptionally onerous and ambitious expectation of individuals who allegedly **unlawfully and intentionally receive** classified information

- How can an individual know **what category the information in their possession falls into especially since the categorization is the result of the subjective mindset of a number of heads of organs of state or their delegates?**

Sanctions: comparative harshness of sanctions in general/Parity/ Intent/Negligence

The bill although addressing only the intentional commission of an offence in its provisions **also imposes criminal liability for negligence** too – so for instance in most of the provisions the individual will be held criminally liable if she **ought reasonably to have known the relevant prejudice would result**. Offences are made even more harsh on the basis that they **exclude the raising of a public interest defence** in answer to the alleged offence

Although the bill provides some protection in the form of a defense for whistle blowers

- it makes **no provision for interceptors, possessors or recipients** of classified information to receive the protection of any other statute in defense. Furthermore
- it does **not define "disclose"** or limit the disclosure to the initial communication by the individual authorized to possess the information.
- And it does not **define what is meant by directly or indirectly benefit a foreign state** – this is a critical distinction as it determines whether the disclosing party will be liable for the lesser 5 yr sentence of the greater 25 yr sentence and further determines whether the individual may be criminally liable for receiving the information.

What would limit the flaws in the bill – the sanctions in particular? In short a public interest defence

- Absent a public interest defense courts and officials implementing the bill would be **hard pressed to engage in the balancing exercise between openness and the needs of security and will be bound** by the strongly prescriptive provisions of the Bill
- Given the **combination of harsh sanctions, unclearly defined offences and absence of a specific defense** will impact the rights to expression access to information, just administrative action, and fair trial

It is therefore recommended that alignment and amendments are necessary

- **Firstly that the actual provisions of the bill are more aligned and guided by the fundamental principles relating to state information, creating a less restrictive impact on fundamental rights,**
- **Alignment with existing constitutionally compliant legislation like PAIA**
- **Amendments to the offences and penalty provisions**
- **Closer consideration and amendments to the limited powers of the CRP**
- **Amendments to increase perceptions of impartiality of this structure (Glenister judgment)**
- **This form of defense could possibly take the form of the defense of a reasonable publication and would overcome some of the defects in the bill**

The Commission has also noted and provided in its written submissions an example *Council of Review, South African Defence Force and Others v Monnig and Others* of recognition by the Appellate Division under the apartheid protection of information act recognition by that court of the existence of a **defense negating unlawfulness on the basis of justified disclosure**. And so it seems that even under such a draconian legislation as the old Protection of Information Act, an extension of the criminal law notion of private defense was recognized.

It is our view that 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

1.1.1 The undesirability of such a chilling effect is well-recognised in our law.[1] 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).[2]

1.1.2 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.

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

[2] Ibid.

We therefore urge the Committee to consider the distinction between public interest as it relates to a defence in respect of the criminal charge; as opposed to the civil realm where public interest is used as a basis for accessing information and exercising rights as such and accepting that the **current inclusion** adversely impacts the rights to freedom of expression and PAIA. Furthermore **the absence** of the public interest as a potential defence unjustifiably limits these rights.

With regard to national security: The Committee needs to look closely at who can classify information and vagueness needs to be addressed in terms of dealing with the classification issue (who, what, when, why and how).

4) Legality and legal certainty are a core concern.

The Commission remains more than happy to support the Committee should it deem so necessary in crafting identified provisions beyond what has been recommended in its written submissions.