Open Democracy Advice Centre

Submission by the Open Democracy Advice Centre

To the Ad Hoc Committee on the Protection of Information Bill

On The PROTECTION OF INFORMATION BILL (B6 2010)

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1. Introduction

The Open Democracy Advice Centre ("ODAC") makes this submission to the Ad Hoc Committee on the Protection of Information Bill ("the Committee") in response to a notice issued by Parliament on 7th May 2010.

1.1 The Open Democracy Advice Centre

ODAC is a specialist law centre working in the areas of access to information and whistleblowing. The Open Democracy Advice Centre (ODAC) was launched in October 2000 and our mission is to promote open and transparent democracy; foster a culture of corporate and government accountability; and to assist people in South Africa in realizing their human rights. ODAC seeks to achieve its mission through supporting the effective implementation of rights and laws that enable access to, and disclosure of, information to help people realize their socio-economic rights, and thereby contribute to social and economic justice.

ODAC undertakes a number of initiatives in respect of access to information including:

- Enhancing civil society access to public and private information through Access to Information laws but primarily the Promotion of Access to Information Act (PAIA).
- Promoting the fight against corruption by supporting actual and potential bona fide whistleblowers using the Protected Disclosures Act (PDA) by providing legal advice, support and case referral.
- Supporting effective implementation of new laws by assisting public institutions to develop policies, procedures and systems.
- Providing public information and training on using PAIA and the PDA through public awareness campaigns, and workshops.
- Monitoring the implementation and use of PAIA and PDA in order to refine and improve it by conducting applied and comparative research.

2. The Protection of Information Bill (B6-2010)

The rest of this paper captures our assessment of the Protection of Information Bill 2010 ("the Bill"):

2.1 General Observations regarding the Bill

The premise of the Open Democracy Advice Centre is that that openness enhances and supports the delivery of social and economic rights and goes some way to preventing the scourge of corruption from diverting resources intended for development. We welcome the tabling of this legislation, as a much needed component of the access to information regime in South Africa. The repeal of the current Protection of Information Act, 1982 is long overdue as well as the revision of the Minimum Information Security Standards (MISS).

ODAC contends that the basic premise of the Protection of Information Bill should reflect that public records and information are the property of South African citizens, and all initial

presumptions should favour disclosure. While certain information must be exempt from immediate disclosure for several disparate reasons, these exemptions must only function to an extent that is reasonable and justifiable in an open and democratic society as provided for in the constitution and must at all times reflect the public interest of South African citizens in order to be considered legitimate.

The draft Bill in front of Parliament attempts to set up a parallel regime for refusing access to information, and for classifying such documents when considered in contrast to the PAIA, the principal governing law on access to information. This can in large measure be remedied by synchronising the two pieces of law, and ensuring that the classifications proposed apply to records, but only once they are exempt from disclosure in terms of PAIA.

The Bill does not create an adjudicatory body, and thus all refusals of records must be referred to the High Court. This creates an obstacle in access to justice because only wealthy applicants will be able to afford such legal action, denying access to such records to the poor where there is a dispute. The ad hoc Committee on the Review of the Chapter Nine and Associated Institutions also identified a gap in relation to managing disputes about the release of records under PAIA, and recommended the creation of a dedicated Information Commissioner. Such information commissioner is to be established in terms of the current Protection of Personal Information Bill which establishes an Information Protection Regulator. It is suggested that the regulator should have powers in terms of the Protection of Information Bill to deal with disputes under this Bill. Alternatively, we propose that the Public Protector should act as an appeal body for protection of information disputes.

2.2 The Preamble

The preamble of the Bill states an affirmation of "*the constitutional framework of the protection and regulation of access to information*". It is not clear what constitutional framework the drafters were alluding to with regards to protection of information. Section 32 of the South African Constitution of 1996 states:

(1) Everyone has the right of access to –
- (a) any information held by the state, and;
- (b) any information that is held by another person and that is required for the exercise or protection of any rights;

(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.[1]

The Promotion of Access to Information Act (PAIA) is the legislation envisaged by sec 32(2) of the Constitution[2] and was approved by Parliament in February 2000 and came into effect in March 2001.[3] It implements the constitutional right of access to information and is

[1] The Constitution of the Republic of South Africa, Act 108 of 1996. http://www.polity.org.za/govdocs/constitution/saconst.html

[2] This was recognised in *inter alia* Clutchco (Pty) Ltd v Davis 2005(3) SA 486 (SCA) at para 1 and Mittalsteel South Africa Ltd v Hlatshwayo 2007(1) SA 66 (SCA) at para 5

[3] Promotion of Access to Information Act, Act 2 of 2000. http://www.gov.za/gazette/acts/2000/a2-00.pdf . For a detailed analysis of the Act, see Currie and Klaaren, The Promotion of Access to Information Act Commentary (Siber Ink 2002).

intended to *"foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information"* and *"Actively promote a society in which the people of South Africa have effective access to information to enable them to fully exercise and protect all of their rights."*

As far as we can see, the constitutional framework provides for access to information and the limitation thereof by a law of general application which is reasonable and justifiable in an open and democratic society.

2.3 Major Difference between PAIA and the Protection of Information Bill

The draft Bill creates three categories of information:

- valuable information, which must be preserved;
- sensitive information, which must be protected against disclosure
- commercial information, which must be protected from disclosure;

Once information is categorized as sensitive, it can then be classified as confidential, secret, or top secret.

There is a wide range of exemptions in PAIA in relation to SARS (sec 35), in relation to information held under a duty of confidence (sec37), the protection of safety of individuals (sec 38), police dockets, law enforcement and legal proceedings, defence, security and international relations (sec 41), economic interests and financial welfare of the Republic (sec 42), and the protection of research information. This information may be exempt from disclosure, but PAIA does not allow for its categorization hence though the information is protected from disclosure, information on defence, security and international relations as well as the economic and financial interests of the Republic may still be disclosed if there is an apparent public interest in doing so.

Objects of the Bill and PAIA

Section 2(b) of the Bill and section 9(e) of PAIA, while not explicitly linked, both seek to promote transparency and accountability. It is therefore expected that the provisions of the Bill would be consistent with the objects of the PAIA.

Chapter 1: Definitions

Public Interest

Attention must be drawn to the differing manner in which PAIA and this Bill deal with the definition of "public interest".

We accept that if disclosure is expected to endanger the security, stability, and defence of the Republic, then that information may justifiably be protected against release. Whereas, this Bill mandates that such information must be protected, PAIA only states that the public interest **may or may not** be used as grounds for refusal for disclosure. The Bill labels such information as "sensitive information", which is consequentially subject to rules regulating

classification (cf. Section 15). The level of classification is proportionate to the degree of harm resulting from disclosure. However, PAIA does not mandate protection from disclosure, but states that the information officer "may refuse" access on the aforementioned grounds (cf. Section 33 1(b)).

Recommendation: The issue of the public interest is inadequately covered and elaborated in the Bill. It seems clear that a mandate to release information through a general public interest override should be built into the Bill.

National Interest

We submit that "National Interest" is defined too broadly in terms of S11. The scope of the definition makes the definition of what is in the national interest within the subjective view of the administrator that is tasked with classifying information. The consequence of this would be that every form of information that an information holder is in possession of which has the slightest likelihood of embarrassing the government can be classified and prevented from public disclosure.

In other jurisdictions, the concept of "National Interest" does not exist. In the USA, the current Bill called the State Secret Protection Act does not have the concept of "national interest" but the term 'state secret' is used which refers to any information that, if disclosed publicly, would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States. As it stands, the US government invokes what is called the State Secrets Privilege to prevent the public disclosure of information. This privilege is limited to *"public disclosure of an item of evidence which would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States."*

The current USA legislation called the Classified Information Procedures Act (*18 U.S.C. App. III. Sections 1-16)* defines "Classified information" to mean *"any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954."*

"National security" is defined as the national defence and foreign relations of the United States.

Also, The UK Official Secrets Act of 1989 only makes the disclosure of Information unlawful if it applies to security and intelligence, defence, international relations, crime and special investigation powers.

The USA and UK jurisdictions limits classification of information to defence, international relations and in the instance of UK, crime and special investigation powers thus limiting considerably, the areas which enjoy classification of information unlike the proposal in the South African Bill where the term "national interest" covers all areas.

Recommendation: We recommend that national interest should only be defined in terms of S 11(3) (g) of the Bill as this would harmonize both the Bill and PAIA

together and somewhat make the Bill fairly consistent with other jurisdictions. S 11 (1) – S11 (3) (f) of the Bill should be deleted.

Organ of State

"Organ of State" is defined in the Bill to include "any facility or installation declared as a National Key Point in terms of the National Key Points Act, 1980". The extension of the definition to National Key Point implies that organs of State are then extended to private entities as well.

Recommendation: We recommend that Part B of the definition of "organ of state" should be deleted.

2.4 Chapter 2: General Principles of State Information

a) Section 6(a) of the Bill states that:

"Unless restricted by law or by justifiable public or private considerations, State information should be available and accessible to all persons"

The use of the formulation "justifiable public or private considerations" could easily lend itself to widely unwarranted and discretionary decision making on the right of access to information by the very holders of the information in dispute.

That the right of access to information may be reasonably and justifiably limited in specific circumstances is not in dispute. It is contended, however, that this section needs to be crafted such that any limitation of the right of access to information is explicitly elaborated and regulated in the law. Such is the case with Chapter 4 of the Promotion of Access to Information Act of 2000 (PAIA).

Recommendation: We recommend that the phrase "justifiable public or private considerations" be removed.

2.5 Chapter 3: National Information Security Standards and Departmental Policies and Procedures

a) Section 7

Recommendation: The phrase "by regulation" should be inserted to subsections (a), (b) and (c) to precede the words "prescribe".

2.6 Chapter 5: Information Which Requires Protection Against Disclosure

a) Section 11

As explained earlier, the definition of "national interest" and "commercial information" are widely worded and covers practically all forms of information that the subjective opinion of

the information holder can deem as sensitive information which is in the "national interest" of the republic to protect against disclosure.

Recommendation: We recommend that the drafters of the Bill redraft this section by considering how protection of national interest information is dealt with in Section 41 of PAIA where national interest information is appropriately regulated to include only matters that concern defence, security and international relations.

b) S12- Commercial Information

Section 12 of the Bill extends the definition of "commercial information" in such a way that there's little room for any commercial information not to be classified as confidential, secret or top secret under the Bill.

S 36 and 42 of PAIA delineate grounds for "mandatory protection" of "commercial information of a third party" and "economic and financial welfare of the Republic" respectively.

The dissonance between the Bill and PAIA is found in the Bill's omission of the public interest as sufficient and mandatory grounds for disclosure of commercial information. Sections 36 and 42 PAIA includes a list of exemptions to the mandatory protection of commercial information, one being if disclosure would "reveal a serious public safety or environmental risk" (cf. 36 (2) (c) & 42 (5) (c)) (Section 46 is entirely dedicated to explicating "mandatory disclosure in public interest").

Also, the Bill creates an anomaly in terms of whistleblowing protection for those in the private/public sector under the new Companies Act.

Under Section 159 of the new Companies Act, the whistleblowing provisions impose a positive duty on employers to promote disclosure (even of commercial information) and the statute seeks to foster a more transparent organizational culture.

This is in stark contrast with the new Bill. In the public sector, we may find a scenario where employees who are dealing with the same commercial information are actively discouraged from making disclosures under the Bill's new restrictions.

This discrepancy in rights will lead to a two-tier system of whistleblowing, where there is far more protection afforded to whistleblowers in the private sector than those in government and corruption within government would have to be exposed by those outside it i.e. business.

S 12 (2) (a) states that "commercial information that is not in the public domain, which if released publicly would cause financial loss or competitive or reputational injury to the organization or individual concerned".

"Reputational injury" is not defined in the Bill and we submit that this term should be deleted in all provisions in the Bill. Public officers have no defence in the common law

against defamation, thus, they have no "reputation" under common law and this Bill would create the existence of something that does not exist under our common law.

Recommendation: We submit that the use of "reputational injury" will deal a serious blow to the disclosure of records and create unintended consequences. We recommend that "reputational injury" should be removed. We also propose that a public interest clause be built into this section.

While it would be preferable that commercial information should be completely exempted from protection against disclosure, we recommend in the alternative the deletion of S 12 (1) (b) as this provision is too broad to the extent that virtually all commercial information can be protected against disclosure because it "could endanger the national interest of the Republic." We also recommend the amendment of S 12 (2) which reads "commercial information which *may* prejudice the commercial, business or industrial interests of an organization..." [Own emphasis] to "commercial information where reasonable expectation of demonstrable harm prejudices the commercial, business or industrial interests of an organization..." We submit that the use of the word "may" in this provision unduly gives a wide scope of interpretation for the protection of information.

We propose that commercial information should be open for disclosure if it would be in the public interest to do so.

2.7 Chapter 6: Classification and Declassification of Information

a.) Section 15: Classification levels

According to this section, state information may be classified as confidential, secret or top secret but each level of classification is subject to the "national interest" of the republic making the issue of correctly determining what is in the national interest even more important.

b.) Section 17: Directions for classification

We commend the drafters of the Bill for this section. This section attempts to bring the tone of the law within the current openness and transparency regime that is being fostered in the country since the passage of South Africa's right-to-information laws in the year 2000, namely; the Promotion of Access to Information Act No. 2, the Promotion of Administrative Justice Act No. 3 and the Protected Disclosures Act No. 26.

First and foremost, classification is guided by the principle, *"Secrecy exists to protect the national interest"* (cf. section 17 (1) (a)). This creates a presumption for protection of information rather than one of disclosure which PAIA envisages. While democratic norms such as promoting transparency and accountability are alluded to in the Bill's preamble and objects of the act, section 17 makes no mention of these precedent norms. Furthermore, section 17's frequent employment of vague and subjective language has the effects of: first, fashioning the activity of classification as a matter of subjective discretion, rather than one of objective jurisdiction. For example, section 17 (1) (i) states that: *"classification decisions ought to*

be assessed and weighed against the benefits of secrecy with the following factors…". The provision uses "ought" rather than "must", which has the effect of putting forth a suggestion to, rather than a mandate on organs of the state. A piece of legislation has to be clear and specific and not suggestive.

The suggestion to evaluate multiple factors when determining the status of information, resembles, but is ultimately not faithful, to the public interest balancing test set forth by PAIA (s. 46) and grounded by constitutional principles. A balancing test, as a democratic mechanism, is designed to guide and facilitate fair, unbiased decisions, through the weighing and consideration of multiple, often competing rights. As follows, Section 17 esteems "benefits of secrecy" as the chief principle in determining classification. As "secrecy exists to protect the national interest" (cf. 17 (1) (a)), protection of the national interest is the assumed benefit to be had from secrecy; thus, the clause implicitly states that the national interest is to be given a higher authority in these considerations.

This biased shift in favor of "national interests" betrays both the democratic commitment to the public interest and betrays the concept of security as defined by the Constitution in section 198 (a), (c), which provides the *"governing principles"* for *"national security"*:

> *"(a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life"*

and

> *"(c) National security must be pursued in compliance with the law, including international law."*

In summary, national security is subject to "public benefit" and legal regulation, both of which 17 fails to uphold. The Bill's concretization of the "national interest" as a broad, competing right with a public interest is a far cry from the founding principles of South African democracy. And again, it should be reiterated that such balanced rational processes, are not required by law, but are themselves a manner of discretion, according to the Bill's provision.

Recommendation: These principles do not have the capacity to effectively regulate classification, nor do they protect such procedures from prejudice and abuse. That being said, it is evident that Section 17, at the very least, needs to be redrafted in more suitable, definitive terms that ensure our state organs, entrusted with this determination, are better informed and regulated, and secondly promote meaningful civic engagement with the legislation; such regulations provide for a more effective, manageable practice, and are consistent with South Africa's democratic foundations.

c.) Section 18: Report and Return of Classified Records

This provision requires a person in possession of a classified record to return that record to South African Police Service or the National Intelligence Agency. It would be very difficult to refute the argument that this clause can be seen to be an attack on freedom of expression in general and media interests in particular as well as limiting the opportunity to blow the whistle that the PDA caters for.

Recommendation: There ought to be an exception to this rule, where for example if the record reveals unlawfulness, then that record should not be subject to the rule. That there is currently no general public interest exemption in the Bill is also a matter of substantial debate. The further absence of any form of specific media protection or exemption in the Bill is also a cause of great concern.

d.) Section 19: Authority to declassify information

This provision makes the organ of state responsible for classifying information to declassify it. This provision is problematic in the sense that it is difficult to see in reality how an organ of state that perceived a document to be worth classifying against disclosure can later find a reasonable justification to declassify the same document.

Recommendation: S 19 (1) contradicts S 28 (2) and it is recommended that S 19 (1) should be deleted in favour of S 28 (2). S 28 (2) is preferable as it limits the time period for the consideration of disclosure of information. There should be a specific timeline for the automatic declassification of information and it would be appropriate for a separate agency to from time to time determine whether classified records of organs of state require continued classification.

e.) Section 20: Maximum protection periods

This section is extremely problematic. The provision initially provides for a classification period of 20 years but then allows a Minister based on 3 factors to continue the protection of the information if the Minister deems it necessary. This is unheard of and actually goes against international best practice and trends. In the rest of the world, the twenty-year secrecy rule is being reviewed downwards to fifteen or ten years yet in South Africa we are looking at extending the period from twenty years to an indefinite period.

In the United Kingdom, classified documents must be reassessed every five years in order to justify their continued exemption under the Official Secrets Act, and these reassessments are limited in number by the thirty year rule to which all records are made subject.

The proposed South African Bill stipulates that any Minister can approve the extension of the secrecy period from 20 years. In an open democracy such as ours, one would have thought that there would be at least a countervailing provision that provides for a shorter classification period based on clearly defined public interest considerations.

Recommendation: The maturity of a record is a more accurate and objective measure of information's readiness for disclosure and we recommend that the Bill must be redrafted to favour the "maturity approach" instead of the "chronological age" approach which favours the age of a record in establishing procedures for protection of information and must provide for a shorter classification period. The assumption that chronological age uniformly aligns with the expiration date of exemptions is untenable. Should the committee still favour the chronological age approach, we recommend that only the text "Information may not remain classified for more than a 20-year period" be retained and the rest of the text be deleted.

2.8 Chapter 7: Criteria for continued classification of information

a) Section 21 (1) states that:

"In taking a decision whether or not to continue the classification of information, a head of an organ of state must consider whether the declassification of classified information is likely to cause significant and demonstrable harm to the national interest of the Republic." [Own emphasis]

Again the Bill seems to go squarely against the provisions of the highly regarded PAIA. PAIA provides for exemptions to the right of access to information, yet even those exemptions are still subject to the public interest override (sections 46 and 70). This means that even if the record falls within the category of records that must not be disclosed to the public, such a record can still be disclosed if it remains in the clearly defined public interest to do so. Granted, PAIA does somewhat inhibit the ability of the "public interest" to favour disclosure by limiting its definition to three aspects only, physical and environmental safety, as well as unlawfulness; and again, these aspects, even if shown to be for disclosure, have the potential of being outweighed by specified rights or important interests. Yet, this Bill does not even mention the public interest in a meaningful way.

PAIA establishes disclosure of protected documents in the public interest. This Bill however, inverts this by establishing secrecy in the national interest. Basically, a public interest based test is replaced by a 'national interest' qualification. As indicated above, this is a very different test to one based upon the public interest and seems to unduly favour the interests of Government.

Further more, the criteria provided for in section 21(2) only define reasons for withholding disclosure while neglecting reasons warranting disclosure, such as public safety.

Recommendation: There is no compelling argument in the Bill for disclosure, and thus it neglects the right of access to information. If the bill is to neglect this right, then the preamble, as well as its invocation of the Constitution, should be reworded for consistency purposes. We recommend that the Bill in general and this section in particular be reworked to let the principle of the public interest permeate through out. At the very least a public interest override clause should be built into this section.

b) Section 23 provides for possibility of the review of classified information. However, it is not clear why it is necessary to only allow "interested non-governmental party or person" to request the review of status of classified information.

We are not convinced that requests for review of status must only be "in furtherance of genuine research interest or legitimate public interest legally". In terms of PAIA, a person requesting access to information held by a public body does not have to give reasons why they want the information so it should not be the case in this legislation as well.

The requirement to show that the request for a status review is for a prescribed purpose makes the possibility of a positive decision on the request quite remote as there would be a double-hurdle that requestor would have to deal with:

i) The grounds for requesting a review
ii) The actual nature and content of the information

The effect of this provision is very similar to the implications of private sector application of PAIA where a requestor has to show that they need the information requested for protection of any other right. This practical implication of this is PAIA has been quite difficult to use in accessing privately held information as the requestors get frustrated on the first hurdle of showing that the information they need will help them protect or exercise another right. The prevailing jurisprudence on PAIA as it relates to the private sector is showing that PAIA is failing in promoting the right of access to privately held information, there is nothing to say that this Bill will also not fail on the same grounds.

Recommendation: The text "interested non-governmental party or person" in section 23(1) must be replaced with "anyone" and section 23(2) should be removed in its entirety.

c) Section 24 stipulates the procedure for the status review

Section 24(1) states that the state official holding information is given "90 days" to review a request for information and to make a determination thereof.

The ninety (90) day period is far too long; legislators need to consider the staggered transitional approach that was adopted in terms of PAIA. In the first year after PAIA was introduced holders of information had ninety days to respond to a request for information, the period was reduced to 60 days after the first 12 months since the Act came into force. The period was finally reduced to 30 days after the second 12 month period[4]. The 30 day processing period in terms of PAIA can be extended by up-to 30 more days under specific circumstances prescribed in the law.

If section 24 is read together with section 25 providing for appeals to a Minister this means that by the time the Minister decides on the appeal 210 days/seven months could have passed since the request for declassification was made!

Recommendation: We recommend that officials be given 30 days to decide on requests for status reviews.

2.9 Chapter 9: Release of Declassified Information

a) Section 271) states that:

"Classified information that is declassified may be made available to the public in accordance with this Act, the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), or any other law." [Own emphasis]

Here the Bill misses an opportunity of being truly consistent with the constitutional principles of openness and transparency.

[4] See section 87 of the Promotion of Access to Information 2 of 2000

Recommendation: The Bill must establish a positive obligation to voluntarily release declassified information. This could be done by replacing the text "may be made available" with "must be made available".

b) Section 27(3) states that following a request for classified or designated information, the official in possession of the record, must refer the record to the organ of state that originally classified the information. This is in direct contradiction to S 28 (2) and we propose that S 27 (3) be deleted in favour of S 28 (2) to limit the time period for consideration of disclosure of a record.

c) Section 27(4) states that:

"There is no automatic disclosure of declassified information to the public unless that information has been placed into the National Declassification Database as provided for in section 41 of this Act."

This clause does not uphold the democratic principle of proactive disclosure of information. We urge the committee to provide for the automatic release of any declassified information.

d) Section 29(1) provides that information that may be refused in terms of PAIA must not be put in the National Declassification Database.

Recommendation: We believe that the Bill is setting the bar for access to information unnecessarily high. We propose that "may" in the phrase "...such information may be refused" should be replaced with "must".

2.10 Chapter 11: Offences and Penalties

a) Section 34 states that:

"Any person who harbours or conceals any person whom he or she knows, or has reasonable grounds to believe or suspect, has committed, or is about to commit, an offence under sections 32 or 33, is guilty of an offence and liable to imprisonment for a period not exceeding ten years."

Section 16(a) of the Protection of Information Act of 1982 seems to have been transplanted almost verbatim into this section. As a result, the Bill creates less offences under the heading "Harbouring or concealing persons", but dramatically increases the penalty from one year maximum imprisonment to ten.

b) Section 35

It is unclear why the drafters of this Bill have chosen to incorporate a definition section into section 35 (6) (a). We recommend that this section should be deleted and the definitions moved to the definition section in chapter 1 of the Bill.

c) Section 38 states that:

"Any person who discloses classified information outside of the manner and purposes of this Act except where such disclosure is for any purpose and in any manner authorized by law is guilty of an offence and liable to imprisonment for a period not exceeding five years."[Own emphasis]

One interpretation of this provision may have this provision effectively criminalising whistleblowing. This provision would have been consistent with the culture of openness and accountability had there been built into it a public interest override allowing the usage of the whistleblower protection provisions that allow any disclosures that reveal unlawful conduct, criminal activity and corruption. This override would make the Bill consistent with PAIA and the Protected Disclosures Act (PDA).

The Bill's application strikes at the heart of the Protected Disclosures, to NEGATE the spirit of that law. The spirit of the law is contained in the preamble as to
"1. *create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosure.*
2. Promote the eradication of criminal and other irregular conduct in organs of state and private bodies"

The Bill will facilitate a culture of secrecy and fear into disclosure of information and will do little to eradicate criminal and other irregular conduct.

We recommend that that the Protection of Information Bill should not discourage the disclosure of information by employees relating to criminal and other irregular conduct in the workplace i.e. the Protection of Information Bill should not take away any of the rights granted to employees in terms of the Protected Disclosures Act 26 of 2000 (PDA). The PDA was enacted because "*criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage.*

We further recommend that the Protection of Information Bill does not override the following Section of the PDA:
2 (3) Any provision in a contract of employment or other agreement between an employer and an employee is void in so far as it -
(b) (i) purports to preclude the employee; or
(ii) has the effect of discouraging the employee from making a protected disclosure

This Bill which if passed would have the effect of allowing what the PDA seeks to prevent in S 2 (3) above by discouraging the employee from making a protected disclosure.

Recommendation: We recommend that S 38 should be limited to those who disclose information in terms of S 11 (3) (g) and also the phrase "…, including the Promotion of Access to Information Act and the Protected Disclosures Act,…" should be added after the phrase "…authorized by law…". We also propose a general public interest override to be built into this section.

d) It is also believed that section 39 seems to limit the freedom of the press and whistleblowers. We propose that a public interest override be built into this section or an exemption if unlawfulness is revealed by the disclosure.

2.11 Chapter 13: General Provisions

Recommendation: The Bill needs to require officials to publicize these reports (in the public interest).

3 Conclusion

We thank the committee for opening an opportunity to the public to submit its concerns regarding this Bill and we will be grateful for any opportunity to address the committee at a public hearing where we can elaborate further on matters raised in this submission.

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