Open Democracy Advice Centre

14 February 2012

P O Box 15
Cape Town
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WRITTEN SUBMISSION [B6 – B2010] PROTECTION OF STATE INFORMATION BILL

Dear Mr G Dixon, Secretary of Parliament

Please find enclosed a written submission on behalf of the Open Democracy Advice Centre on the Protection of State Information Bill.

We thank you for the opportunity to make this submission, as per the public call for written and oral submissions.

Yours Sincerely,

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Submissions in respect of the Protection of State Information Bill, as approved by the National Assembly and marked as [B 6B-2010].

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1. Key points

There have been many improvements. Remaining points of concern include:

- There have been some significant improvements in the Bill.
- While the application of the Bill has been curtailed, the power of the Minister to opt-in agencies into its application should be more limited.
- A reverse onus is contained in the offence created in section 43.
- A public interest defense is necessary because, unusually, offences extend to the general public.
- The inadequacy of whistle-blower protections in cases of non-employees.
- Criminalising mere possession of state insecurity information contravenes international principles.
- The inclusion of economic, scientific and technological information is potentially problematic.
- The public cannot approach the Classification Review Panel for any reason and recourse in terms of the Bill lacks adequate independence and accessibility.
- The Bill does not adequately align with PAIA, either procedurally or substantively.
- The burden on the National Archives is too heavy.

2. Introduction

Thank you for the opportunity to make these submissions.

We wish to note at the outset that the Protection of State Information Bill intends to replace the Protection of Information Act 1982. This intention to bring national security legislation in line with the constitution is a welcome

development, and long overdue. The Bill also intends to regularise the status of the Minimum Information Security Standards, or MISS. This policy adopted by cabinet in 1996 has no legislative underpinnings, and as such its status is very questionable. It has been described by Barry Guilder, ex DG of Home Affairs and head of the NIA, as *ultra vires*; and we agree with this assessment.

This Bill has been the subject of vigorous debate in the National Assembly, in committee and in the house, as well as in civil society. We are very encouraged by the broad range of participation by organisations and individuals, both here and internationally. The questions of state secrecy, access to information, the status of whistleblowers, and the freedom of the press raised in any discussion of official secrets legislation are ones which are close to the hearts of many South Africans, given our apartheid history of secrecy, press censorship, and oppression.

We acknowledge the many changes that have been made to the Bill, as a result of that debate.

3. Points of commendation

We wish to briefly outline the changes that have been made which we regard as most critical, and most welcome:

i. On the question of **what** can be classified: the definition of national security has been narrowed, from 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 etc." (see definition section B6 - 2010) to a much clearer definition, involving the protection of the people of the Republic and the territorial integrity of the Republic against the threat of the use of force, the use of force, hostile acts aimed at undermining the constitutional order, terrorism, espionage, etc. (definition sec Bill 6B – 2010). We have concerns about the new section b(v) which deals with economic issues in the definition, and we will address ourselves to that later in this document.
    a. It has also been accepted that the information which is not subject to release in terms of the Promotion of Access to Information Act, is not to be automatically classified – so we have avoided the inherent difficulties of health records, tax records, legally privileged information, research information and information relating to the operations of public bodies (to name a few) all being classified.
    b. Commercial information was ostensibly excluded, which was welcomed, but we need to look at the question of economic issues in the definition of national security - which may be commercial information in another guise.

ii. The question of **who** can classify information: originally any organ of state could classify information (from the Johannesburg Zoo to the Algoa

Bus Company), and any level of organ of state could classify information, including local government. Now section 3 limits the application of the Bill to the security services of the Republic and the oversight structures referred to in Chapter 11 of the Constitution. These are the defence force, the police services, and intelligence services established in terms of the Constitution. It also allows the state to extend, on good cause shown, the application of the Bill to ANY organ of state, to have the provisions of the law apply to it. Of further significant concern is the broad authorisation provided to any member of the Security Services – whether the head of the organ of state or otherwise – to classify information in section 13(6).

iii. Provisions **protecting whistleblowers** have been introduced. We welcome this, but will point to drafting difficulties, which mean that the protection is not constitutionally sound.

4. Points for further review

Below are some of the issues that have not been resolved and they support our assertion that the Bill needs further amendment:

i. Reverse onus

The protection for whistleblowers is **not constitutionally drafted**. It reverses the onus in respect of the person being charged with releasing classified information, unlawfully. We wish to introduce senior counsel's opinion in respect of this point, and will circulate a copy of the full opinion to the members of the Committee. However, the opinion can be summarily described as such: Subsections (a) and (b) of the offence in section 43 are phrased as exceptions to the disclosure offence. Section 90 of the Criminal Procedure Act 51 of 1977 operates to place the burden of proving any exception on the accused on a balance of probabilities. However, a breach of the presumption of innocence occurs where the prosecution is relieved of proving essential elements of a defense beyond a reasonable doubt. Regardless of listing (a) and (b) as exceptions, one must look at the substance of the offence to decide whether the presumption is breached. In this instance, the exceptions actually form an essential element of the offence, as no offence exists at all if those elements are lacking; *vice versa* a crime does exist if those essential elements do not exist. As such, the accused is essentially required by the offence created under section 43 to prove on a balance of probabilities that the offence is not in existence.

Essentially, the protection for whistleblowers in section 43 makes the person accused of blowing the whistle on corruption or mismanagement bear the burden of proving that they blew the whistle. This will not stand – it should be redrafted. The Constitutional Court has a clearly articulated jurisprudence on the unconstitutionality of reverse onus provisions.

ii. Public interest defense

Government has consistently claimed that in drafting the Bill extensive research was done to in order to ensure that the provisions of the Bill are consistent with international best practice, norms and standards. According to government, a consideration of international norms has influenced their position not to incorporate a public interest defense clause into the Bill as proposed by various formations of civil society.

Government has argued that their research has found that no other country in the world has this provision in its information regulation or classification statute. However, it fails to note also that this is only because our most recent research shows that no other country in the world has passed legislation to criminalise or create an offense from/for the mere receipt or possession of classified information, and that being the case a public interest defense clause has been unnecessary. Most information classification laws in international jurisdictions only provide for an offence of disclosure of classified information by government officials and other agents tasked with keeping such information secret. In such cases there are legal protections for such officials for disclosure of classified information either through strong whistleblower provisions or laws, or constitutional guarantees such as the United States' First Amendment rights.

A further consideration in regard to the creation of the defense is the continued objection by the Ministry on the basis that they believe that people will be encouraged to release information and, after the damage is done, "try their luck" in court. However, this is a fundamental misunderstanding of the creation of crimes generally. When a crime is created, the deterrent effect of that crime is not deemed to be lost merely because of the creation of a defense. For instance, the crime of murder has not lost its deterrent effect because of the possible availability of raising self-defense in court. A citizen will not act in self-defense, unless they are very sure the defense applies as they must rely on the courts interpretation – there is absolutely no reason to believe the case will be different here. There is nothing special about the nature of the defense that could justify a claim it will be abused and this cannot form a presumption to be considered in drafting.

iii. Public interest defense and whistle-blower protection

We wish to quote directly from the legal opinion obtained:

> The argument that a law can be created, which allows for the prosecution of any person who publishes the secret material in the media but which exculpates the whistleblower, ignores the rationale for offering whistleblower protection in the public interest. Whistleblowing (as defined) is a defence to dismissal under the PDA

to encourage employees to expose crime and to promote accountable and transparent governance. ...

It is the fact that the employer had failed to take action that triggers the right to bring about publication. The legislative objective is that through exposure via the media of the employer's failure to address the unlawful conduct (which has already been reported to the employer) concrete steps will be taken.[1] Public exposure of the facts also serves to protect the whistleblower and is more often than not a strong motivating factor for the whistleblower. The whistleblower has come to believe that his employer will not do the right thing unless it becomes exposed to the glare of publicity. It is pointless to take a huge personal risk to expose wrongdoing if no-one may lawfully publish what you have exposed (as it is classified). Providing for prosecution of the journalist who publishes (but not the employee) would thus renders the section 9 protections in the PDA largely pointless in the case of classified documents.

We also submit that it would be unwise for the Bill to cross-refer to or rely on the PDA as that Act has its own procedures, and definitions, which are tailor-made for the purpose of protecting one category of persons only, namely employees from one form of harm only, namely, occupational detriment.

What is under discussion in the Bill is how to protect genuine whistleblowers from being prosecuted for releasing classified material which shows evidence of unlawfulness into the public realm.

The best way to build in sufficient protections is to ensure that any crime created under the Bill is sufficiently narrowly tailored so as to exclude from its ambit the creation of any offence which could lead to prosecutions in what may be termed genuine whistleblowing cases.

It is not good enough for the law merely to create widely framed offences with exculpatory sub-clauses (which the accused can raise at trial after deprivation of liberty through his or her arrest). It is the <u>threat of prosecution</u> which will in itself create a chilling effect.

iv. Offences

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[1] See *Tshishonga supra* at fn 6 at para 252:

> **"Was it reasonable for the applicant to make the disclosure to the media? . . . Corruption undermines democracy. The media's exposure of corruption is good for democracy. Whistleblowers depend on the media and other organs of civil society to help level the playing fields, as they are often lone voices against powerful interests. As an employee the isolation and vulnerability are even more acute. So symbiotic is the relationship between whistleblowers and the media that Brewers Dictionary defines whistleblowing to mean 'exposing to the press a wrongdoing or a cover-up in a business or government office'."**

On first inspection, there is no criminalisation of possession *per* se, but rather possession without communication of such possession to the authorities. However, in the further offence provision of "Prohibition of disclosure" under section 49 (possession in relation to state security information) a person commits an offence when that information is continually retained (see 49(c)) – thus creating an offence of mere possession. In the Draft Principles on National Security and the Right to Information, 1 July 2011, the principles support the specific notion that the mere possession of records should not be criminalised. At Principle 46 (a) it is stated:

> Persons who do not have authorized access to classified information may not be punished for the mere possession of classified information.

It is submitted that state security information would still constitute classified information in the consideration of this Principle. Further, the criminal offence created by section 15 and 44 is an indirect attempt to criminalise mere possession applying to those who do not have an ethical or employment duty outside of this Act to protect the information.

Further, the extreme severity of all of the offences remains a matter of concern for ODAC.

v. **Economic, scientific and technological secrets**

The provisions allowing for the classification of **commercial** information were supposed to be scrapped and Eskom testified that they saw no need for such classification to be available.

However, section b(v) of the definition of 'national security' refers to the exposure of 'economic, scientific, or technological secrets vital to the Republic'– not vital to the defence or security of the public, but the Republic in general. What economic secrets does the Agency propose are vital to the Republic, and are held by defence, SAPS, or intelligence? This may allow for the classification of commercial secrets through the "backdoor", which is surely not the intention of the provision. This should also be balanced the controls already existing in terms of the Regulation of Interceptions of Communications Act, 2002.

We argue this is the reintroduction of classification of commercial information held by the state, including tender documents. We argue this is unnecessary, unwise, and not justified and should be very explicitly framed within security phraseology.

vi. **Appeals**

No appeal is allowed on the request for the declassification of information, **except to the Minister.**

The introduction of the Classification Review Panel, has led some to believe that it can review classification. This is a logical interpretation of the title of the Panel, but is in fact wrong. The role of the Classification Review Panel is to oversee all the other Departments of State, and their reviews of their classified information, and to ensure compliance with the Act. This is not the independent review board called for by civil society, and means that there is no independent appeal on declassification. When read closely, the Bill noticeably does not allow for the review panel to be approached by the public (issues only being referred to them by the relevant organ of state such as in section 17). The citizen's only recourse is through an internal appeal to the head of the organ of state or Minister and, ultimately, the courts. If it is intended that the Classification Review Panel can be approach by the public to contest classification, the Bill must be re-drafted with particular attention being paid to the appeal provisions.

Section 19 of the Act is clear – requests for declassification go to the head of the relevant organ of state. Section 31 of the Act is also clear – if you are refused information in terms of this Act, you may *only* appeal to the relevant Minister, who will make a finding and advise of that finding within 30 days. No Panel, board or any other independent structure is involved. The drafters of the Bill have to learn from the difficulties experienced by the public in the usage of the appeals mechanism in terms of the Promotion of Access to Information Act (PAIA) which is similar to that proposed in this Bill. It is now generally accepted by all stakeholders involved with PAIA that PAIA's appeals mechanism is weak and is not consistent with socio-economic realities of South Africa, nor will it help to assist government in achieving its goal of creating access to justice for all. The NCOP Ad Hoc Committee should ensure that the Bill's appeals mechanisms are relevant, robust and accessible to the public, especially to the poor. This will be done by expressly providing for a right, procedure or mechanism for the public to approach the CRP to appeal against wrongful classification decisions.

What is also not clear is who has the ultimate right to disclose the record. In the POSIB, in section 19, the 'relevant head of the organ of state' is the one to whom a request for information is referred. No delegation of the power is allowed for in the draft legislation. It is also not clear what is meant by relevant – does it mean, the institution holding the record, the institution that classified the record, or the institution that generated the record? There is also lack of clarity on how this process will coexist with PAIA procedures, which is discussed in slightly more detail below.

vii. **The Promotion of Access to Information Act, 2 of 2000**

The **overriding of the primacy of the Promotion of Access to Information Act** in respect of information by the Bill is a matter of deep concern.

Subsection 1 (4) says in respect of classified information, and despite PAIA, that this Act prevails if there is a clash between this Act, and any act regulating access to classified information. PAIA regulates access to all information, and is enacted to give effect to section 32 of the constitution. It is one of the three laws enacted by Parliament to give effect to a constitutional right. If this law clashes with PAIA, to say that this law overrides PAIA in relation to classified information, is to say that this law overrides a law which gives effect to a constitutional right. Any clash therefore overrides a Parliamentary expression of what is a reasonable and justifiable limit on the right to access to information. We see this as a serious concern.

We are joined in this concern by the PAIA Civil Society Network, a group of NGOs working on PAIA issues. They say as follows:

> The Network notes that there has been some suggestion by government representatives that PAIA does not regulate 'classified' information and, as such, clause 1(4) of the Bill will have no affect on PAIA. However, respectfully, that interpretation is based on a misunderstanding of PAIA. PAIA regulates access to records. The term 'record' is defined in PAIA to include all records in the possession or under the control of the information holder regardless of form or medium. Therefore, in the absence of an express exemption, classified documents must fall within the definition of a record and therefore the release of those records is regulated by PAIA.

The Network's interpretation is consistent with the current operation of PAIA. Many previously classified documents have been released to Network members on the basis of a request for access under PAIA. Though classified documents are currently declassified in accordance with the MISS standards prior to release, the position concerning the right of access is determined under PAIA. That is, a classified record must be declassified and released if it cannot lawfully be refused in accordance with an exemption ground in PAIA (classification not constitution an independent ground for refusal). It is this deviation from the previous operation of PAIA that also creates all the procedural inconsistencies mentioned in brief below.

In effect, this indirectly expands on the grounds of refusal under PAIA, whereas the previous grounds were adequately constituted to deal with the mischief feared by the Agency - as seen in section 41 of PAIA. It is questionable whether this furthering restriction on the right of access to information is justifiable when it is considered that less restrictive means are already available and effective within PAIA itself.

viii. **The National Archives**

Originally, the Bill was intended to relieve the burden on the already poorly functioning National Archives. However, the current drafting of

Chapter 9 does not do so. There is no mechanism to guide the actions of the National Archives should a record be classified by multiple agencies (experiences in the Archives have shown us that this is sometimes the case). This will lead to incredible delays if a person is trying to access these documents from the Archives. Provision should be made for automatic declassification once a document is within possession of the National Archives in order to ease its burden.

5. Additional procedural and drafting issues

There are also some basic procedural questions that may require attention which we will refer to in brief:

i. As seen above, the public do not have access to the Classification Review Panel.
ii. Section 19 does not properly take into consideration the already delayed time lines inherent in if a request was made through PAIA: what will happen to the timelines of the PAIA request – will the PAIA process be suspended indefinitely while a classification review is occurring? How will the requestee organ of state in terms of PAIA coordinate with the head of the organ of state of the classifying body? These problems extend to the appeals procedures. At a minimum, the inclusion of a 'reasonable time' in section 19 would potentially extend the normal 30 day maximum period in terms of PAIA.
iii. In terms of section 34(3), there is no justification for making the notification of the requester of the transferal discretionary. Such notification must be compulsory.
iv. The offences in section 40 should be limited to systems designed to protect classified state information, rather than merely state information.
v. In seeking to use the protections of section 43 it is very unclear how the civil and criminal procedures could be aligned.

These complications in procedure, duplication of steps and extensions of time contradict the general principles of state information described in section 6(h) which states that:

> ...measures to protect state information should not infringe unduly on personal rights and liberties or make the rights and liberties of citizens unduly dependent on administrative decisions.

LEGAL OPINION

PRIVATE AND CONFIDENTIAL

Ex parte: OPEN DEMOCRACY ADVICE CENTRE

In re: THE OPERATION OF SECTION 38 OF THE PROTECTION OF INFORMATION BILL

COLIN KAHANOVITZ SC

DAVID SIMONSZ

Chambers, Cape Town

I. INTRODUCTION

1. Counsel is briefed by the Open Democracy Advice Centre ("Consultant"), a non-profit organisation whose aims include promoting an open and transparent democracy in South Africa. Consultant seeks advice on the legality of a proposed amendment to section 38 of the Protection of Information Bill ("the Bill").

2. The proposed section 38 of the Bill provides:

> **"Subject to section 1(6), any person who 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); or**
> **(b) Authorised by any other law."**

3. Counsel has been briefed with a draft of the Bill annotated as "Working document 8".[1] We have also been briefed with a revised draft of section 38 which is contained in a separate self-standing document.[2] For the purposes of this opinion it is assumed that the proposed revised draft of section 38 will be included in the Bill; accordingly references to "section 38" and "section 38 of the

[1] The draft Bill also has the further comment "As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 32999 of March 2010)". The Bill is currently being debated by a Parliamentary Committee known as the "Ad Hoc Committee on the Protection of Information Bill". The Bill is commonly referred to in the media as the "Secrecy Bill".
[2] In other words it is not set out in "Working document 8".

Bill" should be interpreted to refer to the proposed revised draft of section 38, as it has been quoted above.

4. Consultant asks the following questions:

   4.1. Does the draft clause in the submission[3] place the onus on the accused, in a way which renders it unlawful? And

   4.2. Do the exceptions contained in the draft clause in the submission need to be repeated for each offence, in order to apply to each offence contained in the Bill?

5. The above questions are posed within a broader debate, which is phrased by the Consultant as follows:

   5.1. How does one draft legislation in a manner that walks the narrow line between effectively protecting necessary secrets while at the same time ensuring that all relevant constitutional rights and principles are respected?

6. In answering the above questions, this opinion deals with:

   6.1. The elements of section 38 of the Bill;

   6.2. The applicable legal principles;

[3] The submission refers to the document containing the revised draft of s38.

6.2.1. Constitutional provisions;

6.2.2. Freedom of expression;

6.2.3. Government secrets and the Constitution;

6.2.4. International and foreign jurisprudence;

6.2.5. Section 35(3)(h) of the Constitution;

6.3. Section 38 of the Bill and onuses;

6.4. The presumption of innocence;

6.5. Repeat application;

6.6. Conclusions on the first two questions; and

6.7. .Conclusion on the general question.

7. In concluding the opinion, we set out our views not only on the two specific questions listed above, but also on the broad debate on the permissible ambit of secrecy laws in a constitutional democracy.

II. THE ELEMENTS OF SECTION 38 OF THE BILL

8. The text of section 38 of the Bill is set out above. It can be broken down into the following elements:

8.1. Any person;

8.2. Who discloses;

8.3. Classified information;

8.4. In contravention of the Act (meaning the Bill);

8.5. Except where such disclosure is protected or authorised:

8.5.1. Under the Protected Disclosures Act ("the PDA");[4]

8.5.2. Under section 159 of the Companies Act ("the Companies Act");[5] or

8.5.3. Under any other law.

9. Section 38 also contains the phrase "subject to section 1(6)". This refers to a provision which is triggered on conviction for one of the (many) offences created by the Bill which impose minimum sentences. In such case the court is entitled to

[4] Act 26 of 2000.
[5] Act 71 of 2008.

impose lesser sentences where "substantial and compelling circumstances exist". It is not an element of the offence created by section 38.

10. The first four elements of the offence are reasonably clear in their meaning and ambit.

11. "Any person" is a generic legislative phrase that should be interpreted broadly to include all persons. Section 3(1) of the Bill also provides that:

> **"This Act applies to—**
> **(a) All organs of state; and**
> **(b) Juristic and natural persons to the extent that the Act imposes duties and obligations on such persons."**

12. "Discloses" is not defined in the Bill.[6]

13. The Oxford English Dictionary defines "disclose" as "make (secret or new information) known" or to "allow (something hidden) to be seen". The Collins and Cambridge English Dictionaries have a similar definition. Bearing in mind the broad ambit of the Bill, "disclose" could be interpreted to include any means of communication which results in the transfer of information from one person to another.

14. Classified information is defined in the Bill as:

[6] See *Tshishonga v Minister of Justice and Constitutional Development and Another* (2007) 28 ILJ 195 (LC) ("*Tshishonga*") at paras 195-200 for a discussion of the meaning of the terms "disclosure" and "protected disclosures" under the PDA.

"[T]he state information that has been determined under this Act or the former Minimum Information Security Standards guidelines to be information that may be afforded heightened protection against unlawful disclosure".

15. The meaning of "in contravention of this Act" is self-evident. It distinguishes this offence from the legal consequences of disclosing information that is confidential for a different reason, for example on the basis of lawyer-client privilege.

16. All four of the above elements are indisputably core parts of the offence created by section 38. Accordingly, it is trite that the prosecution will bear the onus of proving these elements beyond a reasonable doubt.

17. Under a separate heading we examine the exceptions to the general offence.

18. First, it is necessary to examine the applicable legal principles, including those principles laid down in the leading South African and foreign law decisions.

III. THE APPLICABLE LEGAL PRINCIPLES

Constitutional provisions

19. The Constitution of the Republic of South Africa, 1996 ("the Constitution") is the supreme law of South Africa.[7]

20. Section 39 of the Constitution provides:

[7] Section 2 of the Constitution.

"(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

21. The founding values of the Constitution are contained in, *inter alia*, section 1(d) of the Constitution, which provides:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

. . . .

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, <u>to ensure accountability, responsiveness and openness.</u>"[8]

22. Chapter 2 of the Constitution sets out the Bill of Rights. In terms of section 7(2) of the Constitution, there is an especial duty on the State to "respect, protect, promote and fulfil" the rights in the Bill of Rights.[9]

23. Section 36 of the Constitution provides:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and

[8] Emphasis added.

[9] See *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) ("*Glenister*") at para 177.

justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

24. Section 36 of the Constitution only comes into play after law or conduct has been found to infringe upon a right in the Bill of Rights.[10] Law or conduct that fails the limitation analysis contained in section 36 of the Constitution must be declared to be invalid.[11]

Freedom of expression

25. Section 16 of the Constitution enshrines freedom of expression:

"(1) Everyone has the right to freedom of expression, which includes—

(a) Freedom of the press and other media;

[10] *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) at para 9; see also *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC) at para 7; *Johncom Media Investments Ltd v M and Others* 2009 (4) SA 7 (CC) at para 22.

[11] Section 172(1) of the Constitution, which provides:

"When deciding a constitutional matter within its power, a Court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make an order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect".

See *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 59.

(b) Freedom to receive or impart information or ideas;

(c) Freedom of artistic creativity; and

(d) Academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to—

(a) Propaganda for war;

(b) Incitement of imminent violence; or

(c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

26. Section 32(1) of the Constitution sets out the related[12] right to information:

"Everyone has the right to 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."

27. The importance of freedom of expression as part of the constitutional project in South Africa has been emphasised on many occasions by the Constitutional Court.[13]

[12] The right to information and the right to freedom of expression are inter-linked: see *Brummer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) at para 63.

[13] See *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para 7; *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) at para 37; and *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at paras 25-30. See also the minority judgment of Mokgoro J in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at paras 25-27:

> **"But my freedom of expression is impoverished indeed if it does not embrace also my right to receive, hold and consume expressions transmitted by others. Firstly, my right to express myself is severely impaired if others' rights to hear my speech are not protected. And secondly, my own right to freedom of expression includes as a necessary corollary the right to be exposed to inputs from others that will inform, condition and ultimately shape my own expression. Thus, a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and of the would-be recipients.**
>
> **It is useful to relate that reasoning to the foundational purposes for the existence of the right to freedom of expression. The most commonly cited rationale is that the search for truth is best facilitated in a free 'marketplace of ideas'. That obviously presupposes that both the supply and the demand side of the market will be unfettered. But of more relevance here than this 'marketplace' conception of the role**

28. For example, in *Khumalo v Holomisa*,[14] the Constitutional Court stated:

> **"Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.**
>
> **The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate."[15]**

29. And in *South African National Defence Union v Minister of Defence and Another*,[16] it was held that:

> **"Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by**

> **of free speech is the consideration that freedom of speech is a *sine qua non* for every person's right to realise her or his full potential as a human being, free of the imposition of heteronomous power. Viewed in that light, the right to receive others' expressions has more than merely instrumental utility, as a predicate for the addressee's meaningful exercise of her or his own rights of free expression. It is also foundational to each individual's empowerment to autonomous self-development.**
>
> **We must understand the right embodied in s 15 not in isolation, but as part of a web of mutually supporting rights enumerated in the Constitution, including the right to 'freedom of conscience, religion, thought, belief and opinion', the right to privacy, and the right to dignity. Ultimately, all of these rights together may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value."**

[14] 2002 (5) SA 401 (CC) ("*Khumalo*").
[15] *Khumalo* at paras 21-22.
[16] 1999 (4) SA 469 (CC) ("*SANDU*").

individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."[17]

30. The preamble to the PDA also explains the relationship between the constitutional values of accountability, responsiveness and openness and the need to protect whistleblowers from retaliation from their employers:

"Recognising that—

• the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;

• section 8 of the Bill of Rights provides for the horizontal application of the rights in the Bill of Rights, taking into account the nature of the right and the nature of any duty imposed by the right;

• 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;

And bearing in mind that—

• neither the South African common law nor statutory law makes provision for mechanisms or procedures in terms of which employees may, without fear of reprisals, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers, whether in the private or the public sector;

• every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace;

• every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure;

And in order to—

[17] *SANDU* at para 7.

• **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 disclosures;**

• **promote the eradication of criminal and other irregular conduct in organs of state and private bodies."**[18]

31. It is thus beyond dispute that any law concerning expression, or restraints on expression, must pay appropriate regard to section 16 of the Constitution, and may not infringe further into the right to freedom of expression than can be justified in terms of section 36 of the Constitution.

Government secrets and the Constitution

32. There can be no doubt that, to protect the public interest, legislation can be enacted for the important purpose of deterring unauthorised leaks of certain types of government information that carry with them some element of harm to national security. The real question concerns the permissible content of such legislation.

33. Enacting such legislation is inevitably a risky business as a tension will often arise between freedom of expression, the public interest in transparent government and government interest in national security considerations. In balancing these objectives one inevitably has to determine a hierarchy of values

[18] Emphasis has been added. See *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and Another* (2010) 31 ILJ 322 (SCA) at para 33:

> **"All of this [the protections provided by the PDA] is located within the constitutional imperative of good, effective, accountable and transparent government in organs of state."**

and in this regard we are required to turn the Constitution as our yardstick. Rights explicitly protected under the constitution have special protection.

34. In *S v Makwanyane*,[19] the Constitutional Court said the following:

> **"The Constitution entrenches certain fundamental rights. Included amongst these are the right to life (s 9), the right to the respect for and protection of dignity (s 10) and the right not to be subjected to cruel, inhuman or degrading punishment (s 11(2)). The prisoners allege that the death penalty is in conflict with each of these. The language of each of these rights is broad and capable of different interpretations. How is this Court to determine the content and scope of these rights? This question is at least partially answered by s 35(1) of the Constitution, which enjoins this Court in interpreting the rights contained in the Constitution to 'promote the values which underlie an open and democratic society based on freedom and equality'.**
>
> **No one could miss the significance of the hermeneutic standard set. The values urged upon the Court are not those that have informed our past. Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government. As the epilogue to the Constitution states:**
>
> > **'This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights'.**
>
> **. . . .**
>
> **[G]enerally s 35(1) instructs us, in interpreting the Constitution, to look forward not backward, to recognise the evils and injustices of the past and to avoid their repetition."**[20]

[19] *S v Makwanyane* 1995 (2) SACR 1 (CC) ("*Makwanyane*").
[20] Emphasis added. *Makwanyane* at paras 321-323.

35. It is further worth noting that there is no provision of the Constitution that expressly permits or promotes the keeping of secrets by government or by security services in the interests of national security. We submit that this was deliberate. We come from a past where secrecy laws – justified under the heading of state security - were used as a method to prevent the exposure of injustice. Section 16(2) of the Constitution lists advocacy of hatred, war propaganda and incitement of violence as exceptions which limit the right to freedom of expression. State secrecy laws are not an exception.

36. On the contrary, section 199 of the Constitution provides in relevant part:

> **"(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic;**
>
> **. . . .**
>
> **(8) To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament."**

37. This is yet more proof that, even for security services, restraints on freedom of expression must be the exception and not the norm. Providing for the wide use of State power to prosecute those who disseminate classified documents may have been acceptable in the past (in many democracies), but under a Bill of Rights the use of prosecutions to constrain freedom of expression could only ever be justified on the basis of the necessity to fulfil a pressing social need.

38. The Constitutional Court has recently reaffirmed that the State's duty to create security services that comply with constitutional imperatives is not merely aspirational, but is a strict standard that legislation must meet or else be struck down. In *Glenister*,[21] the Constitutional Court invalidated Chapter 6A of the South African Police Service Act 68 of 1995, which created the Directorate of Priority Crime Investigation (also known as the Hawks). The reasoning of the Court was that:

> **"The Constitution is the primal source for the duty of the State to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. <u>There is however no doubt that its scheme taken as a whole imposes a pressing duty on the State to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices. As we have seen, corruption has deleterious effects on the foundations of our constitutional democracy and on the full enjoyment of fundamental rights and freedoms. It disenables the State from respecting, protecting, promoting and fulfilling them as required by s 7(2) of the Constitution</u>.**
>
> **Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of State contract for goods and services. It is equally clear that the national police service, amongst other security services, shoulders the duty to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property, and to uphold and**

[21] *Supra* at fn 9.

enforce the law. In turn, the National Prosecuting Authority bears the authority and indeed the duty to prosecute crime, including corruption and allied corrupt practices.

The Constitution enshrines the rights of all people in South Africa. These rights are specifically enumerated in the Bill of Rights, subject to limitation. Section 7(2) casts an especial duty upon the State. It requires the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The State's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern State, creates a duty to create efficient anti-corruption mechanisms. Parliament itself has recognised this in the preamble to PRECCA. All this constitutes uncontested public and legislative policy in South Africa. For it has been expressly articulated and enacted by Parliament."

39. Put differently, laws penalising or protecting whistleblowers must not be seen as existing in a vacuum. They are – they must be – an integral part of the State apparatus which seeks to achieve the constitutional goals of openness, accountability, and transparency. When asking whether secrecy laws comply with the Constitution, therefore, it is important to assess the impact the laws are likely to have on the fight against, *inter alia*, corruption.

40. Put another way the question we pose is this: Can the State impose restrictions that would prevent the public from learning of illegality and wrongdoing from whistleblowers employed in State institutions?[22] In what way can it ever be said that preventing the exposure of unlawful conduct by government can be justified on the ground that it is genuinely required to protect the security of citizens?

[22] Section 199(6) of the Constitution states that no member of the security forces may obey a manifestly unlawful order. To bar exposure of criminal conduct on the part of the State under secrecy laws may amount to an unlawful order.

International and foreign jurisprudence

41. The right to freedom of expression contained in section 16 of the Constitution is buttressed by international and foreign law.[23]

42. Article 19 of the Universal Declaration of Human Rights provides:

> **"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."**

43. The International Covenant on Civil and Political Rights[24] states in article 19 that:

> **"1. Everyone shall have the right to hold opinions without interference.**
> **2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.**
> **3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**
> **(a) For respect of the rights or reputations of others;**
> **(b) For the protection of national security or of public order (ordre public), or of public health or morals."**

[23] International law must be considered in the interpretation of the Bill of Rights; see section 39(1) quoted above.
[24] "(The ICCPR"). South Africa signed the ICCPR on 3 October 1994 and ratified it on 10 December 2008.

44. Article 9 of the African Charter on Human and Peoples' Rights[25] provides:

> **"1. Every individual shall have the right to receive information.**
>
> **2. Every individual shall have the right to express and disseminate his opinions within the law."**

45. Foreign jurisprudence grants insight into how other countries have balanced freedom of expression against the need to keep certain information secret. In particular, Canadian jurisprudence follows a similar two-stage rights analysis to South Africa[26] and is accordingly of especial value.

46. Canada has for many years recognised that it may often be appropriate for whistleblowers to speak out against the government. In *Fraser v Public Service Staff Relations Board*,[27] the Supreme Court of Canada held:

> **"As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. <u>And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others</u>, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability."[28]**

[25] ("The ACHPR"). South Africa signed and ratified the ACHPR on 9 July 1996.
[26] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at para 75.
[27] 1985 CanLII 14 (S.C.C.), [1985] 2 S.C.R. 455 ("*Fraser*").
[28] Emphasis added. *Fraser* at 470.

47. And more recently, commenting on the exceptions referred to in *Fraser*, the Federal Court of Canada held:

> **"In my opinion, these exceptions embrace matters of public concern. They ensure that the duty of loyalty impairs the freedom of expression as little as reasonably possible in order to achieve the objective of an impartial and effective public service. Where a matter is of legitimate public concern requiring a public debate, the duty of loyalty cannot be absolute to the extent of preventing public disclosure by a government official. The common law duty of loyalty does not impose unquestioning silence. As explained in *Fraser*, the duty of loyalty is qualified: 'some speech by public servants concerning public issues is permitted.' It is my understanding that these exceptions to the common law rule may be justified wherever the public interest is served. <u>In this regard, the importance of the public interest in disclosure of wrongdoing, referred to as 'the defence of whistleblowing', has been recognized in other jurisdictions as an exception to the common law duty of loyalty</u>."**[29]

48. In *O'Neill v Canada (Attorney-General)*,[30] the Ontario Superior Court of Justice emphasised the many dangers that go with overbroad secrecy laws, not least that they can result in the effective criminalisation – or the risk of criminalisation – of a plethora of ordinary interactions and the prosecution of persons on the basis of unclear offences. This, in turn, implicates other constitutional rights, including the right to liberty.[31] In discussing the secrecy legislation at issue in the matter, Ratushny J stated, *inter alia*, that:

> **"<u>This is legislation that fails to define in any way the scope of what it protects and then, using the most extreme form of government control, criminalizes the conduct of those who communicate and receive government information that</u>**

[29] Emphasis added. *Haydon v Canada* [2001] 2 FC 82 at para 83.
[30] 2006 CANLII 35004 (ON SC) ("*O'Neill*").
[31] Section 12 of the Constitution.

falls within its unlimited scope including the conduct of government officials and members of the public and of the press.

If I am correct in setting the state objective for the impugned sections at the protection against the unauthorized release of certain government information that carries with it some element of harm to the national interest if released, then the means used have not been adequately tailored. They are not, largely by virtue of a lack of definition of the protected things, the "least restrictive" means "necessary" to achieve this objective: *Demers* at para. 43.

In *R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 S.C.R. 731 at paras. 61 and 71, the Chief Justice of Canada made an observation in connection with the unconstitutionality of section 181 of the *Criminal Code* for infringing section 2(b) of the *Charter*, a comment that is applicable to the present case and the impugned sections:

> **Its danger, however, lies in the fact that by its broad reach it criminalizes a vast penumbra of other statements merely because they might be thought to constitute a mischief to some public interest, however successive prosecutors and courts may wish to define these terms. The danger is magnified because the prohibition affects not only those caught and prosecuted, but those who may refrain from saying what they would like to because of the fear they will be caught. (para. 61)**
>
> **[T]hey underrate the expansive breadth of s. 181 and its potential not only for improper prosecution and conviction but for 'chilling' the speech of persons who may otherwise have exercised their freedom of expression. (para. 71)".[32]**

49. Most recently, the Supreme Court of Canada, in *R v National Post*,[33] reiterated the important role of the media as an institution supporting democracy:

[32] Emphasis added. *O'Neill* at paras 62-65.
[33] 2010 SCC 16, [2010] 1 SCR 4 ("*National Post*").

"It is well established that freedom of expression protects readers and listeners as well as writers and speakers. It is in the context of the *public* right to knowledge about matters of public interest that the legal position of the confidential source or whistleblower must be located. The public has an interest in effective law enforcement. The public also has an interest in being informed about matters of importance that may only see the light of day through the cooperation of sources who will not speak except on condition of confidentiality.

. . . .

It is important, therefore, to strike the proper balance between two public interests — the public interest in the suppression of crime and the public interest in the free flow of accurate and pertinent information. Civil society requires the former. Democratic institutions and social justice will suffer without the latter."[34]

50. Once again, the clear position is that although limits on freedom of expression are indisputably necessary, they are the exception and not the norm.

Section 35(3)(h) of the Constitution

51. One further provision of the Bill of Rights that has had a marked impact on statutory offences in particular is section 35(3) (h) of the Constitution. It states:

"Every accused person has the right to a fair trial, which includes the right—

. . . .

(h) To be presumed innocent, to remain silent, and not to testify during the proceedings."

52. Section 35(3)(h) of the Constitution thus enshrines what is known as the presumption of innocence.

[34] *National Post* at para 28.

53. The importance of the presumption of innocence, particularly as regards the subject matter of this opinion, is that it affects how criminal provisions are applied instead of what criminal conduct is prohibited. Even the most necessary of criminal prohibitions will be found unconstitutional if they trespass upon this right. The Constitutional Court has referred to it as a "golden thread running through the criminal law and a prime instrument for reducing the risk of convictions based on factual error."[35]

54. The presumption of innocence operates by insisting that, as a general rule, the State bears the onus of proving all elements of a crime beyond reasonable doubt.[36]

IV. SECTION 38 OF THE BILL AND ONUSES

55. For convenience, section 38 is repeated:

> **"Subject to section 1(6), any person who 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); or**
> **(b) Authorised by any other law."**

[35] *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) ("*Baloyi*") at para 15.
[36] *Baloyi* at para 15.

56. We are requested to identify, in the event of a criminal prosecution based on section 38, which party will bear the onus of proving the exceptions listed in subsections (a) and (b) ("the exceptions").

57. Section 90 of the Criminal Procedure Act 51 of 1977 ("the CPA") provides:

> **"In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negatived in the charge and, if so specified or negatived, need not be proved by the prosecution."**

58. Section 90 of the CPA operates to place the onus of proving exceptions upon the accused.[37] The standard of proof that must be met by the accused is that of a balance of probabilities.[38] It is a procedural provision designed to facilitate proof by the prosecution.[39] It alleviates the burden that might otherwise be placed on the State to negative a number of possible defences that an accused may raise under the exceptions to the general defence. Thus in *Kula* the offence was that no "Native" could remain in an urban area for more than 72 hours unless the exceptions applied. Once the State had proved that the "Native" had been present for that time period, the Native was guilty of the offence save that "a relatively small number of Natives were excused", namely those exempted if they could prove that they could "usefully . . . be absorbed into the economic life of the

[37] *R v Kula and Others* 1954 (1) SA 157 (A) ("*Kula*").
[38] *S v Coetzee and Others* 1997 (3) SA 527 (CC) ("*Coetzee*") at paras 19, 88, 114, 137, 158; *S v Madevu* 1966 (3) SA 222 (C) at 223H.
[39] *Bestall* at 567B.

urban community".[40] The Crown (now the State) was not required to aver or prove the exceptions.[41]

59. We are of the opinion that the subsections to section 38 constitute "exceptions" for the purpose of section 90 of the CPA. This is not only because they follow shortly after the word "except". In *Attorney-General, Cape v Bestall* ("*Bestall*"),[42] the Appellate Division per Nestadt JA held:

> **"What has to be decided is whether the negative element or excusing factor forms a material part of the offence itself or whether it is merely an exclusion (to be established by the accused) from the general prohibition contained in the provision. In each case it is a question of construction of the relevant legislation. Factors used as an aid in this regard, in addition to the form in which the prohibition is cast, include the grammatical shape of the provision, its context, its apparent scope and object and the practical consequences of the competing constructions. In addition, according to the so-called 'truncation test', assistance may be derived from considering whether, if the alleged exemption be excised, what remains looks like something that the Legislature might well have intended to make an offence."**[43]

60. The following factors serve to support the conclusion that subsections 38(a) and (b) would be found to be "exceptions" for the purpose of section 90 of the CPA:

60.1. The use of the word "except";

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[40] At 165A-C.
[41] *Ibid*.
[42] 1988 (3) SA 555 (A).
[43] *Bestall* at 568A-C. For a further elucidation of the truncation test, see *Kula* and *R v Beebee* 1944 AD 333 at 335–336.

60.2. That proving the existence of the exceptions could be said to be peculiarly within the accused's knowledge, and hence easier for him or her to prove than for the prosecution to disprove;[44]

60.3. The laws referred to in the subsections do not constitute or materially supplement the offence at the heart of the section;[45]

60.4. If one applies the truncation test, section 38 still stands as an intelligible and reasonable offence even if the words after "years" are excised.[46]

61. Consequently, as a result of the operation of section 90 of the CPA, the onus of proving the exceptions will rest on the accused on a balance of probabilities.

V. THE PRESUMPTION OF INNOCENCE

62. Complicating the above scenario, however, is the fact that the Constitutional Court has declared that any statutory offence – like section 38 of the Bill read with section 90 of the CPA – which might operate to allow the conviction of an accused person despite the existence of reasonable doubt violates the presumption of innocence.[47]

63. In *Coetzee*, Langa J (as he then was) held for the majority that:

[44] See *S v Zuma and Others* 1995 (2) SA 642 (CC) at paras 41-42; *Coetzee* at para 15.
[45] Compare *S v Coetzee and Others* 1997 (3) SA 527 (CC) ("*Coetzee*") at paras 203 and 224 (dissenting judgments of O'Regan and Sachs JJ, but not contradicted by the majority on this point).
[46] *Kula* at 161A-B; *Coetzee* at para 51.
[47] This begs the question whether section 90 of the CPA is not itself unconstitutional. This question, however, appears not to have arisen in the courts, and this opinion will not address it.

"The provision imposes an onus on the accused to prove an element which is relevant to the verdict. It should make no difference in principle whether or not an offence created by a statute is formulated in a way which makes proof of certain facts an element of the offence or proof of the same facts an exemption to the offence. <u>What matters in the end is the substance of the offence. If a provision is part of the substance of the offence and the statute is formulated in a way which permits a conviction despite the existence of a reasonable doubt in regard to that substantial part, the presumption of innocence is breached</u>.

The fact that section 332(5) requires that the accused director should, on pain of conviction, prove that he or she did not take part in the commission of the offence and could not have prevented others from doing so, even if it is formulated as an exception, has the same consequence as a reverse onus provision which relates to an essential element of the offence. Such accused will be convicted unless he or she discharges the onus; this despite the existence of a reasonable doubt with regard to such accused's participation in the offence and the ability to have prevented it.

In the final analysis, whether section 332(5) creates a form of statutory liability, with a shift in onus in respect of a part thereof or a new crime with a special defence, the proof of which rests on the defence, the final effect is the same. <u>The objection which is fundamental to the reversal of onus in this case is that the provision offends against the principle of a fair trial which requires that the prosecution establish its case without assistance from the accused. In either event, the right of the accused to be presumed innocent is breached</u>."[48]

64. In other words, the Constitutional Court holds that there is nothing to be gained from dividing an offence (like section 38) into a "core offence" and an "exception". One must look at the substance of the offence, and whether it might permit the conviction of a person despite the existence of reasonable doubt. If it does, then

[48] Emphasis added.

it infringes upon the presumption of innocence contained in section 35(3) (h) of the Constitution.

65. For the reasons set out above, the exceptions in section 38 of the Bill read with section 90 of the CPA would, in the event of a prosecution, lead to such an infringement.

66. The question that then arises is whether section 38 of the Bill – or at least that aspect of the section that infringes the presumption of innocence[49] – could be justified in terms of section 36 of the Constitution.

67. We are of the view that the courts are unlikely to find that section 38 of the Bill meets the standards set by section 36 of the Constitution.

68. The only reason that section 38 of the Bill might pass constitutional muster is because the knowledge needed to prove the exceptions might be argued to lie peculiarly within the knowledge of the accused person.[50] As against this it is difficult to see on what basis it could be argued that infringement of the presumption of innocence might be justified to strengthen the State's hand in prosecutions that will, by their very nature, be said to infringe potentially on a cluster of the accused's constitutional rights.

[49] The only issue that we discuss in this opinion.
[50] The Canadian cases cited above mention a few other possible justifications, but none of them is applicable to the subject-matter of this opinion, and in any event none of them carries much weight with the Canadian courts.

69. However, this reason loses a great deal of its weight when one considers that, for there to be any prosecution at all, the State must have a specific disclosure in mind which they contend is in contravention of the Bill. Given that the State will already be required to prove the existence of the unlawful disclosure, it would not be especially difficult for the State to also demonstrate that the disclosure does not fall into any of the categories listed in subsection 38(a) and (b).[51]

70. A further difficulty which arises from the cross-reference to the PDA is that the Labour Relations Act 66 of 1995 ("LRA") sets out the procedure for challenging a dismissal on the basis that it was automatically unfair, as the employee who was dismissed is protected as a whistleblower. In such a case the onus rests on the employer and not the employee. It is the employer who must show that the employee was not dismissed unfairly in contravention of the PDA.[52] There would seem to be no justification for requiring the employee to bear the onus of proving the protected disclosure in a criminal case, when such is not required under the LRA.

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[51] The *dictum* of Langa J in *Coetzee* on this point is instructive:

> **"The problem of proving elements of the offence is one that is not peculiar to offences envisaged under section 332(5). It is a problem that is often encountered in the criminal justice system. <u>Where, however, special measures have to be provided to meet specific difficulties related to facilitating prosecutions, they must fit in with the requirements of the Constitution</u>. It is not the function of this Court to prescribe to the legislature how it should seek to achieve these ends. I can see no reason however, why the state could not, for example, impose appropriate statutory duties on directors and other persons associated with the corporate body aimed at ensuring that its affairs are honestly conducted and that it is itself protected against dishonest conduct. This could be done in a variety of ways by means of appropriate legislative provisions which might, for instance, impose the duties of disclosure and reporting on the corporate body, its directors, servants and other persons involved with its affairs. There has been no suggestion that such measures, enforced through appropriate sanctions, could not accomplish as effectively the ends sought to be achieved by section 332(5) of the Act. It has further not been contended that such objectives could not be achieved without placing an onus on the accused to prove any aspect of his or her innocence in a criminal prosecution for a breach of such duty. I am accordingly not persuaded that the reverse onus provisions in section 332(5) are necessary. It follows therefore that reliance on section 33(1) of the Constitution must fail."**
>
> (Emphasis added.)

[52] S187(1) read with s192(2) of the LRA.

71. In the lack of any other pressing justification, it is unlikely that the courts will hold that it is reasonable and justifiable, in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, for the accused to bear the burden of proving the exceptions, and not the State. [53]

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[53] A further level of complexity is introduced by the cross-reference to the Companies Act. Section 159 thereof provides as follows:

" Protection for whistle-blowers

(1) To the extent that this section creates any right of, or establishes any protection for, an employee, as defined in the Protected Disclosures Act, 2000 (Act 26 of 2000)—

(a) that right or protection is in addition to, and not in substitution for, any right or protection established by that Act; and

(b) that Act applies to a disclosure contemplated in this section by an employee, as defined in that Act, irrespective of whether that Act would otherwise apply to that disclosure.

(2) Any provision of a company's Memorandum of Incorporation or rules, or an agreement, is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of this section.

(3) This section applies to any disclosure of information by a person contemplated in subsection (4) if—

(a) it is made in good faith to the Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, a person performing the function of internal audit, board or committee of the company concerned; and

(b) the person making the disclosure reasonably believed at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, had—

(i) contravened this Act, or a law mentioned in Schedule 4;

(ii) failed or was failing to comply with any statutory obligation to which the company was subject;

(iii) engaged in conduct that had endangered, or was likely to endanger, the health or safety of any individual, or had harmed or was likely to harm the environment;

(iv) unfairly discriminated, or condoned unfair discrimination, against any person, as contemplated in section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or

(v) contravened any other legislation in a manner that could expose the company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company.

(4) A shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier, who makes a disclosure contemplated in this section—

(a) has qualified privilege in respect of the disclosure; and

(b) is immune from any civil, criminal or administrative liability for that disclosure.

VI. REPEAT APPLICATION

72. A further issue raised by the Consultant is whether the exceptions contained in section 38 would apply to all the offences contained in the Bill, or only to section 38.

73. Counsel is of the opinion that the current drafting of the exceptions would limit their application to section 38 alone. This is because subsections, on an ordinary construction and in the absence of explicit wording dictating otherwise, apply only to their constitutive section.

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(5) A person contemplated in subsection (4) is entitled to compensation from another person for any damages suffered if the first person is entitled to make, or has made, a disclosure contemplated in this section and, because of that possible or actual disclosure, the second person—

(a) engages in conduct with the intent to cause detriment to the first person, and the conduct causes such detriment; or

(b) directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the first person or to another person, and—

(i) intends the first person to fear that the threat will be carried out; or

(ii) is reckless as to causing the first person to fear that the threat will be carried out,

irrespective of whether the first person actually fears or feared that the threat will or would be carried out.

(6) Any conduct or threat contemplated in subsection (5) is presumed to have occurred as a result of a possible or actual disclosure that a person is entitled to make, or has made, unless the person who engaged in the conduct or made the threat can show satisfactory evidence in support of another reason for engaging in the conduct or making the threat.

(7) A public company or a state-owned company must directly or indirectly-

(a) establish and maintain a system to receive disclosures contemplated in this section confidentially, and act on them; and

(b) routinely publicise the availability of that system to the categories of persons contemplated in subsection (4).”

(Emphasis added.)

VII. CONCLUSIONS ON THE FIRST TWO QUESTIONS

74. As concerns the first two question posed by the Consultant, we accordingly conclude that:

74.1. Section 38 of the Bill would, interpreted in light of section 90 of the CPA, ordinarily operate to place the onus of proving the exceptions on the accused on a balance of probabilities;

74.2. This would infringe the presumption of innocence contained in section 35(3)(h) of the Constitution, as it would create the possibility that an accused might be convicted despite the existence of reasonable doubt;

74.3. Section 38 of the Bill must therefore pass the limitations analysis contained in section 36 of the Constitution to be valid; but

74.4. There is no pressing need for or explanation why the accused must prove the exceptions and not the State;

74.5. This is especially true given the general rule, flowing from the right to freedom of expression enshrined in the Constitution, that secrecy must be the exception and not the norm; and therefore

74.6. Section 38 of the Bill would be likely to be found unconstitutional.

75. Finally, if the intention is for the exceptions contained in section 38 to apply to all offences within the Act, then it would be better to place the exceptions in a separate section, and state the terms of their application explicitly.

VIII. CONCLUSION ON THE GENERAL QUESTION

76. The last issue is the general question posed by the Consultant

> **"How does one draft legislation in a manner that walks the narrow line between effectively protecting necessary secrets while at the same time ensuring that all relevant constitutional rights and principles are respected?"**

77. It is evident from what we have stated above that the problems with laws of this nature are not restricted to the narrow issue of onus and certain other procedural considerations. Should this section be re-drafted, further fundamental issues will need to be taken into consideration. Many have already been touched on.

78. One may narrow the above general question as follows: What are the circumstances in which it would permissible to criminalise whistleblowing on the grounds that the information which has been disclosed by the whistleblower is classified?

79. We first stress that there is a difference between the following:

79.1. creating laws, which prevent the publication of classified information but where such publication can only be prevented by seeking a court order in a civil court; and

79.2. Creating laws, where the prevention of publication can be enforced through prosecutions and the imposition of criminal sanctions.

80. The argument that a law can be created, which allows for the prosecution of any person who publishes the secret material in the media but which exculpates the whistleblower, ignores the rationale for offering whistleblower protection in the public interest. Whistleblowing (as defined) is a defence to dismissal under the PDA to encourage employees to expose crime and to promote accountable and transparent governance.

81. Section 9(2)(e) of the PDA provides as follows:

"9 General protected disclosure

(1) Any disclosure made in good faith by an employee—

(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;

is a protected disclosure if—

(i) one or more of the conditions referred to in subsection (2) apply; and

(ii) in all the circumstances of the case, it is reasonable to make the disclosure.

(2) The conditions referred to in subsection (1) (i) are—

(a) that at the time the employee who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;

(b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;

(c) that the employee making the disclosure has previously made a disclosure of substantially the same information to—

(i) his or her employer; or

(ii) a person or body referred to in section 8,

in respect of which no action was taken within a reasonable period after the disclosure; or

(d) that the impropriety is of an exceptionally serious nature."[54]

82. It is the fact that the employer had failed to take action that triggers the right to bring about publication. The legislative objective is that through exposure via the media of the employer's failure to address the unlawful conduct (which has already been reported to the employer) concrete steps will be taken.[55] Public exposure of the facts also serves to protect the whistleblower and is more often than not a strong motivating factor for the whistleblower. The whistleblower has come to believe that his employer will not do the right thing unless it becomes exposed to the glare of publicity. It is pointless to take a huge personal risk to expose wrongdoing if no-one may lawfully publish what you have exposed (as it

[54] Emphasis added.

[55] See *Tshishonga supra* at fn 6 at para 252:

> **"Was it reasonable for the applicant to make the disclosure to the media? . . . Corruption undermines democracy. The media's exposure of corruption is good for democracy. Whistleblowers depend on the media and other organs of civil society to help level the playing fields, as they are often lone voices against powerful interests. As an employee the isolation and vulnerability are even more acute. So symbiotic is the relationship between whistleblowers and the media that Brewers Dictionary defines whistleblowing to mean 'exposing to the press a wrongdoing or a cover-up in a business or government office'."**

is classified). Providing for prosecution of the journalist who publishes (but not the employee) would thus renders the section 9 protections in the PDA largely pointless in the case of classified documents.

83. We also submit that it would be unwise for the Bill to cross-refer to or rely on the PDA as that Act has its own procedures, and definitions, which are tailor-made for the purpose of protecting one category of persons only, namely employees from one form of harm only, namely, occupational detriment**.**

84. What is under discussion in the Bill is how to protect genuine whistleblowers from being prosecuted for releasing classified material into the public realm.

85. The best way to build in sufficient protections is to ensure that any crime created under the Bill is sufficiently narrowly tailored so as to exclude from its ambit the creation of any offence which could lead to prosecutions in what may be termed genuine whistleblowing cases.

86. It is not good enough for the law merely to create widely framed offences with exculpatory sub-clauses (which the accused can raise at trial after deprivation of liberty through his or her arrest). It is the threat of prosecution which will in itself create a chilling effect. In O'Neill [56] the court held as follows:

> **"I find that by creating criminal sanctions, these sections are, in that sense alone, connected to their important purpose of deterring unauthorized leaks of**

[56] *Supra* at fn 30.

certain types of government information that carry with them some element of harm to the national interest.

However, when the wording of the impugned sections, being the "measures adopted", is considered, for all of the reasons referred to in connection with their overbreadth and vagueness analysis, they are not able to qualify under the rational connection aspect of the proportionality test as not being arbitrary or unfair. They have not been well tailored to suit their purpose: *R. v. Edwards Books and Art Ltd*., 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713 at para. 122. They arbitrarily and unfairly and with a blunt club of criminal sanction restrict freedom of expression including freedom of the press.

Neither is the second aspect of the proportionality requirement, that the impugned measures minimally impair or impair sections 7 and 2(b) *Charter* rights no more than reasonably necessary, able to be satisfied, for all of the same reasons. The impugned sections have not been carefully limited to be a "measured and appropriate response" to the harms they address: *Keegstra* referred to in *Sharpe* at para. 95. Their overbreadth and vagueness prevent a finding of minimal impairment. Instead, because of their lack of appropriate tailoring, they are able to criminalize a wide variety of conduct that should not be caught, for example, the communication, receipt or possession and retention of information that invokes no harm element to the national interest. They also have the very real potential to "chill" the pursuit and enjoyment of the right of freedom of expression by the public and by the press."[57]

87. The recently decided decision *Wizerkaniuk v Poland*,[58] in the European Court of Human Rights, also refers:

"**However, in the present case it is not only the obligation imposed under section 14 of the Press Act which constituted the legal background of the case, but the criminal sanction imposed for the applicant's failure to comply with that obligation, expressly provided for by section 49 of the same Act.**

[57] Emphasis added.
[58] *Wizerkaniuk v Poland* 18990/05 [2011] ECHR 1068 (5 July 2011) ("*Wizerkaniuk*").

The Court reiterates that it must exercise caution when the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern (see *Standard Verlags GmbH v. Austria*, no. 13071/03, § 49, 2 November 2006; *Kuliś and Różycki v. Poland*, no. 27209/03, § 37, ECHR 2009 ...). The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident (see, *mutatis mutandis*, *Wille v. Liechtenstein* [GC], no. 28396/95, § 50, ECHR 1999-VII; *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002 II; *Goodwin*, cited above, p. 500, § 39; and *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 714, 13 November 2003). This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals."[59]

88. In drafting secrecy legislation, it is worth noting that the cases that appear to have had the greatest impact on exposing unlawful government action through whistleblowing have involved the exposure in the media of classified material. Two of the most famous examples are the Pentagon Papers[60] and Watergate cases.

89. **To conclude and sum up :** When drafting secrecy legislation, any criminal provisions must be narrowly tailored for the following reasons:

89.1. To avoid threatening the liberty of citizens (particularly whistleblowers and the members of the press) by creating of the threat of arrest under laws

[59] Emphasis added. *Wizerkaniuk* at paras 67-68.

[60] See the remarks of the Supreme Court of Canada (with the benefit of hindsight) in *National Post*, *supra* at fn 33, at para 61

> **"The Crown argues that the existence of any crime is sufficient to vitiate a privilege but that is too broad a generalization. The *Pentagon Papers* case originated in circumstances amounting to an offence, yet few would now argue that the publication of the true facts in that situation was not in the greater public interest."**

which confer upon law enforcement agencies powers of arrest and prosecution under overbroad laws.

89.2. To ensure that the mere threat of prosecution does not, in its own right, infringe upon freedom of expression.

89.3. To ensure that the rights which employees have under the PDA and the Constitution to blow the whistle on unlawful State action are not taken away by creating crimes under a new law which may to a large extent serve to undermine the purpose and objectives of the existingwhistleblower legislation.

89.4. To avoid placing the onus upon the accused.

90. Counsel advises accordingly.

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3 August 2011