SUMMARY OF CONCERNS ABOUT THE PROTECTION OF INFORMATION BILL B6-2010

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1. Introduction

1.1 Print Media South Africa is of the view that aspects of the Protection of Information Bill B 26-2010 ("**the Bill**") are unconstitutional in that they offend the values of openness, accountability and transparency underlying the Constitution, and the constitutional rights to freedom of expression and access to information.

1.2 It is undoubtedly the case that the topics dealt with in the Bill are of great significance to our democracy. Moreover, the drafters of the Bill deserve credit for crafting proposed legislation that is radically different to the apartheid-era Protection of Information Act 84 of 1982 and that in large measure strives to accommodate conflicting constitutional interests and rights of the public and the state, in a balanced and equitable manner.

1.3 There are nevertheless significant aspects of the Bill – issues that go to its heart, such as the tests employed for classifying information, and the offences that are proposed to be created – which in PMSA's view fail to pass constitutional muster, in respects that will significantly restrict investigative reporting on matters of public interest.

2. Overview of the Bill

2.1 The main aim of the Bill is to create a statutory framework for protection of sensitive state information

2.2 The Bill creates three classification levels Confidential, Secret and Top Secret. The classification levels are set out in clause 15 of the Bill.

2.3 Confidential information is defined as:

2.3.1 sensitive information, the unlawful disclosure of which may be harmful to the security or national interest of the Republic or could prejudice the Republic in its international relations;

2.3.2 commercial information, the disclosure of which may cause financial loss to an entity or may prejudice an entity in its relations with its clients, competitors, contractors and suppliers.

2.4 Secret information is defined as:

2.4.1 sensitive information, the disclosure of which may endanger the security or national interest of the Republic or could jeopardise the international relations of the Republic;

2.4.2 commercial information, the disclosure of which may cause serious financial loss to an entity; or

2.4.3 personal information, the disclosure of which may endanger the physical security of a person

2.5 Top Secret information is defined as:

2.5.1 sensitive information, the disclosure of which may cause serious or irreparable harm to the national interest of the Republic or may cause other states to sever diplomatic relations with the Republic;

2.5.2 commercial information, the disclosure of which may:

2.5.2.1 have disastrous results with regard to the future existence of an entity; or

2.5.2.2 cause serious and irreparable harm to the security or interests of the state;

2.5.2.3 personal information the disclosure of which may endanger the life of the individual concerned.

2.6 In terms of clause 16(1) of the Bill the head of every organ of state is allowed to classify information. This will include parastatals as well. The head of an organ of state may delegate his authority to a subordinate; however, only designated staff members will be permitted to classify information as secret and top secret. (clause 16)

2.7 An entire category or file series of documents may be classified and every document falling within the category will be automatically classified. (clause 16(5) and 16(6))

2.8 The head of an organ of state has authority to declassify information and may designate this power to subordinates. (clause 19)

2.9 Documents may not remain classified for longer than 20 years unless the head of the organ of state concerned certifies to the Minister in charge of that organ of state that certain criteria have been met. (clause 20)

2.10 Every 10 years there must be a review of classified information by the head of every organ of state. The Minister in charge of intelligence services as well as the public must be informed of the result of the review. It is unclear how the public can be properly informed concerning a status review considering the fact that the public will not be permitted to have access to any classified information. (clause 22)

2.11 An individual or NGO may lodge a request with the head of an organ of state for status review of classified information in furtherance of a genuine research interest or legitimate public interest. When the head of an organ of state receives a request for status review he or she may refuse to confirm or deny the existence of the information if the information is classified top secret. (clause 23)

2.12 If a request for status review is denied, an appeal can be lodged with the Minister in charge of the organ of state in question. (clause 25)

2.13 Access to classified information can also be requested through the procedures set out in the Promotion of Access to Information Act ("**PAIA**"). (clause 28)

2.14 Clause 46 of the Bill sets out the manner in which classified information must be dealt with by the courts:

2.14.1 The information may not be disclosed to any person not authorized to receive it unless the court orders disclosure;

2.14.2 The court must call for submissions from the Director General of the State Security Agency if it is minded to disclose the document. These submissions may not be disclosed to the public and the hearings in this regard must be held behind closed doors;

2.14.3 The court may seek submissions from interested parties but may not disclose the classified information to such parties;

2.14.4 The head of an organ of state may apply to court for unclassified information before the court to be restricted.

2.15 The feature of the Bill that is of most concern to the media is that several offences are created in the Bill which could apply to investigative journalists, or indeed any member of the public, who wish to disclose classified information in the public interest:

2.15.1 Clause 18 prohibits continued possession of classified information and carries a minimum jail sentence of 5 years;

2.15.2 Clause 32 (the espionage offence) carries a minimum jail sentence of 25 years;

2.15.3 Clause 33 (the hostile activity offence) carries a minimum jail sentence of 25 years;

2.15.4 Clause 35 prohibits accessing of classified information and carries a minimum jail sentence of 10 years;

2.15.5 Clause 38 prohibits disclosure of classified information or any matter covered by s 34 – 42 of PAIA and carries a minimum jail sentence of 5 years;

2.15.6 Clause 43 (the general state security offence) prohibits the disclosure of any information, whether classified or not, which falls into the category of 'state security matter'. This offence carries a minimum sentence of 10 years.

3. The constitutional background

3.1 The values of openness, accountability and transparency are underlying values of the Constitution of the Republic of South Africa 108 of 1996 ("**the Constitution**"). The Constitution also expressly protects the right to freedom of expression and media freedom. It is significant that the guarantee of media freedom is designed to serve the interest that all citizens have in the free flow of information which is possible only if there is a free press.

3.2 The Constitution also protects the right of access to information. PAIA was promulgated to give effect to the constitutional right of access to information.

4. National security as a limitation on constitutional rights

4.1 It is trite that no right is absolute. The rights to freedom of expression, and access to information, and the principle of open justice may all yield to more compelling state interests. PMSA accepts that one such compelling state interest that is in principle capable of legitimately restricting the constitutional rights of free speech and access to information, is the protection of national security.

4.2 The point of departure with respect to the Bill is that, although in principle it is legitimate for national security interests to justifiably limit rights, the burden of justification in this context is firmly upon the state. Provisions of the Bill that limit the rights to freedom of expression and access to information, and the principle of open justice, will therefore not survive constitutional scrutiny unless these restrictions comply with section 36 of the Constitution. PMSA submits that in the respects outlined below, this threshold has not been met.

5. The unconstitutionality of aspects of the Bill

5.1 Offences that undermine media freedom

5.1.1 PMSA submits that a number of aspects of the Bill that relate to the criminal offences that have been created in the Bill, are unconstitutional. A number of criminal offences are capable of application to investigative journalists.

5.1.2 These include clause 18 of the Bill which prohibits possession of classified information; clause 32, which creates the espionage offence; clause 33 which creates the hostile activity offence; clause 35 which prohibits accessing of classified information; clause 43 which creates a general 'state security' offence in respect of publication of unclassified information and clause 45 which creates the disclosure offence.

5.1.3 Apart from the severe and, we submit, disproportionate penalties (including the new minimum sentences) that are attached to these offences, we submit that there are a number of constitutional difficulties that arise from these offences from a media perspective.

5.1.4 First, no public interest defence has been proposed. A journalist or editor who is prosecuted under any of the offences cannot argue that the

information is of public benefit, e.g. in that it exposes wrongdoing, incompetence, criminality, or hypocrisy. The recognition of such a defence would accord with other aspects of freedom of expression law in analogous contexts:

5.1.4.1 Section 46 of PAIA governs the mandatory disclosure of information in the public interest. It states as follows:

> **Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in… 41(1)(*a*) or (*b*), 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.**

5.1.4.2 The effect of this provision of PAIA is that, inter alia, section 41 (the provision that regulates the disclosure of records concerning defence, security and international relation) may be overridden if it is in the public interest. If documents can be released under PAIA despite the threat that the contents pose to national security, it would be anomalous and inequitable in parallel circumstances to criminalise the access, disclosure and continued possession of classified documents that are significant for the public.

5.1.4.3 Moreover, the fact that a publication is in the public interest already functions as a defence in a number of contexts in our common. It is submitted that the decision of Yacoob J in the **Independent Newspapers (Pty) Ltd v Minister for Intelligence Services**[1] case is compelling in this context. The case was not concerned with criminal liability on the part of the media for publishing classified documents, but rather whether such documents should be made public. The decision of Yacoob J nevertheless illustrates the potency of a public interest-based analysis in national security cases:

> **On the other hand, the circumstances in which an intelligence agency came to improperly and unlawfully infringe upon the privacy of an innocent citizen are not merely matters of public curiosity. They would be issues of immense public interest. The degree of public interest is an important factor to be put into the balance and would, in my view, not be of insignificant weight if the interest is one that must be fulfilled…**
>
> **The public importance of and interest in these events can neither be gainsaid nor over-emphasised. A member of the public was unlawfully and improperly harassed and he and his family suffered an egregious and inexcusable invasion of privacy. All this consequent upon secret government action. The public is entitled to know all except that which cannot be revealed on account of important national security considerations. I would put the strong public interest to know as well as the extent to which the material is already in the public domain on the one side of the scale and the appropriate weight to be attached to the government objection on the other side of the scale in order to determine where the balance falls in the interests of justice enquiry. …**

[1] 2008 (4) SA 31 (CC).

> **The starting point of the enquiry into whether the document should be released is that it was of great public importance and justified considerable public interest. The report was concerned with and provided particulars of unlawful action taken by the NIA that had the impact of infringing upon the privacy of Mr Macozoma and his family. Unless there was good reason for concealment, the public as a whole had the right to know what Mr Masetlha said to the Minister about this unjustifiable action...**

5.1.5 PMSA is of the view that the failure to provide for a defence of public interest – at least to members of the public and the media, as opposed to members of the security forces – coupled with the vagaries of the offences created and the severe penalties involved, will create a chilling effect on freedom of expression.[2] This will drastically undermine public discourse, discussion and debate on matters of political speech, which ought to receive heightened protection.

5.1.6 The reason provided by the drafters of the revised version of the Bill for failing to include a public interest defence (despite the fact that the suggestion of including this defence had already been accepted by the previous Minister) is that such a defence would create legal uncertainty.[3] PMSA submits that this concern is misplaced because, as set out above, our courts are well versed in applying the public interest defence in a range of contexts in our law and would accordingly be able to develop similar jurisprudence to address any public interest defence included in the Bill. In any event, the desire to create legal certainty cannot outweigh the public and the media's constitutional right to freedom of expression.

5.1.7 It has also been suggested by some members of the drafting team that a public interest defence is unnecessary because such a defence already

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[2] Such an exemption was proposed in the Explanatory Notes on the 2008 Bill dated 10 June 2008, at para 111 as well as the Explanatory Notes dated 13 June 2008 at para 120. It is unclear why the drafters: see below.

[3] This statement was made in the Presentation to the Ad Hoc Committee on the Bill dated 7 May 2010. A copy of the presentation is available at www.pmg.org.za (Accessed on 2 June 2010).

exists under the common law.[4] This suggestion is, with respect, incorrect. There is no general common law defence of 'public interest' which is available to a person accused of committing a statutory offence. If a public interest defence is not specifically included in the Bill it will not be open to the public and the media to raise such a defence.

5.1.8 PMSA is of the view that the failure to provide for a defence of public interest coupled with the vagaries of the offences created and the severe penalties involved, will create a chilling effect on freedom of expression. This will drastically undermine public discourse, discussion and debate on matters of political speech, which ought to receive heightened protection. It is noteworthy that in the Explanatory Note on the 2008 Bill which was issued by the Ministry of Intelligence on 13 June 2008, it was stated that "**the Minister has no objection to the inclusion of a public interest exemption**". Moreover, foreign jurisprudence and analysis support the introduction of such a defence.

5.1.9 Secondly, PMSA is of the view that a public domain defence should also be included in the Bill which will be available where the information is already in the public domain. The need for such a defence finds support both in the case law of our domestic courts and court decisions in other jurisdictions.

[4] This suggestion was made during the briefing of the Ad Hoc Committee by the Minister of State Security on 7 May 2010. A minute of the briefing is available at www.pmg.org.za (Accessed on 2 June 2010).

5.2 **The classification regime**

5.2.1 The Bill envisages that once information is classified, its accessibility to members of the public and its disclosure is limited. The classification of information therefore constitutes a clear limitation on both the rights of access to information and the right to freedom of expression, and amounts to censorship of political speech. We submit that in at least four respects this regime suffers from fatal constitutional flaws. These are discussed in more detail below.

Overbroad definitions

5.2.2 Various definitions that lie at the core of the Bill are so wide as to be utterly unworkable and offensive to the principle of legality, and the rights to free speech and access to information.

5.2.3 The doctrine of legality, which is a foundational principle in our Constitution (1(c) of the Constitution), requires that laws must be clear and accessible. The Constitutional Court has endorsed the proposition that laws must be drafted with sufficient precision to allow those who are tasked with their implementation to have reasonable certainty about the conduct that is required of them.

5.2.4 The basic requirement for classification is that information must be "**sensitive**" information. The definition of sensitive information is of particular concern because it links to the concept of "**national interest**", which is defined so broadly as to be, we submit, unconstitutional.

5.2.5 It is submitted that given the breadth of the definition of "**national interest**" in the Bill, it will be difficult, if not impossible, for government officials charged with the duty of classifying information, to properly ascertain which information ought to be classified. There exists a real danger that such an official would – even if acting in good faith – engage in overclassification. To take two examples of obvious overbreadth, clause 11(1)(a) states that the "**national interest**" includes "**all matters relating to the advancement of the public good**", and clause 11(2)(b) proclaims that

the concept also includes "**the pursuit of justice [and] democracy**". Such concepts are so broad as to potentially cover all conceivable aspects of a citizen's existence in our democracy. Rather than dramatically curtailing the definition of "**national interest**" as proposed in submissions in respect of the 2008 Bill, the definition in fact expands upon that overbroad definition by adding all records that are subject to mandatory protection in terms of s 34 – 42 of PAIA. This inclusion is patently absurd. PMSA submits that the Bill's extension of the concept of "**national interest**" in this manner, and indeed the very breadth of the definition itself, betrays an obsession with secrecy that cannot be countenanced in a democracy.

5.2.6 The definition of "**security**" is also impermissibly broad as "**security**" is defined as "**to be protected against loss or harm, and is a condition that results from the establishment and maintenance of protective measures that ensure a state of inviolability from hostile acts**".

5.2.7 The drafters of the Bill have substantially amended the narrow definition of national security which was contained in the 2008 version of the Bill and which was arguably defensible. The definition of "national security" embraces a wide range of matters which PMSA submits ought not to fall within the compass of national security. The two fundamental problems with the definition of national security are that it includes nebulous concepts and an extremely broad category of issues that could fall within the definition and the list of more specific matters contained in the definition is not exhaustive.

5.2.8 A further problematic definition is that of a "**state security matter**", disclosure of which triggers a criminal offence. The definition is impermissibly vague and overbroad as it essentially covers every aspect of any matter that relates to the activities of the security services. And, exacerbating this position, the definition covers information which is not necessarily classified and as such may not carry any markings that indicate that it is the type of information that may not be disclosed.

5.2.9 In order not to fall foul of constitutional guarantees and particularly in light of South Africa's repressive history of thought control by the apartheid

state, PMSA recommends that the definitions of "**national interest**", "**security**" and "**state security matter**" should be replaced with a single, narrow and defensible definition of "**national security matter**":

5.2.10 It is instructive in this context to emphasise the joint statement issued on 6 December 2004 by the United Nations' Special Rapporteur on Freedom of Opinion, the Organisation for Security and Cooperation in Europe's representative on Freedom of the Media, and the Organisation of African States' Special Rapporteur on Freedom of Expression, where the Special Rapporteurs cautioned that secrecy laws should define "national security" precisely.[5]

5.2.11 This sentiment is echoed in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information ("**the Johannesburg Principles**"), which were adopted on 1 October 1995 by an international group of experts in human rights, national security and international law, and are based on international and regional human rights standards. The Johannesburg Principles have been endorsed by the United Nations Special Rapporteur on Freedom of Opinion and Expression.[6]

5.2.12 Principle 2(a) of the Johannesburg Principles provides that:

> **A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. (our emphasis)**.

5.2.13 In terms of Principle 12, a government must designate

> **only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest (own emphasis).**

[5] Available at http://www.cidh.org/relatoria/showarticle.asp?artID=319&lID=1 (Accessed on 9 June 2010).

[6] Available at http://www.article19.org/pdfs/standards/joburgprinciples.pdf (Accessed on 9 June 2010).

5.2.14 The definitions of "**national security**", "**security**", "**state security matter**" and "**national interest**" fail this test in every respect, and must be eliminated from the Bill. Rather, the Bill should employ the concept of national security that was contained in clause 1 of the 2008 Bill, as the centrepiece for the classification of information. Thus the first criterion for State information to be classified ought to be, in PMSA's view, that it relates to national security, narrowly defined.

The misplaced protection of commercial information

5.2.15 Private individuals and entities are granted sufficient protection in respect of commercial information by PAIA and the common law. It is therefore not only unnecessary to use the moment of the Bill to create an additional layer of protection in this regard, but it is also disproportionate to criminalise the disclosure of such commercial information on pain of severe prison sentences.

5.2.16 It also appears that with respect to classification of commercial information, the Bill is not in line with international practice in that the relevant laws in the United Kingdom, the United States of America (on which the Bill appears to have been modelled) and Canada relating to classification of state information, do not protect and seek to classify commercial information.

Impermissibly speculative levels of classification

5.2.17 The Bill prescribes classification levels that are ostensibly designed to protect information at successive levels of confidentiality. Clause 15 of the Bill prescribes three classification levels, i.e. "Confidential", "Secret" and "Top Secret".

5.2.18 What all the thresholds for classification have in common is the insistence by the drafters that speculative harm will suffice for classification and hence censorship. Thus a document, for instance, will be classified as "**Top Secret**" if its disclosure "**may cause serious or irreparable harm" to "the national interest**"; it will be classified as "**Secret**" if its disclosure "**may endanger"**

the "security or national interest"; and it will be classified as "**Confidential**" if its disclosure "**may be harmful**" to the "**security or national interest**".

5.2.19 The tests for determining the degree of harm that may arise from the disclosure of information is set at an impermissibly low bar for all three classification levels.

5.2.20 The Bill's reliance on such low threshold tests for harm is unconstitutional. Such tests result in widespread over-classification and hence censorship of documents of potential public interest.

5.2.21 In our free speech jurisprudence, and in analogous contexts such as contempt of court, and under PAIA, our courts have clearly required a high degree of harm before imposing liability. The same is true of numerous international jurisdictions. The Bill runs counter to these developments.

5.2.22 A commitment to freedom of expression impels the result that information should only be classified if the harm to national security sought to be prevented thereby is at least reasonably likely to occur, substantial and demonstrable.

Miscellaneous problems with the classification and declassification regime

5.2.23 *Independent oversight mechanism*

5.2.23.1 The Bill does not make provision for an independent oversight mechanism to review classification decisions. PMSA is of the view that in order to guard against the problem of over-classification, an independent and expert oversight body accountable to Parliament should be created to periodically review classified documentation, and to hear appeals from decisions of the heads of organs of state.

5.2.24 *s 7(1), 14(2), 16(5) and 16(6) of the Bill*

5.2.24.1 These provisions provide for the classification of broad categories and subcategories of information, files, integral file blocks, file series or categories of information, and permits all individual items that fall

within such a classified group of documents to be automatically classified.

5.2.24.2 This approach to bulk classification is dangerously restrictive of access to information and free speech. The classification of any document that does not have the potential to harm those interests is patently unjustifiable. The mere fact that bulk classification would be expedient or administratively efficient cannot serve as a justification for limitation of fundamental rights.

5.3 **Access to court documents**

5.3.1 Clause 46 of the Bill deals with protection of State information before courts. PMSA is of the view that clause 46 fails to give proper effect to the principle of open justice which our courts, both in the pre- and post- constitutional era, have emphasised as an essential element of the proper administration of justice.

5.3.2 46 fails to pass constitutional muster in a number of material respects:

5.3.2.1 first, 46(1) of the Bill, which provides that classified information that is placed before a court may not be disclosed to any person not authorised to receive this information unless a Court orders full or limited disclosure, undermines the principle of open justice. The starting point it envisages is that classified information before a court may not be disclosed unless a Court orders disclosure. This is inconsonant with the position adopted in our jurisprudence in regard to a limitation of open justice;

5.3.2.2 Secondly, the provisions in clause 46 which compel courts to issue directions for the proper protection of classified information during the course of proceedings, which may include holding proceedings or part thereof *in camera* (clause 46(2)), and also which compel courts to not order classified information to be disclosed without taking reasonable steps to obtain the submissions of the classification authority (clause 46(3)), severely hamstring the ability of courts to regulate their own process, in violation of 173 of the Constitution;

5.3.2.3 Thirdly, PMSA submits that the injunction, contained in clause 46(4), that the hearing in relation to whether documents should be disclosed should always take place *in camera*, and the absolute rule that the submissions as to why the documents should be kept secret should not be disclosed, in addition to fettering of courts' discretion, constitute drastic interferences with the right to open justice ;

5.3.2.4 Fourthly, PMSA submits that clause 46(5) of the Bill, which adopts a blanket prohibition against litigants having sight of classified information, does not accord with the jurisprudence of the Constitutional Court;

5.3.2.5 Fifthly, clause 46(9) of the Bill is also unconstitutional. It is objectionable to allow the head of an organ of state to apply to court for an order restricting the disclosure of unclassified State information that is contended to harm the "national interest";

5.3.2.6 Finally, clause 46(8), which criminalises the disclosure or publication of any classified information in contravention of an order or direction issued by a court in terms of clause 46 of the Bill, is unnecessary and fails to take into account developed principles of criminal liability.

5.4 **Other laws that restrict the disclosure of "classified information"**

5.4.1 There are several pieces of national legislation dealing with the confidentiality and classification of State information, such as:

5.4.1.1 Section 104(7) and 104(19) of the Defence Act 42 of 2002;

5.4.1.2 Section 103(d) of the Intelligence Services Act 65 of 2002; and

5.4.1.3 Section 8A and 8B of the National Supplies Procurement Act 89 of 1970.

5.4.2 PMSA is concerned that the Bill does not propose to repeal any of these provisions. As it presently stands, therefore, parallel systems of classification of information will exist, despite clause 17 of the Bill, which provides that the decision to classify information must be based solely on the guidelines and criteria set out in the Bill and the policies and regulations made in terms of the Bill.

5.4.3 Thus, while the Bill will hopefully provide enhanced protection for the media, the classification regimes or powers in existing pieces of legislation will remain restrictive of the rights to access to information and free speech.

6. Conclusion

6.1 PMSA is of the view that the Bill is in many respects a welcome change to the national security landscape in South Africa.

6.2 However, in significant and crucial respects, the Bill does not properly balance the interests of openness and transparency, and the rights to open justice, freedom of speech, and access to information, with national security concerns. Indeed, in its present form, the Bill will result in widespread and unjustifiable censorship, will undermine investigative journalism, and will result in little oversight for classification decisions. These harmful consequences must be avoided at all costs, given the overall significance of the Bill to our constitutional project.