

LRC CLU Advocates:

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**ORAL SUBMISSIONS ON THE PROTECTION OF STATE INFORMATION
BILL BEFORE NCOP – 29 MARCH 2012**

1. When the LRC was contemplating whether or not to make submissions on the PSI Bill, I said at that stage, we must be careful to confine ourselves to identifying the probable unconstitutionality of specific provisions of the Bill and guard against joining the chorus of those involved in sensationalising the issues.
2. The LRC, like the government of South Africa, is committed to protecting the legitimate classified state information. In so doing, however, we believe that the values enshrined in the Constitution should not be undermined but must be respected and protected.
3. For those who do not know who we are, the LRC was established in 1979 and is a human rights organization. We use the law as an instrument of justice for the vulnerable and marginalised, including the 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. In short, we represent the helpless and more often than not, the hopeless.

4. In our written submissions, which we did on behalf of People Against Suffering Suppression, Oppression and Poverty (PASSOP), we raised the following 7 points which we believed could assist in alleviating the bone of contention raised against the Bill.

- 4.1 The Bill does not include a public interest defence;
- 4.2 The Bill adopts a standard of 'ought reasonably to have known';
- 4.3 The Bill allows for an improper delegation of powers;
- 4.4 The Bill does not include an improper classification defence;
- 4.5 The Bill adopts disproportionately severe penalties;
- 4.6 The Classification Review Panel lacks independence; and
- 4.7 The review jurisdiction of the Court must be maintained.

5. Because of the time constraints, I will only focus on the 3 key points, namely;

5.1 The Bill does not include a public interest defence;

5.2 The Bill adopts disproportionately severe penalties; and

5.3 The Classification Review Panel lacks independence

Public Defence and severe penalties

6. By far, the main criticism of the Bill has been its exclusion of a public defence clause which, if included, would allow public disclosure of classified information if public interest in such disclosure outweighs the harm to the protected interests.

7. Section 43 of the Bill already affords a limited defence to the crime of disclosing classified information to those employees protected under Protected Disclosures Act and certain company stakeholders protected under section 159 of the Companies Act. The question is, why is this protection, not extended to others who may have a legitimate reason for disclosing classified information? We are not suggesting that the public interest defence should be broad and general but what we are proposing

is that such defence may be limited to specific enumerated instances where disclosure is in the public interest. We gave examples of:

- 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

These examples are by no means exhaustive or the best there is. They are merely to show that the Bill can be made good to pass Constitutional muster without being left too broad and too general that it will be open to abuse.

8. The Constitution protects the right to freedom of expression [section 16 of Constitution]. Although all rights can be limited in terms of section 36, failure to protect legitimate disclosure which unreasonably limits the right

to freedom of expression and which is exacerbated by harsh punishments, is clearly unconstitutional.

9. The Bill not only proposes these disproportionately harsh punishments for offenders (who, technically would be exercising their constitutional right to freedom of expression), but also introduces strict liability with harsh criminal sanctions for even mere negligent behaviour, where for instance a person is in possession of a classified document where he "ought to have known" ... that such a document is classified even where such actual knowledge is absent. **See chapter 11 of the Bill.**

Classification Review Panel

10. Section 24 of the Bill, describes the circumstances in which a member of the Classification Review Panel may be removed. These include 'the adoption by the National Assembly of a (majority vote) resolution calling for that member's removal.'
11. This undermines the independence of the Review Panel and will lead to a reasonable apprehension of bias based on the perceived possibility of political manipulation. Our suggestion is that this provision be removed.

12. Section 6(1) of PAJA provides for 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

Remedy

13. Section 75(1)(a)(ii) empowers this council to pass the Bill subject to amendments proposed by it or to reject the Bill.

14. In terms of section 75(1)(c), if this council passes the bill subject to amendments, the Assembly MUST reconsider the Bill, taking into account any amendment proposed by this council and may

- a. pass the Bill again with or without amendments; or
- b. decide not to proceed with the Bill.

15. It is clear from these sections that this house has the power to influence all legislation passed by the Assembly.

Conclusion

16. Our Government has a fundamental duty to protect the safety and security of its people. This Bill is aimed at promoting that duty which we perfectly understand. However, 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.

17. 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.'* 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 fully exercise and protect all of their rights.'*

18. I would conclude by quoting 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.”

19. If the current Bill proceeds unchanged, section 80 of the Constitution empowers the members of the National Assembly to apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional. We would strongly encourage the National Assembly to make such an application.

THANK YOU