110415 addn pleas

AFRICAN NATIONAL CONGRESS COMMENTS ON THE PROTECTION OF STATE INFORMATION BILL

SUBMISSION NUMBER TWO

INTRODUCTION

Following the initial submissions and engagements in the Ad Hoc Committee on the Protection of Information Bill, the African National Congress, taking into account submissions made in the Public Hearings, submissions by various Parliamentary Parties in the Ad Hoc Committee, presentations and legal opinions tabled by the office of the State Law Adviser and presentations made by the Ministry of State Security and subsequent and related debates and discussions in the Ad Hoc Committee, makes this submission with a view to help facilitate the conclusion of the work of the Ad Hoc Committee.

This document does not re-open debate on issues that have already been agreed to such as the change in the title of the Bill to the Protection of State Information Bill; migration from "national interest" to national security as ground for classification; the deletion of commercial information in the Bill; accepting the principle that what the Promotion of Access to information Act gives the Bill would not take away and that alignment would be sought between these pieces of legislation; aligning the Bill with the Protected Disclosures' Act, the Companies Act and other legislation that protects whistleblowers.

The submission seeks to move the process forward by addressing those elements that are still outstanding to help finalise the parked issues during earlier debates and discussions. It would look at the Original Bill clause by clause and make recommendations where applicable.

Preamble

It is proposed that reference to section 198 of the Constitution be added in the fifth line as follows: "and that national security is subject to the authority of Parliament and the national executive as contemplated in section 198(d) of the Constitution".

Contents

It is suggested that the office of the State Law Adviser be mandated to review this section once the debate has been concluded to align the heading and references to sections in the Bill.

Chapter 1: Definitions, Objects and Application of Act

It is suggested that the current definition of "Classified information" be dropped and substituted with a reference to the meaning in section 11 of the Bill as revised. To this end the new definition should be as follows: "Classified Information" has the meaning assigned to it in Section 11".

It is proposed, as was initially agreed, that a definition for "information peddling" be added to the definitions. The definition that is proposed to this end is: "means –

(a) The deliberate distortion of information or facts and presenting it to the Security Services or a member of the Security Services referred to in Chapter 11 of the Constitution with the intention of, or which has the effect of prejudicing and destabilizing the security of the Republic; or
(b) The fabricating of information and thereafter distributing or publishing it or allowing it to be distributed or published with the intention of or which has the effect of prejudicing or destabilizing the security of the Republic".

Whilst the Ad Hoc Committee is getting closer on the definition of "national security" there are aspects that have been erroneously left out in this definition. For completeness of record, it is proposed that the definition of national security should be: "national security" means the protection of the people of the Republic and the territorial integrity of the Republic against –

(a) The threat of the use of force or the use of force;
(b) The following acts:
    (i) Hostile acts of foreign intervention;
    (ii) Terrorism or terrorist related activities;
    (iii) Espionage;
    (iv) Information peddling
    (v) Exposure of a state security matter;
    (vi) Exposure of economic, scientific or technological secrets vital to the Republic's stability, security, integrity and development;
    (vii) Sabotage; and'
    (viii) Violence.
(c) Whether directed from, or committed within, the Republic or not, and includes the capacity of the Republic to respond to the use of or the threat of the use of force and carrying out of the Republic's responsibilities to any foreign country and international organizations in relation to any of the matters referred to in this definition".

In the definition of "state security matter" it is proposed that it should be restricted to any classified matter and be inclusive of state or international organisation. The revised definition should read as follows: "state security matter" includes any classified matter which is dealt with by the Agency

[security services] or which relates to the functions of the Agency [security services] or to the relationship existing between any person, state or international organization and the Agency[security services];

It is proposed that a definition of status review be included in the definitions section and should read: "...means the process of considering levels of classification of information with a view to upgrade, downgrade or declassify the information concerned in response to a request as contemplated in terms of section 23.

Furthermore, it is proposed that a definition of "top secret information" be included and should be: ""top secret information" has the meaning assigned to it in section 13 (3)".

Objects of the Act

It is proposed that the reference to harmonization referred in object (j) as it is not comprehensive and all inclusive of laws that the Bill would be in harmony with.

Application of the Act

It is proposed that the Act should be applicable to all the Security Services as contemplated in Chapter 11 of the Constitution. To this end, it is proposed that an inclusion that reads as follows in clause 3(1):

"(c) All security services as contemplated in Chapter 11 of the Constitution".

In clause 3 (3), it is proposed, to avoiding imposing onerous classification responsibilities to an entire organ of state, that the relevant and affected section or unit of a state organ be made to comply with the provisions of this Bill. To achieve that objective, it is proposed that sub-clause (c) be added to read as follows:

"(b) determine that a part of an organ of state is to be regarded as a separate organ of state as specified by the Minister".

Furthermore, a new sub-clause (4) be added to provide for exclusion of organs of state from the application of the Bill. In this quest it is proffered as follows:

"(4) An organ of state may, in a prescribed manner, apply in writing to the Minister for exemption from the application of this Act, provided that such an application is approved by the responsible Minister, except the security services referred to in Chapter 11 of Constitution".

Chapter 2: General Principles of State Information

In clause 6 there is a need to emphasise internationally accepted grounds for the limitation of the right of access to information. It is suggested that the following be added so that the revised sub-clause (a) would read thus: "Unless restricted by law that clearly sets out reasonable and objectively justified public or private considerations, state information should be available and accessible to all persons".

In sub-clause (j) competing rights need to be balanced with national security. It is therefore proposed that it should read as follows: "paragraphs (a) to (i) are to be balanced with the security of the Republic, in that the national security of the Republic may not be compromised". This is to align with the grounds set by section 36 of the Constitution.

Chapter 3: National Information Security Standards, Policies and Procedures

When it comes to the enactment of policies and procedures as provided for in clause 8(3), the timeframes need to be revisited and aligned to the relevant court judgements, as were presented by the office of the State Law Adviser.

Chapter 4: Information which requires protection against alteration. Destruction or loss

An omission has been made in Clause 9(1) of the alteration of information. It is thus proposed that information should be protected against alteration, destruction and loss.

In clause 9(2) the following addition should be made "developed and maintained by an organ of state" to ensure that organs of state understand their obligation of maintaining and managing a register of valuable information.

As the international best practice indicated, valuable information and its handling are regulated to guide the public officials who deal with it, to protect it accordingly. A provision for the regulation of such information is thus proposed by the insertion of "as prescribed" in clause 10(2).

Chapter 5: Classification and Declassification of Information

To ensure that public servants who are to work with classified information understand their responsibilities, it is critical that this law be clear in some areas where there is no or is seemingly no clarity. Clause 11(b) should be reworded to read as follows: "must be protected from unlawful disclosure against alteration, destruction and loss in the prescribed manner". The handling instruction would be dealt with in the regulations.

For clarity, it is suggested that sub clause (d) be deleted.

On the threshold of classification, it is important to increase the threshold and to limit the exercise of discretion in this process as has been argued during discussion. Other than the reasons submitted in previous discussions, this is to meet the guidance received from the Courts in cases such as Dawood, Shalabi and Thomas v Minister of Home Affairs (2000) (3) SA 396 (CC) at 966-7, [46] – [48] which addresses the "dangers of uncontrolled and unguided discretionary powers that are conferred on state officials" and its impact on the Rule of Law.

The threshold test, which is in line with international best practice that is suggested, is "is likely or could reasonably be expected to cause demonstrable harm". It is proposed that clause 13 be revised to effect this change.

To ensure uniformity and limit discretion, it is proposed that sub-clause (4) be added to provide for the production of a classification manual that would deal with classification levels. It should read as follows: "(4) The Minister must, in a prescribed manner, create a manual to deal with classification levels". This would guide organs of state in the classification process in keeping with international best practice.

To ensure that the Bill read better and is not unduly repetitive, it suggested that it be cleaned up. As an example, clause 14(2), can end with the words "at a sufficiently senior level". The Bill has addresses the rest of the issues that follow in the rest of the sentence elsewhere.

To ensure that this Bill does not create a loophole in the classification process as it relates to oversight bodies that deal with classified information, it is necessary to make a provision to cover their workings. This is to avoid them being left out in the chain of classified information and the

management thereof required by their founding legislation. Furthermore, studies have shown that oversight is compromised by the failure of oversight bodies to maintain confidentiality of secrets passed to them by bodies they oversee. It proposed that sub-clause 6 be added to read as follows:

"Where a person is a member of Security Services as contemplated in chapter 11 of the Constitution who –

(a) By the nature of their work deal with information that may fall within the ambit of this Act, must classify information in accordance with the classification levels as set out in section 13"
(b) Such information is deemed to be classified information until the head of an organ of state in question decides otherwise.

This clause is, in addition, to provide for derivative classification authority and to protect information especially when being moved from collection point to the relevant authorities who may need to review such information and ensuring its final classification. The same applies to oversight bodies that may need to maintain confidentiality during early stages of an investigation they are conducting, they need to be able to classify and protect the work-in-progress sensitive investigative information.

Chapter 6: Criteria for continued classification of information

In keeping with the increased threshold for the classification of information, clause 19(1) must be aligned with the new threshold, namely, "is likely or could reasonably be expected to cause demonstrable harm".

Chapter 7: Review and Appeal Proceedings

It is suggested that the current provision of the purpose of the chapter deleted to make the Bill leaner and clear. Elsewhere the Bill addressed the issues contained in this section. Clause 20 should therefore be deleted.

To ensure that corrective reviews are conducted by organs of state, as was pointed in the international best practice, it is suggested that a provision be made enabling the head of an organ of state to review the status of classified information at any time. The following provision in clause 20(1)(b) is proposed to that end:

"(b) Despite subsection 1(a), the head of an organ of state may review the status of classified information at any time".

To provide clarity on the time-frame for classification, it is proposed that the ten year period starts on the commencement of this Act instead of the original provision which was "commences on the effective date". Clause 20(2) must be revised to read: "The first 10-year period referred to in subsection (1)(a) starts on the date of the commencement of this Act".

To avoid making onerous demands on reporting on the reviews, it is proposed that the current clause 20 (5) be deleted and replaced by the following provision: "Organs of state must submit a report to the responsible Minister on each review contemplated in subsection (1)(a) within six weeks of finalizing the review and must make the report available to the public by publication in the Gazette". [**Comment**: the appeal role of the Minister, some have argued, may be affected by the provision of classified information review reports as envisaged in this section. They caution as follows: "Should the minister affirm the decision of the head of organ of state, a reasonable apprehension of bias would arise which would preclude the Minister from hearing the appeal".

Since there are a number of supporting documents and mechanisms that are contemplated in the administration of the Bill, such as regulations, policies and procedures, manuals, training and development on classification and declassification, it is crucial that the reference to departmental standards and procedures be deleted in clause 21(4) as the aim of that clause is the development of such mechanisms. The words "in the departmental standards and procedures" in that clause must be deleted.

The wording in the Appeal Procedure section needs to be made simpler, clearer and needs to be cleaned to be made more user-friendly. This may include, inter alia, changing clause 23(2) to read as follows:

"An appeal contemplated in subsection (1) must be lodged within 30 days of receipt of the reasons upon which the decision for refusal was based".

In the submission by the Minister of State Security on 22 October 2010, a proposal was made to add a provision that would ensure that the responsible Minister is assisted in the consideration of the appeals. It is thus proposed that Clause 23(4) be added as follows: "When considering an appeal contemplated in this section, the Minister of an organ of state may be assisted in a prescribed manner". This is to ensure that there is uniformity informed by regulations in this regard.

Following the submissions made by the office of the State Law Adviser on the options that are available to the public in accessing the information, the ANC wants to submit that the dual access system be maintained on condition that forum shopping is expressly excluded. This means that the Promotion of Access to Information Act would remain as the access route for information. If the information is classified, then it must be processed using the provisions in this Bill. For this reason, it is proposed as follows:

The title of subsection should refer to "Request for classified information". The previous reference to the Promotion of Access to Information Act must now be deleted.

In addition, a new clause 24 should be inserted that reads as follows:

"(1) If a request is made for information and it is established that the information requested is classified that request must be dealt with in terms of a procedure prescribed in this Act;

(2) An organ of state must grant a request referred to in paragraph (1) if –

(a) the disclosure of the information would reveal evidence of –

(i) a substantial contravention or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b)t he public interest in the disclosure of the information clearly outweighs the harm contemplated in the provision in question." Consequently, the previous sub-clauses (2) up to (5) should be deleted.

Chapter 9: Release of Declassified Information to the Public

Since National Archives is defined, to make the Bill simpler, leaner and user-friendly, it is suggested that this chapter uses National Archives and delete references such as "and Records Service of South Africa". This full name appears in the definition section. Clause 27 must be cleaned accordingly.

Chapter 10: Implementation and Monitoring

No changes are contemplated in this Chapter.

Chapter 11: Offences and Penalties

It is suggested that the section on the "Knowledge of fact and existence of substantial and compelling circumstances" which was elsewhere in the Bill be inserted in this section. This would be a new clause 30. So too should the provision pertaining to minimum sentences and the discretion of the courts. These changes would affect the references in the Bill. Consequential amendments must then be effected in the Bill.

To ensure the protection of whistleblowers, it is proposed that a provision be made that would align the Bill with the other laws seeking to protect whistleblowers. As a matter of principle, the disclosure of information after due process, is supported without reservations. It is thus proposed that a new Clause 37 be inserted that reads:

"(37). Any person who unlawfully discloses classified information in contravention of this Act is guilty of an offence and liable on conviction to imprisonment for a period not less than three years but not exceeding five years, except where such disclosure is –

(a) Protected under the Protected Disclosures Act, 2000 (Act No.26 of 2000), or section 159 of the Companies Act, 2008 (Act No. 71 of 2008); the Promotion of Access to Information Act, 2000 (Act No. of 2000); or
(b) Authorized by any other law".

Chapter 13: General Provisions

To ensure that the system can be adaptable, it is proposed that a general provision for the Minister to make regulations to address new developments and changes in technology and business process re-engineering. It should be added thus: "(m) generally, all matters which are necessary or expedient to be prescribed in order that objects of this Act may be achieved". Furthermore, to give teeth to the regulations and to address the current lax attitude towards the implementation of the Minimum Information Security Standards, it is proposed that the regulations should provide for offence and penalties. To this end, it is proposed as follows:

"(3) Any regulation made in terms of subsection (1) may provide that –

(a) The contravention thereof, or failure to comply therewith, is an offence; and
(b) A person convicted of that offence is punishable with a prescribed fine or a term of imprisonment not longer than the period so prescribed.

(4) The Minister may publish the draft regulations in the Gazette for public comment and submit the draft regulations for scrutiny of the Joint Standing Committee on Intelligence at least 30 days before the regulations are promulgated.

To ensure that the proposals pertaining to the seriousness of the offences contemplated in this Bill, it is crucial to include them in schedule of the Criminal Laws Act, 1997 (Act No. 105 of 1997). A new clause is thus proposed as follows:

"50. The laws specified in the Schedule are hereby amended to the extent indicated in the third column of that Schedule".

CONCLUSION

In this document, the ANC has sought to support the provisions already agreed to in earlier discussions, by providing details on issues that were outstanding. It has also considered the submissions and presentation made to the Ad-Hoc Committee by the general public, experts, and parliamentary political parties and has made proposals that are aimed at facilitating open and robust engagement in the Ad-Hoc Committee, whilst keeping those who are observing the proceedings involved and informed.

It is the view of the ANC that this should enable the Ad-Hoc Committee to deal with issues thoroughly and speedier having heard from the interested parties and the general public. This submission consolidates the human rights based approach to the limitation of the right to information whilst ensuring that South Africa continues to be a democratic and open society provided for in the Constitution of the Republic. Working together, we can deliver a state information protection system that would continue to put South Africa at the forefront of providing national security within a human rights framework. When the Freedom Charter proclaimed: "The People Shall Govern" it envisaged that the free flow of information would be the lifeblood that drives their decisions. We continue to seek the realization of the clarion call.