LRC

LEGAL RESOURCES CENTRE

Submission on Bill B6-2010
Protection of State Information Bill

on behalf of People Against Suffering, Suppression, Oppression and Poverty

LEGAL RESOURCES CENTRE
Constitutional Litigation Unit

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I. INTRODUCTION

1. The Legal Resources Centre (LRC) on behalf of People Against Suffering, Suppression, Oppression and Poverty (PASSOP) is pleased to respond to the call of the *Ad Hoc* Committee on the Protection of State Information Bill (National Council of Provinces) for written and oral submissions on Bill B6-2010 *Protection of State Information Bill* (the Bill).

2. Established in 1979, the LRC is a human rights organization in South Africa. We use the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances. This response is primarily the work of the Constitutional Litigation Unit.

3. PASSOP is a public, non-profit organisation established with the objective of assisting oppressed people with a specific focus on documented and undocumented immigrants in accessing the rights laid down in the Bill of Rights.

4. These submissions are made by the LRC on behalf of PASSOP and outline a response to seven aspects of the Bill. We use the draft of the Bill as of the date of submission and thus our submissions may not reflect any changes from that date.

5. While there is general agreement that there is a need to replace the Protection of Information Act No 84 of 1982, the Bill does not correctly balance the principles of protecting classified state information against the equally important principles of openness, transparency, accountability and the rule of law.

6. The Bill has not received the detailed and careful consideration necessary and appropriate for such significant legislative change. Even more important than our concerns about the process that the Bill has undergone is our concern about the general tenor of the Bill.

7. Like the government of South Africa, we are committed to protecting genuinely and legitimately classified state information, but any legislative response must be reasonable, proportionate, legal and constitutional.

8. The current draft of the Bill, as it stands, runs contrary to and indeed threatens many of the fundamental values and principles enshrined in our Constitution. Rather than revisiting apartheid-era securocratic methods of information protection, the Bill must seek an appropriate balance between state secrecy and human rights.

9. There are seven points in particular that we would like to raise with respect to the Bill:

    a. The Bill does not include a public interest defence;
    b. The Bill adopts a standard of 'ought reasonably to have known';
    c. The Bill allows for an improper delegation of powers;
    d. The Bill does not include an improper classification defence;
    e. The Bill adopts disproportionately severe penalties;
    f. The Classification Review Panel lacks independence; and
    g. The review jurisdiction of the Court must be maintained.

10. We will examine each in turn.

II. SUBMISSIONS

Rights at Stake

11. Section 12 of the Bill of Rights guarantees for everyone 'the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.'

12. Legislation containing sanctions of imprisonment risks violating the right to freedom and security of the person.

13. Section 16 of the Bill of Rights guarantees for everyone 'the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.'

14. Section 16(2) of the Bill of Rights provides for express restrictions on the right to freedom of expression, including propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

15. National security does not figure in this list.

16. Legislation that limits freedom of expression infringes on the right guaranteed in section 16.

17. Section 32 of the Bill of Rights guarantees for everyone 'the right of access to any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights.' The Promotion of Access to Information Act No 2 of 2000 (PAIA) gives effect to this right.

18. Legislation that limits access to information infringes on the right guaranteed in section 32.

19. Section 36 of the Bill of Rights states that '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 justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.'

Public Interest Defence

20. We view a public interest defence as imperative. Such a defence would exempt from prosecution certain individuals in limited and appropriate circumstances where the disclosure has been made in the public interest.

21. It is axiomatic that the Bill will limit the right to freedom of expression and the right to access information.

22. Furthermore, the Bill must be read in conjunction with PAIA, a constitutionally-mandated statute, which provides for a public interest defence. Section 32(2) of the Constitution states that '[n]ational legislation must be enacted to give effect to this right (of access to information), and

may provide for reasonable measures to alleviate the administrative and financial burden on the state.' PAIA is that legislation.

23. In *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC), Chaskalson CJ offered a discussion of the relationship between the Constitution and the Promotion of Just Administration Act No 3 of 2000 (PAJA) noting that section 33 of the Constitution entrenches the right to administrative action that is "lawful, reasonable and procedurally fair" and states that "[n]ational legislation must be enacted to give effect to these rights…" Chaskalson CJ also wrote at paragraphs 95-96:

> [95] PAJA is the national legislation that was passed to give effect to the rights contained in section 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.
>
> [96] A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation.

24. Like PAJA, PAIA (and we borrow the words of Chaskalson CJ) 'is the national legislation that was passed to give effect to the rights contained in section' 32. 'It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.'

25. Sections 46 and 70 of PAIA provide for mandatory disclosure in the public interest where the disclosure would reveal evidence of 'a substantial

contravention of, or failure to comply with, the law; or an imminent and serious public safety or environmental risk; and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

26. Any proposed legislation that seeks to displace the clear provisions of PAIA also violates section 32 of the Constitution and is thus unconstitutional.

27. Section 5 of PAIA states that PAIA applies 'to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record of a public body or private body; and is materially inconsistent with an object, or a specific provision, of this Act.'

28. Conversely, section 1(4) of the Bill states that in 'respect of classified information and despite section 5 of the Promotion of Access to Information Act, this Act prevails if there is a conflict between a provision of this Act and a provision of another Act of Parliament that regulates access to classified information.'

29. The Bill's attempt to trump PAIA, a constitutionally-mandated statute, is a further indication of the Bill's overall unconstitutionality.

30. In light of the limits on the right to freedom of expression and the right to access information, the next question becomes whether these limits can be justified in terms of section 36. Without a public interest defence, we do not believe they can.

31. As it stands, section 43 of the Bill affords a limited defence to the crime of disclosing classified information to (1) those employees who may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers in terms of the Protected Disclosures Act No 26 of 200 and (2) whistle blowers in terms of section

159 of the Companies Act No 71 of 2008. All others, including journalists and other whistle blowers, risk arrest, prosecution and imprisonment.

32. Those who dispute the necessity of a public interest defence do so on the basis that section 47 of the Bill criminalises improper classification of state information in order to 'conceal breaches of the law; promote or further an unlawful act, inefficiency, or administrative error; prevent embarrassment to a person, organisation or agency; or give undue advantage to anyone within a competitive bidding process' with jail terms of up to 15 years.

33. This suggests that a public interest defence and the criminalisation of improper classification are mutually exclusive when they are not. This further ignores the practical reality that improperly classified information will be difficult, if not impossible, to detect and challenge without the efforts of investigative journalists and whistle blowers who will be hamstrung in their ability to bring these illegal classifications to light if they fear lengthy jail terms. Furthermore, the severity of prison sentences for legitimate disclosure far outweighs that for unlawful misclassification.

34. While there are mechanisms for bringing a classified document to the public by having it de-classified, the processes will be long and convoluted, including reporting possession to the authorities, formally requesting access to the information, and then if the organ that initially classified the document does not declassify, an application to the Classification Review Committee and then to the High Court, a potentially time-consuming and costly endeavour.

35. A public interest defence would allow an individual or organization to disclose without fear of arrest, prosecution and imprisonment. Of course such decisions would have to be made after careful deliberation since the individual or organization could face severe criminal sanctions.

36. As an illustration of the harsh effects of excluding a public interest defence, we take the example of the Bill's criminalisation of mere possession of classified information for which there are severe criminal penalties.

37. Section 15 states that a 'person who is in possession of a classified record knowing that such record has been unlawfully communicated, delivered or made available other than in the manner and for the purposes contemplated in this Act … must report such possession and return such record to a member of the South African Police Service or the Agency to be dealt with in the prescribed manner.'

38. Section 44(1)(a) of the Constitution states that any 'person who fails to comply with section 15 is guilty of an offence and liable to a fine or imprisonment for a period not exceeding five years.'

39. Without a public interest defence, one would be criminally liable for possession of classified information even if the information has been unlawfully classified thus fundamentally undermining the constitutionally entrenched right to access information and right to freedom of expression. Any resulting imprisonment in turn leads to an unconstitutional deprivation of freedom and security of the person.

40. In terms of foreign and international support for a public interest defence, we note the following:

    a. Sections 13 and 14 of the Canadian Security of Information Act RSC 1985 c O-5 make it an offence liable to imprisonment for a person permanently bound to secrecy to intentionally and without authority communicate or confirm information that is, or would be if it were true, special operational information. Section 14 states that no 'person is guilty of an offence under section 13 or 14 if the

person establishes that he or she acted in the public interest.' The subsections to section 14 go on to describe the circumstances in which a person acts in the public interest.

b. Section 152(e) of the Danish Criminal Code (Straffeloven) NR 1235 of 26 October 2010 creates a public interest defence, which can be invoked to avoid sanction if a person is found guilty of disclosing confidential information.

c. Sections 93(2), 97a and 97b of the German Criminal Code permit public interest disclosures as a measure of last resort.

d. Article 3(2) of the Council of Europe's Convention on Access to Official Documents (adopted by the Committee of Ministers on 27 November 2008) states that '[a]ccess to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.'

e. Principle 15 of the Johannesburg Principles of National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996) states that 'no person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.' The introduction to the document states that the 'Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgments of national courts), and the general principles of law recognized by the community of nations.'

f. Section 19 of the International Convention on Civil and Political Rights (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A of 16 December 1966 with entry into force 23 March 1976) (ICCPR), to which South Africa is a signatory, guarantees the right to freedom of expression, including the '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.' The ICCPR says these rights are 'subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others or the protection of national security or of public order or of public health or morals.' (emphasis added)

g. In *Guja v Moldova* [2008] ECHR 14277/04, the European Court of Human Rights has also recognised that in certain circumstances, the public interest may favour the disclosure of confidential and secret information and accordingly such disclosures may merit protection in accordance with Article 10 of the European Convention of Human Rights which guarantees the right to freedom of expression.[1]

h. Article 9 of the African Charter on Human and Peoples' Rights states that every individual 'shall have the right to receive information' and 'shall have the right to express and disseminate his opinions within the law.'

41. According to section 198(c) of the Constitution, '[n]ational security must be pursued in compliance with the law, including international law.'

[1] See paras [69] – [78].

42. It is clear that not only does the exclusion of a public interest defence violate the right to freedom of expression and the right to access information but that such exclusion is also not in line with binding (and non-binding) international law standards.

43. The right to freedom of expression and right to access information are not absolute and may be limited in terms of section 36.

44. It is well established that the five factors expressly itemised in section 36 are not an exhaustive list, but are 'key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society.'[2] Thus, we briefly consider each here:

    (a) The *nature of the right* is that of the right to freedom of expression and right to access information relating to state activities that may be classified.
    (b) The *importance and purpose of the limitation* is to protect classified state information in order to safeguard the national security of South Africa.
    (c) The *nature and extent of the limitation* is a complete prohibition on accessing or disclosing classified state information with severe criminal sanctions for any breach of the statute's provisions.
    (d) The *relation* between the limitation and the purpose is clear since there is a rational connection between limiting access and disclosure of classified information and the national security of South Africa.
    (e) The crux of the section 36 analysis in terms of the Bill lies at the fifth enumerated factor, namely, whether there is a *less restrictive means to achieve the purpose.*

[2] *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1; 2000 (CC) (*Manamela)* at [32].

45. While there are a number of flaws in the Bill that demonstrate it does not adopt restrictive means that are less rights limiting, we will focus here on the exclusion of a public interest defence.

46. It cannot be said that the Bill has adopted the least restrictive means to achieve its purpose in terms of section 36 when it has not adopted a public interest defence, which represents a viable option for continuing to protect classified information with intrusion into the rights at stake.

47. By criminalising access and disclosure in all circumstances irrespective of the public interest, the Bill goes beyond what is strictly 'necessary' (to borrow the binding word of the ICCPR) for national security.

48. While Parliament may not be required to use the perfect or absolute least restrictive option to achieve its purpose, the alternative of the public interest defence demonstrates that there are options for restricting rights less without compromising national security since heavy penalties for unlawful access and disclosure remain. Parliament must do more and indeed can do more to protect the rights at stake and meet the requirements in an open and democratic society based on human dignity, equality and freedom.

49. Finally, while we do not purport here to re-draft the Bill, we note that a public interest defence does not have to be broad or general, but rather like the Canadian example may require strict conditions and list specific instances where disclosure will be in the public interest. We offer in brief the following examples:

    a. where the disclosure reveals criminal activity, including for the ulterior purposes listed in section 47, which are now criminalised under the Bill;

b. where the disclosure reveals actions by officials or politicians that may tend to undermine South Africa's constitutional democracy; and
c. where the disclosure reveals actions that may pose a risk to human life.

50. The guiding principle must be that in some limited instances the public interest in access and disclosure will clearly outweigh the public interest in secrecy over classified documents.

51. A balance between disclosure and secrecy is reflected in the Bill at section 19(3) where, upon receiving a request for access to classified information and status review, the 'head of the organ of state concerned must declassify the classified information in accordance with section 14 and grant the request for state information if that state information reveals evidence of a substantial contravention of, or failure to comply with the law; or an imminent and serious public safety or environmental risk; and the public interest in the disclosure of the state information clearly outweighs the harm that will arise from the disclosure.'(emphasis added)

52. The unjustifiable and unreasonable failure to include a similar public interest provision in the list of offences in Chapter 11 renders that chapter unconstitutional.

53. We would be pleased to participate in furthering the Bill's constitutionality through more specific and concrete modifications.

'Ought Reasonably to Have Known'

54. In Chapter 11 on Offences and Penalties, the wording 'ought reasonably to have known' is used in relation to the proof of the offence at least 15 times, including for: espionage offences (section 36) carrying jail terms of

up to 25 years; receiving state information unlawfully (section 37) carrying jail terms of up to 25 years; and hostile activity offences (section 38) carrying jail terms of up to 20 years. Similarly, section 49 adopts the wording 'reasonably should know' for the prohibition of disclosure of a state security matter, which carries a jail term of up to 10 years.

55. The effect of these provisions is to not require the state to prove actual knowledge on the part of the accused, but rather to only require the state to show that a reasonable person standing in the shoes of the accused *should have known* that what he or she did was an offence.

56. The Bill introduces statutory liability with harsh criminal sanctions for merely negligent behaviour. This low standard is unacceptable and runs contrary to the fundamental principle of legality that laws must be certain, predictable, knowable in advance and not be vague or overbroad.

57. All offences in the Bill must require intention or actual knowledge on an absolutely subjective standard and nothing less.

58. Furthermore, it is well accepted in South African criminal law that conduct must have an element of *mens rea* or fault, which may take the form of intention (*dolus)* or negligence (*culpa*).[3] All common law crimes are based on intention with two exceptions – culpable homicide and contempt of court by a newspaper editor.[4] Even these two negligence based crimes do not carry jail terms as severe as those imposed by the Bill.

59. Such a low standard may also risk creating a reverse onus whereby the accused may have to adduce evidence establishing the reasonableness of his or her subjective belief thus effectively introducing statutory liability for the negligent, albeit innocent, accessing or disclosure of classified

[3] Jonathan Burchell, *Principles of Criminal Law Third Edition* (Juta: Landsdown, SA, 2005) (Burchell) at 151-152.

[4] Burchell at 152.

information. The Constitutional Court has held that reverse onus provisions, which may infringe on the right to silence and limit the presumption of innocence, are inconsistent with the Constitution.[5]

60. To only require the state to prove offences carrying severe penalties on the low objective standard of 'ought reasonably to have known' or 'should have known' creates a climate of fear and has a chilling effect on both the accessing and disclosure of information.

61. Where individual liberty is at stake and possible jail sentences are severe, statutory offences must adopt a high threshold for fault.

Delegation of Powers

62. Section 13 deals with the authority to classify state information and allows 'any head of an organ of state' to 'classify or reclassify state information' subject to section 3.

63. Section 3(1) states that the 'provisions of this Act with regard to the protection of valuable information against alteration, destruction or loss apply to all organs of state.' Section 3(2) states that the 'classification, reclassification and declassification provisions of this Act apply to the security services of the Republic and the oversight bodies referred to in Chapter 11 of the Constitution; and may be made applicable by the Minister, on good cause shown, by publication in the *Gazette*, to any organ of state or part thereof that applies in the prescribed manner, to have those provisions apply to it.' (emphasis added)

64. The Bill defines 'classification authority' as 'the entity or person authorised to classify state information and includes a head of an organ of state; or

[5] *Manamela* at [52].

any official to whom the authority to classify state information has been delegated in writing by a head of an organ of state.'

65. The Bill in turn defines 'head of an organ of state' as encompassing:

    a. 'in the case of a department, the officer who is the incumbent of the post bearing the designation mentioned in Column 2 of Schedule 1, 2 or 3 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), or the person who is acting as such;
    b. in the case of a municipality, the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), or the person who is acting as such;
    c. in the case of any other institution, the chief executive officer or equivalent officer, of that public body or the person who is acting as such; or
    d. in the case of a national key point declared as such in terms of the National Key Points Act, 1980 (Act No. 102 of 1980), the owner of the national key point.'

66. The Bill defines 'Minister' as the member of the Cabinet designated by the President in terms of section 209(2) of the Constitution to assume political responsibility for the control and direction of the intelligence services established in terms of section 209(1) of the Constitution.'

67. The Bill defines 'relevant Minister' as 'any Cabinet member whose portfolio is affected by this Act.'

68. In *Justice Alliance of South Africa v President of Republic of South Africa and Others*, 2011 (5) SA 388 (CC) (*JASA*), a unanimous Constitutional Court offered a discussion of the law surrounding the delegation of powers noting that the Court had 'frequently recognised that the Constitution

sometimes permits Parliament to delegate its legislative powers and sometimes does not.'[6]

69. The Court went on to cite an earlier decision in which Chaskalson P made plain:

> In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. <u>There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body</u> . . . .[7] (emphasis added)

70. The Court went on to examine whether the Constitution permitted the delegation in the case before it.

71. In *JASA*, where the question was one of renewing the term of the Chief Justice of the Constitutional Court, the Court considered in the main Chapter 8 on Courts and Administration of Justice. In *Executive Council I*, where the question was one of the power of local government, the Court focused primarily Chapter 7 on Local Government.

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[6] *JASA* at [53].

[7] *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others,* 1995 (4) SA 877 (CC) at [51] (*Executive Council I*).

72. In most if not all cases involving an impugned delegation of power, Chapter 4, which provides that the legislative authority of the national sphere is vested in Parliament, will be relevant.

73. Section 3(2) of the Bill purports to grant authority to the Minister responsible for the Bill to delegate the power of classification to other Ministers. Therefore, our analysis will focus on Chapters 4, which deals with the powers of Parliament, and Chapter 5, which deals with the powers of the President and Executive Council.

74. There are a number of textual and contextual indicators that the Constitution does not empower Parliament to empower a Minister to in turn empower other Ministers.

75. Section 44 states that the 'national legislative authority as vested in Parliament confers on the National Assembly the power to amend the Constitution; to pass legislation with regard to any matter including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.'

76. Section 55(2) of the Constitution states that the 'National Assembly must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of the exercise of national executive authority, including the implementation of legislation; and any organ of state.'

77. Section 85(2) states that the 'President exercises the executive authority, together with the other members of the Cabinet, by implementing national legislation except where the Constitution or an Act of Parliament provides otherwise; developing and implementing national policy; co-ordinating the functions of state departments and administrations; preparing and initiating

legislation; and performing any other executive function provided for in the Constitution or in national legislation.'

78. Section 91(2) states that the 'President appoints the Deputy President and Ministers, assigns their power and functions, and may dismiss them.'

79. Section 92 states that (1) 'The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President. (2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. (3) Members of the Cabinet must (a) act in accordance with the Constitution; and (b) provide Parliament with full and regular reports concerning matters under their control.'

80. Citing the above passage of Chaskalson P, the Court in *JASA* described the nature and extent of delegation by saying that the 'primary reason for delegation is to ensure that the legislature is not overwhelmed by the need to determine minor regulatory details. Thus, delegation relieves Parliament from dealing with detailed provisions that are often required for the purpose of implementing and regulating laws.'[8]

81. It cannot be said that the Bill delegates the determination of mere minor detail to the Executive. Rather, it is allowing power that Parliament has granted to one organ of state to be in turn granted to an equal and not subordinate organ of state, namely by one Minister to another.

82. The legislative delegation of the power to delegate to parallel organs must be seen to constitute an unlawful delegation. Nowhere in the Constitution does it contemplate that Ministers may allocate powers to other Ministers.

83. Such a parallel delegation of power runs contrary to the principle of accountability in terms of sections 55(2) and 92 of the Constitution. Will

[8] *JASA* at [51].

Ministers be accountable to the Minister responsible for the Bill? Who will oversee the exercise of authority of those Ministers to whom the responsible Minister delegates the power of classification?

84. By allowing the responsible Minister to delegate to another Minister, the fundamental principle of accountability, which is enshrined in section 1 of the Constitution, vanishes in this context, and the critical function of overseeing the exercise of authority by the other Ministers is seemingly displaced from the National Assembly to the Minister responsible for the Bill, which is an unlawful and unconstitutional delegation of power.

85. As the Court in *JASA* stated, '[i]n a constitutional democracy, Parliament may not ordinarily delegate its essential legislative functions.'[9]

86. The delegation of power to the relevant Minister cannot be then delegated on a parallel basis to another Minister. The Parliamentary delegation of power to Ministers through legislation is a matter of utmost importance in our constitutional democracy. Parliament's important role in delegating power should not be handed over to Ministers to wield as they wish particularly when that power involves classifying state information as confidential, secret or top secret. Such an improper delegation represents a threat to the separation of powers between the legislature and the executive, which is a governing principle in our constitutional democracy.

87. Even if this parallel delegation from one Minister to others is constitutional (and we are of the view that it is not), there must in that case be factors, criteria or guidelines relating to the delegation so that the Minister is not permitted to simply exercise an unfettered discretion.

88. In the event such factors, criteria or guidelines are developed, the scope of delegation must be narrow. There may be obvious reasons for granting

[9] *JASA* at [55].

the power of classification to certain organs of state, including those already envisioned by section 3 of the Bill, namely the security services of the Republic (defence force, police service and intelligence services) and the oversight bodies referred to in Chapter 11 of the Constitution, but other organs of state should not be granted the power of classification without substantial and compelling reasons justifying the grant.

Improper Classification Defence

89. As it stands, the Bill does not currently allow for a defence of improper classification to the criminal charges. Indeed, once the state has proved the required elements of the offence, it does not appear that there are any available defences.

90. We maintain that a defence of improper classification is necessary. Such a defence would allow an accused to defend charges by arguing that the document should not be classified.

91. Improper classification already exists as an offence at section 47, which criminalises the classification of state information 'in order to achieve any purpose ulterior to the Act…' Why then is improper classification not a defence to those charged for unlawfully accessing or disclosing state information?

92. The current processes in the Bill at Chapter 5 involving declassification, at Chapter 7 involving the Classification Review Panel and at Chapter 8 involving appeals for refusal of access to information are inadequate for defending against the Bill's criminal charges and do not address the need for a defence of improper classification.

Punishment Severity

93. In terms of punishment severity, as an example, we note section 36 of the Bill, which makes communicating, delivering or making available classified state information or making, obtaining, collecting, capturing or copying a record containing classified state information an offence punishable by a term of:
    i. 15 years minimum and 25 years maximum in the case of top secret information;
    ii. 10 years minimum and 15 years maximum in the case of secret information;
    iii. 3 years minimum and 5 years maximum in the case of confidential information.

94. In a similar vein, we note all the provisions in Chapter 11 on Offences and Penalties of the Bill from sections 36 to 51.

95. The severity of the penalties is disproportionate to the gravity of the crimes committed and will work to silence whistle blowers, journalists and concerned members of South African society where the public interest demands that they be permitted to communicate information. The Bill will thus have a chilling effect on freedom of expression.

96. Although there are penalties for public officials who conceal public information that should be disclosed, those penalties are significantly less than the penalties potentially imposed on others for the disclosure of classified information.

97. Additionally, section 36(4) states that if ‘a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in this section, it shall enter those

circumstances on the record of the proceedings and must thereupon impose such lesser sentence.'

98. While we are in favour of affording a level of sentencing discretion to the Courts, particularly when the right to liberty is at stake and such severe penalties may be imposed, we are concerned about the uncertainty surrounding the onus. It is important that the Bill clarify on whom the onus falls and not leave it to debate.

99. When the right to freedom and security of the person is at stake, the imposition of disproportionately severe terms of imprisonment will not pass constitutional muster in terms of section 36. As it currently stands, the severity of the penalties contained in the Bill amount to using the proverbial sledgehammer to crack a nut.

Classification Review Panel Independence

100. Chapter 7 of the Bill establishes the Classification Review Panel (the Panel). Section 24 describes the circumstances in which a member of the Panel may be removed from the Panel, including 'the adoption by the National Assembly of a (majority vote) resolution calling for that member's removal as member from the Classification Review Panel.'

101. Section 33 of the Constitution provides for 'review of administrative action by a court or, where appropriate, an independent and impartial tribunal.' The possible removal of a Panel member by the adoption of a majority vote resolution by the National Assembly undermines the independence of the Panel and will lead to a reasonable apprehension of bias based on the perceived possibility of political manipulation. Such a removal provision is thus unconstitutional and should be struck from the Bill.

Court Jurisdiction Maintained

102. As a final point, section 6(1) of PAJA provides for the instituting of a judicial review of an administrative action before a court or tribunal. Accordingly, any attempt, implicit or otherwise, on the part of the legislature to oust the jurisdiction of the High Court to judicially review administrative acts, such as the classification of information, must be seen to be unequivocally unconstitutional. The judicial review jurisdiction of the Court must be maintained.

III. CONCLUSION

103. States have a fundamental duty to protect the safety and security of those within their borders. Nevertheless, at this critical stage in South Africa's democratic growth, we believe that the proposed Bill, if passed as it currently stands, will operate to return South Africa to the secrecy and securitisation that pervaded our dark history rather than moving us forward with a democracy built on openness, transparency, accountability and the rule of law.

104. As the Preamble to PAIA notes, 'the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public bodies which often led to an abuse of power and human rights violations.'

105. Accordingly, PAIA was enacted to 'foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; [and] to actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.'

106. As affirmed by the Supreme Court of Appeal in the opening lines of its recent judgment in *The President of the Republic of South Africa and Others v M & G Media Ltd* (2011) (2) SA 1 (SCA): 'Open and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy.'

107. Pursuant to section 80 of the Constitution, members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional. If the current

Bill proceeds unchanged, we strongly encourage the National Assembly to make such an application.

108. We also request an opportunity to make an oral presentation in Parliament during the public hearings of 13 March 2012 and 14 March 2012.

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17 FEBRUARY 2012