EXECUTIVE SUMMARY

SUBMISSIONS TO THE AD HOC COMMITTEE ON THE PROTECTION OF INFORMATION BILL B6-2010 IN THE NATIONAL ASSEMBLY

SUBMITTED ON BEHALF OF PRINT MEDIA SOUTH AFRICA

1. Introduction

1.1 PMSA submits 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 submission fail to pass constitutional muster, in respects that will significantly restrict investigative reporting on matters of public interest.

2. The constitutional background

2.1 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.

2.2 The Constitution also protects the right of access to information. The Promotion of Access to Information Act 2 of 2000 ("**PAIA**") was promulgated to give effect to the constitutional right of access to information.

3. National security as a limitation on constitutional rights

3.1 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.

3.2 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.

4. The unconstitutionality of aspects of the Bill

4.1 Offences that undermine media freedom

4.1.1 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.

4.1.2 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.

4.1.3 Apart from the severe and, we submit, disproportionate penalties (including the new minimum sentences) that are attached to these

offences, we submit that the main constitutional difficulties that arise from these offences from a media perspective are the following:

4.1.3.1 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, for instance PAIA, the Films and Publications Act of 1996, and our common law of privacy. PMSA submits 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. ,

4.1.3.2 secondly, PMSA submits 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.

4.2 **The classification regime**

4.2.1 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

4.2.2 PMSA submits that 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.

4.2.3 The doctrine of legality, which is a foundational principle in our Constitution (section 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.

4.2.4 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.

4.2.5 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 sections 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.

4.2.6 It is submitted that 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**".

4.2.7 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.

4.2.8 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.

4.2.9 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": The concept must be precisely and narrowly defined such that any impairment on constitutional rights will be justifiable, as is also required under the UN-endorsed Johannesburg Principles on National Security, Freedom of Expression and Access to Information, and in international jurisprudence.

The misplaced protection of commercial information

4.2.10 While it may in principle and in exceptional circumstances be defensible for classification to take place of commercial information pertaining to an organ of state, this protection ought in our submission not to extend to commercial information of private individuals and entities in the possession of the State. Indeed, the Bill even contemplates classification of commercial information of other parties which is not in the hands of the state.

4.2.11 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.

4.2.12 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

4.2.13 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".

4.2.14 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**".

4.2.15 PMSA submits that 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.

4.2.16 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.

4.2.17 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.

4.2.18 A commitment to freedom of expression impels the result, we submit, that records 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

4.2.19 *Independent oversight mechanism*

The Bill does not make provision for an independent oversight mechanism to review classification decisions. We submit 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.

4.2.20 *Clauses 7(1), 14(2), 16(5) and 16(6) of the Bill*

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.

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.

4.3 **Access to court documents**

4.3.1 Clause 46 of the Bill deals with protection of State information before courts. PMSA submits 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.

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

4.3.2.1 first, clause 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;

4.3.2.2 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 section 173 of the Constitution;

4.3.2.3 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 ;

4.3.2.4 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;

4.3.2.5 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";

4.3.2.6 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. .

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

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

4.4.1.1 section 104(7) and 104(19) of the Defence Act 42 of 2002;

4.4.1.2 section 103(d) of the Intelligence Services Act 65 of 2002; and

4.4.1.3 section 8A and 8B of the National Supplies Procurement Act 89 of 1970.

4.4.2 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.

4.4.3 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.

5. Conclusion

5.1 We have submitted that the Bill is in many respects a welcome change to the national security landscape in South Africa.

5.2 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.

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