



17 February 2012

Chairperson Raseriti Tau
Ad-hoc Committee on the Protection of State Information Bill
National Council of Provinces

Dear Mr Tau,

ALTERNATIVE INFORMATION DEVELOPMENT CENTRE (AIDC)

WRITTEN SUBMISSIONS ON THE PROTECTION OF STATE INFORMATION BILL

(HEREAFTER REFERRED TO AS THE ‘SECRETILITY BILL’¹)

Introduction

1. The Alternative Information Development Centre is a non-profit Trust formed in 1996 in response to the democratic transition in South Africa and the new opportunities and challenges it brought those seeking greater social justice within the democracy. We work to strengthen the movement for social justice by giving voice to the poor and marginalized locally and internationally.
2. We recognise that the right to access and share information is fundamental to the pursuit of social justice. These rights underpin our democracy and are a precondition to the realisation of further socio-economic rights enshrined in our Constitution.
3. As a matter of principle we maintain that a responsive and accountable democracy can only exist if it creates as few secrets as possible. We therefore recognise the need to repeal Apartheid era secrecy laws still on our statute books, as well as the Minimum Information Security Standards (MISS), a policy guideline adopted by Cabinet in 1996 which has led to broad and unjustifiable classification of information across government.
4. As an active member of the Right2Know campaign, we fully endorse the detailed concerns and recommendations made in the Right2Know’s submission to your Committee.
5. Our submission aims to draw your attention to two critical aspects of your deliberations:
 - a. Contextual factors that need to be considered when developing appropriate secrecy laws for our democracy;
 - b. The threat that the current draft of the Bill poses to social justice activists in their pursuit of their human, socio-economic, and environmental rights.

¹ AIDC invokes Section 16 of the Bill of Rights of the Republic to assert our right to use the language of our choice to refer to the Protection of State Information Bill. We note with great concern recent media reports that Chairperson Tau turned off the microphone whenever the bill was referred to as the Secrecy Bill at the Committee’s Port Elizabeth hearings. This attempt to censor public opinion is not appropriate for a member of the democratic Parliament.

THE CONTEXT

6. The tabling of the Secrecy Bill by the Minister of State Security can best be understood against the backdrop of the unfolding global economic and ecological crisis and the resulting deepening poverty and inequality in South Africa.
7. As social cohesion falters we have witnessed the emergence of greater authoritarianism – militarisation and the rolling back of human rights - in democracies across the world.
8. The draconian provisions of the Secrecy Bill passed by the National Assembly in early 2012 are indicative of the growing influence of conservative authoritarianism in our governing politics. We have witnessed various expressions of this including:
 - a. Attempts by some traditional leaders, through the House of Traditional Leaders, to revive the apartheid era through social, political and economic control of the country-side with a post-apartheid legislation that is ironically built on tribal authorities, tribal boundaries and other undemocratic foundations of the hated Black Authorities Act of 1951;
 - b. The militarisation of the police and the increasing use of state violence against community protests;
 - c. The unjustified arrest and detention of Sunday Times journalist, Mzilikazi wa Afrika, designed to intimidate the media;
 - d. The widespread victimisation of whistleblowers in the public service, from the Atomic Energy to the City of Cape Town;
 - e. The Intelligence General Laws Amendment Bill, which threatens to further erode accountability in the South African state security apparatus;
 - f. The City of Durban's use of paid vigilantes to intimidate activists during the COP17 Global Day of Action.
9. Sadly, this list could go on.
10. The rise of conservative authoritarianism should be seen in the context of South Africa's deepening economic crisis. South Africa is the most unequal society in the world (the richest 10% of South Africans take home 54.4% of all household income while the poorest 50% share only 8.3% of household income). In 2009 alone we lost over 1 000 000 jobs. It is conservatively estimated that every worker supports 5 dependants, so it is safe to say that more than five million South Africans have lost their primary source of income since the onset of the global economic crisis.
11. The majority of South Africans are understandably worried and look to their elected representatives for explanation and direction. Rather than addressing the causes of the crisis and debating alternative economic polices, we have seen leaders of all political parties fall back on populism intended to distract and entertain rather than facilitate a meaningful public discussion on the future of our country. The politicians offer scapegoats: the 'foreign spies', 'third force inspired protests' and the 'unpatriotic media' as a subterfuge.
12. The tendency towards greater conservative authoritarianism must also be understood in the context of the battle between various factions and groups fighting for influence in the ruling party and the state. Many of these groups see the state as an avenue for the primitive accumulation of wealth while few have a more pro-poor agenda. The 'alliance of the wounded' cobbled together pre-Polokwane, is weakening, and its fissures rupturing. The control of information has become a critical concern for these factions as information leaks expose the kleptomaniacal tendencies of aspirant comprador elites.
13. We suggest that the Secrecy Bill is merely one symptom of a much bigger and problematic effort to centralise power in the security cluster of Government:
14. The Constitution states that "...national security must reflect the resolve of South Africans to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life." Unfortunately – as with earlier iterations of Secrecy Bill - this expansive definition of national security is being abused to ensure a expanded mandate for the state security services. This was reflected in a revision to the NIA's mandate in 1999, to include a broader role for the Agency, including political intelligence gathering (which in turn has been used in the service of factions of the political elite).

15. Unless the growing power of the security cluster is checked, South Africa may well be on its way to a national security state, one that is likely to respond with repression against social justice activists who dissent against the failures of service delivery, the loss/absence of decent work, and other manifestations of the failing dominant economic system.
16. It is vital that members of the National Council of Provinces' Committee dealing with the Protection of State Information Bill stand up to pressure from the securocrats in the Executive and ruling alliance. You must remain true to the oath you took when assuming office to "be faithful to the Republic of South Africa and obey, respect and uphold the Constitution and all other law of the Republic". In short you must defend the democracy that so many have fought and died for.

DEFENDING THE RIGHTS OF SOCIAL JUSTICE ACTIVISTS TO ACCESS INFORMATION

17. As stated in our introduction above: we recognise that the Constitutionally enshrined right to access and share information is fundamental to the pursuit of social justice. These rights underpin our democracy and are a precondition to the realisation of further socio-economic rights enshrined in our Constitution.
18. The right to access and share information was not a concession handed to the Apartheid regime during the negotiated settlement of the early 1990s. On the contrary these – and other basic human rights – are the product of centuries of struggle by working and poor people across the world. These rights have been struggled for against those who sought (and seek) to prolong undemocratic power relations for their own survival or narrow gains.
19. South African social justice activists – like our comrades around the world – are committed to defending and advancing our hard won right to access and share information.
20. We recognise a number of important policy initiatives undertaken in recent years to create a framework to protect those rights, including the Protected Disclosures Act (2000) and Promotion of Access to Information Act (2000)
21. We note, however, that a good deal of the protection promised by these initiatives remain unfulfilled.
22. Despite limited protection offered to whistleblowers by the Protected Disclosures Act, and more recently the Companies Act (2008), whistleblowers continue to be persecuted relentlessly today in the private and public sectors where they have the courage to speak out.
23. Where the Promotion of Access to Information Act is concerned, it is the routine experience of social movements, community groups and NGOs who attempt to use PAIA that requests made for access to information are likely to be denied as a matter of course. (Surveys conducted by the Open Democracy Advice Centre and South African Human Rights Commission show that roughly two-thirds of such requests simply receive no response.)
24. As an organisation committed to the principles of an equal and just society, we have opposed various drafts of the Secrecy Bill since its initial tabling in Parliament. Recognising the number of progressive amendments made to the Secrecy Bill during deliberations at the National Assembly, we still believe that in its current form, the Secrecy Bill still poses a threat to the free flow of information and requires radical redrafting.
25. We note with concern that, despite attempts to align aspects of the Secrecy Bill with the Protected Disclosures Act (2000) and S159 of the Companies Act (2008) (s43 of the Bill), the Secrecy Bill falls short of providing adequate protection to whistleblowers. Though these limitations have been documented extensively elsewhere, it would do to note that:
 - a. the protection offered in these laws would only extend to civil servants where state information in concerned, not to members of the public;
 - b. this limited protection for whistleblowers is only written into one of a number of clauses in the Bill that could undermine the rights of whistleblowers.

26. Recognising that it is an essential principle of social justice that the rights of whistleblowers should be protected and promoted, we believe S36, S37, S38, S43 and S49 are still sufficiently broad in their provisions as to criminalise both activists engaged in legitimate disclosures of state information, and the persons receiving such information, where doing so is patently in the interests of social justice. Furthermore, S15, S37 and S49 also effectively criminalise possession of such information, even when doing so may be a necessary step in the act of a legitimate disclosure to serve the public interest.

CONCLUSION

27. We welcome the provincial hearings hosted by the National Council of Provinces as a rare opportunity for ordinary people to speak directly to Parliamentarians about their concerns. While many communities have come forward with concerns about the provisions of the Bill, at least as many came forward with concerns about service delivery, joblessness and poverty. It is clear that the people of South Africa have much more basic needs than can be fulfilled by this Bill. While the Ministry of State Security has repeatedly informed us that this Bill must be passed in its current form to protect South Africa against an apparently immeasurable crisis, many more face an urgent crisis of poverty and systemic inequality.
28. A responsive and accountable democracy that meets the basic needs of its people is built upon transparency and the free flow of information. The Secrecy Bill threatens the gains of South Africans' struggle for freedom. It extends the veil of secrecy in a manner reminiscent of the apartheid past.
29. South Africans have a long and proud history of challenging and defying unjust laws. There can be little doubt that if the NCOP fails in its task of ensuring the Constitutionality of the Protection of State Information Act, it will be challenged in the Constitutional Court. If the Constitutional Court does not remedy the Act, we can take heart that a number of internet and encryption technologies will enable those patriotic South Africans who will choose to defy the Act in defence of our democracy.
30. To reiterate, as a member of the Right2Know campaign we fully endorse the detailed concerns and recommendations made in the Right2Know's submission to this committee.
31. We thank the chairman and members of the Ad-hoc Committee for affording us their attention, and look forward to making an oral submission in the near future.

Regards,

Mark Weinberg
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Alternative Information Development Centre