



**Attention: The Honourable Simphiwe George Mthimunye**  
Chairperson, NCOP Committee on Security and Justice  
Dealing with the Critical Infrastructure Protection Bill

10 October 2018

Dear Mr Mthimunye

**FURTHER WRITTEN SUBMISSIONS AND REQUEST TO MAKE ORAL SUBMISSIONS ON THE CRITICAL INFRASTRUCTURE PROTECTION BILL BY THE SOUTH AFRICAN NATIONAL EDITORS' FORUM (SANEF), THE SOS: SUPPORT PUBLIC BROADCASTING COALITION AND MEDIA MONITORING AFRICA (MMA)**

## 1. INTRODUCTION

- 1.1. These submissions are made by the South African National Editors Forum (SANEF), the SOS: Support Public Broadcasting Coalition (SOS) and Media Monitoring Africa (MMA) (collectively, the Group) a grouping of civil society organisations with different focus areas but all involved in

preserving media freedom and working to improve the media landscape in South Africa and to promote freedom of expression and access to information in South Africa.

## 2. THE GROUP WELCOMES MOST OF THE PROVISIONS OF THE CRITICAL INFRASTRUCTURE PROTECTION BILL

- 2.1. As discussed previously the Group welcomes most of the provisions of the Bill including a number of amended provisions from [B22 – 2017] (the Original Bill) to [B22B – 2017] as approved by the National Assembly Committee on Policing (the Latest Bill).
- 2.2. The Group is of the view that South Africa is leading the way in demonstrating how post-Colonial countries need to deal with repressive, Colonial (or Apartheid)-era security laws, namely, by repealing same and replacing them with progressive laws that give meaningful protection to genuine national security while respecting the constitutionally-guaranteed rights of citizens.
- 2.3. The Group is of the view that South Africa is playing a critically important leadership role in this regard. Far too many countries on the Continent still have security legislation on their statute books that dates back to the early Colonial era, in many instances to before even the adoption of the United Nations (“the UN”) Declaration of Human Rights<sup>1</sup>. By taking the step of repealing Apartheid-era security laws, such as National Key Points Act, 1980 (NKPA), designed to subjugate and silence, South Africa is demonstrating how law-making is a vital component of a developmental-focused and democratic political agenda. This is to be warmly welcomed.
- 2.4. Nevertheless, there is no doubt that certain of the current provisions of the Latest Bill are not progressive, do not accord with the Constitution and are out of step with South Africa’s commitments to good governance and transparency as contained in ratified African Union (“AU”) Treaties, Conventions and Declarations. The Group is of the view that the NCOP must ensure that South Africa’s leadership role on the Continent is not undermined by a few provisions in the Latest Bill which can, with relatively minor amendments, make the passage of the Bill something that the country can be justly proud of.

## 3. PROBLEMATIC PROVISIONS OF THE LATEST BILL REQUIRING URGENT AMENDMENT BY THE COMMITTEE

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<sup>1</sup> See generally, Southern African Media Law Handbook, Limpitlaw, KAS, 2011 <http://www.kas.de/medien-afrika/en/publications/23503/>

- 3.1. As the Group has stated previously, we are generally excited by and welcoming of the majority of the provisions of the Latest Bill as they are in line with international good practice and, in particular, with AU recommendations as expressed in its Treaties, Conventions, Charters and Declarations. We have no doubt that this Bill could herald a decisive break from our terrible history of security legislation that promotes secrecy and a culture of impunity by the state.
- 3.2. However, where the Group does have concerns about the Bill, these concerns are not trifling. They are serious concerns which unaddressed could result in the passage of legislation which:
  - 3.2.1. is unconstitutional;
  - 3.2.2. flouts the provisions of International African Treaties, Declarations and the like that South African has ratified and which it has promised to uphold; and
  - 3.2.3. is out of step with the Johannesburg Principles, international good practice standards which South Africans played a leading role in developing.
- 3.3. **Problematic Provisions of the Bill: Insufficient protection for the public broadcaster, the SABC which result in unconstitutional limitations on the right to freedom of expression**
  - 3.3.1. As the NCOP is obviously aware, the SABC has been designated as a National Key Point (NKP) in terms of the NKPA.
  - 3.3.2. As a result of this, the SABC is subject to regulations that have been passed in terms of the NKPA with regard to the appointment of security guards and other security staff at NKPs. These regulations are contained in Notice 1731 published in Government Gazette No. 8338 dated 13 August 1982 (as amended) (the Regulations).
  - 3.3.3. These are the only legal regulatory requirements in respect of security measures for staff as required in terms of the NKPA that we are aware of.
  - 3.3.4. It has come to our attention (as a number of SABC editorial staff members are also individual members of SANEF) that the State Security Agency (SSA) has been approaching non-security personnel at the SABC and more specifically, editorial staff, that is journalists and/or management personnel and informing them of the necessity of completing a very detailed and invasive security vetting questionnaire, a copy of which is annexed hereto. As is clear from the questionnaire, the information required goes far beyond basic personnel details such

as: name, address, ID number and includes information regarding family members, relationships etc.

3.3.5. The authority for this is cited as section 2A(1)(b)(ii) of the National Strategic Intelligence Act, 1994 (the NSIA) which provides, in its relevant parts, as follows:

***“The relevant members of the National Intelligence Structures may conduct a vetting investigation in the prescribed manner to determine the security competence of a person is such a person... is rendering service... which service may... give him or her access to areas designated national key points in terms of the National Key Points Act, 1980.”***

3.3.6. We have a number of comments to make about this ostensible authority to act in this manner:

3.3.6.1. First, this power given to the National Intelligence Structures is discretionary (see use of the term “may” as opposed to “must”) and there is no absolute legal requirement for all non-security personnel to be vetted in this matter;

3.3.6.2. Second, it is unclear whether or not employment services outside of the ambit of security services were intended to be subject to this provision;

3.3.6.3. Third, there is no recognition that a public institution such as the SABC as the nation’s independent public broadcaster is a *sui generis* example of a National Key Point;

3.3.6.4. Fourth, the vetting of journalistic staff in this extremely probing manner appears designed to be intimidatory and to put journalists “under watch” as it were by the SSA; and

3.3.6.5. Fifth, this power is being exercised in a manner that we believe to be an unconstitutional violation of the right to freedom of the press which is a specifically protected aspect of the right to freedom of expression as is provided for in section 16(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

3.3.7. It is with this in mind that the Group requests the NCOP to ensure that specific protection of editorial integrity and freedom of work as a journalist be provided for with regard to the staff of the SABC, other than, of course, in respect of the security staff needed to secure the SABC as a National Key Point or, in due course, a Critical Infrastructure or Critical Infrastructure Complex.

- 3.3.8. We therefore suggest the introduction of a new section 24 to be contained in Chapter 3 of the Bill (which will require consequential renumbering of the subsequent sections and probably additional definitions, for example, of the SABC) as follows:

***“Specific Protections for the SABC as the independent public broadcaster***

***24. In recognition of the vital role that the SABC, the independent public broadcaster, plays in ensuring that the public has access to a wide range of news and information, nothing in this Act shall require the security vetting, other than of the SABC’s security staff, of the SABC staff, in particular, no journalist or non-security staff member shall be required to disclose any communication undertaken in the course of his or her employment and sources of journalistic information as a result of the SABC being declared critical infrastructure and/or a critical infrastructure complex.”***

- 3.3.9. Obviously this would not prevent security scrutiny of any journalist or indeed of any non-security staffer at the SABC should there be reasonable grounds to consider him or her a real security threat but what we are anxious to avoid is a routine securitization of journalists as it were.

- 3.3.10. Assuming such amendments are made, this will require consequential numbering amendments to be made to the remaining sections of the Bill.

**3.4. Problematic Provisions of the Bill: Limitations on the practise of journalism in certain circumstances which unconstitutionally limit the right to freedom of expression**

- 3.4.1. The Bill contains severe penalties for violations in relation to critical infrastructure as provided for in section 26. These range from 20 years imprisonment for tampering with, damaging or destroying critical infrastructure (section 26(4)) to a fine and/or three years imprisonment.

- 3.4.2. Nevertheless, we think it critical to point out that a penalty of up to 3 years imprisonment is currently provided in section 26(1) for activities that could be described as journalism, namely section 26(1)(a), (b), (e) and (f), which sections prohibit, *inter alia*, publishing information, being at or taking photographs of critical infrastructure. While it is true that these are subject to this being done “unlawfully” – this term is never defined - and we are concerned that this would have a chilling effect on reporting about activities taking place at critical infrastructure sites.

- 3.4.3. For example, while the offence provided for in section 26(1)(a) is specifically subject to the Protected Disclosures Act, 2000, Prevention and Combatting of Corrupt Activities, 2004, and “any other Act of Parliament that provides for the lawful disclosure of information”, none of these Acts provides protection for disclosure by journalists reporting in the public interest. Consequently we are of the view that a limited public interest override remains essential to the constitutionality of the Latest Bill and that it must be applicable to sections 26(1)(a), (b), (e), and (f).
- 3.4.4. The Group therefore supports the call that the Bill specifically contains a public interest override to ensure, in particular, that the information-disclosure activities contained in what is currently section 26(1) of the Latest Bill as set out above would not constitute offenses if the disclosure of information and related activities regarding critical infrastructure would be in the public interest.
- 3.4.5. We therefore suggest that a new sub-section (3) be inserted into what is currently section 26 the Bill as follows:

**“(3) Notwithstanding the provisions of section-sections (1)(a), (b), (e) and (f), where a disclosure of information regarding critical infrastructure would reveal evidence of:**

- (a) a substantial contravention of, or failure to comply with, the law; or**  
**(b) an imminent and serious public health, safety or environmental risk; and**  
**(c) the public interest in the disclosure clearly outweighs the harm in question, the disclosure and related activities falling within those listed in section 26(1)(a), (b), (e) and (f), shall be lawful.”**

3.4.6. This will require a consequential renumbering of existing sub-sections 26(3) to 26(6).

#### 4. CONCLUSION

- 4.1. The Group thanks the NCOP for this opportunity to submit written representations on the Latest Bill.
- 4.2. The Group is of the view that the Latest Bill is a step in the right direction on the long road to ridding our statute books of outdated Apartheid-era security legislation. However, there is no doubt that the Latest Bill as it currently stands is still flawed, and is out of step with South Africa’s AU obligations, and, in our view, is unlikely to withstand Constitutional scrutiny.

- 4.3. As The Group has pointed out, relatively minor wording changes to sections 26, together with the proposed new section 24 as set out above, requiring no major policy reconsiderations and doing no damage to coherence of the Latest Bill, would transform the Latest Bill into one that South Africa can be justly proud of. If the Committee makes the amendments suggested by the Group herein, the Group is of the view that the Bill will find that illusive balance between protecting the public interest in legitimate national security interests and protecting the public interest in a free press and in the free flow of information in order to further democracy and development, and will pave the way for other countries of the Continent to reconsider Colonial-era security laws to the benefit of the peoples of Africa.
- 4.4. We formally request the opportunity to make oral submissions before the NCOP on these matters during the NCOP's hearings to consider the Latest Bill.
- 4.5. Please do not hesitate to contact us should you have any queries or require any further information.

**Yours Faithfully**

**Kate Skinner (SANEF) (082) 926-6404**

**Director@sanef.org.za**

**Duduetsang Makuse (SOS) (060) 911-5889**

**duduetsang@soscoalitioon.org.za**

**William Bird (MMA) (082) 887-1370**

**williamb@mma.org.za**