SAJBD
South African
Jewish Board of Deputies

SUPPLEMENTARY OPINION

FOR THE SOUTH AFRICAN JEWISH BOARD OF DEPUTIES (SAJBD) ON THE PROTECTION OF STATE INFORMATION BILL (POSIB)

SUBMITTED TO THE NATIONAL COUNCIL OF PROVINCES (NCOP)

Prepared by Kobus van Rooyen, SC

15 February 2012

I have had the opportunity of studying the issue of the Protection of State Information Bill (POSIB) which is presently before the National Council of Provinces (NCOP). I agree with the South African Jewish Board of Deputies (SAJBD) that several of its proposals previously sent to the General Assembly's ad hoc committee by the SAJBD, have been implemented.

There are still a few matters which should, with respect, be considered.

[1] **The removal of minimum sentences**. The tradition with common law offences within this area, treason and sedition, is to leave the matter of the severity of punishment in the discretion of the Courts. The Court would be in the best position to judge the severity of the offences.

Thus the following is proposed: the removal of the minimum sentences in sub-clauses 36(1), 36(2), 36(3). I have noted clause 36(4) which grants the authority to the Court to impose a lesser sentence, but believe that an open discretion without having to set out "compelling circumstances" would serve justice best. Each set of circumstances would then be judged objectively in the light of its own peculiar circumstances.

[2] **The removal of negligence as sufficient form of *mens rea* in sections 38, 39 and 49. Security** offences are traditionally connected to an *intention* to overthrow the state or cause public disorder, an intention, which would include *dolus eventualis.*[1] There is, accordingly,

[1] *Dolus directus, indirectus or eventualis* are the three forms of intention – see Snyman *Criminal Law* (2002)180 *et seq*. Our courts also find *dolus eventualis* in cases where a person ignores the true situation and recklessly continues: see *S v Beukes* 1988(1) SA 511(A) at 522C and *R v Myers* 1948(1) SA 375(A) where Greenberg JA stated the following: "[A] belief is not honest (and is therefore fraudulent) which 'though in fact entertained by the representor may have been itself the outcome of fraudulent diligence in ignorance - that is, of a wilful

no rational reason why the said statutory offences should not also be limited to *intentional* contraventions. The accent lies in the intention and desire to subvert the existing state and not in mere negligence, which is not sufficient within this context. To send a person to prison for negligence would be quite extraordinary in these circumstances.

[3] **The criteria.** The ad hoc committee and the First Chamber of Parliament have clearly moved away from wide overbroad criteria. The protection of national security – see clause 12 of the Bill – lies at the heart of the legislation. This is to be distinguished from mere political or individual interest. All countries must have such legislation – in our case to protect the admirable Constitutional order which was achieved in 1994. In clause 1 of the Bill, national security is defined. The clause provides as follows:

“”national security” includes the protection of the people of the Republic and the territorial integrity of the Republic against –

(a) the threat of use of force;

(b) the following acts:

(i) Hostile acts of foreign intervention directed at undermining the constitutional order of the Republic;

(ii) Terrorism or terrorism related activities;

(iii) Espionage;

(iv) Exposure of a state security matter with the intention of undermining the constitutional order of the Republic;

(v) Exposure of economic, scientific or technological secrets vital to the Republic;

(vi) Sabotage;

(vii) Serious violence directed at overthrowing the constitutional order of the Republic

(c) acts directed at undermining the capacity of the Republic to respond to the use of, or the threat of the use of, force and carrying out the Republic’s responsibilities to any

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abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense) believe.”

foreign country and international organisations in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not, but does not include lawful political activity, advocacy, protest or dissent"

Firstly The use of the terms "*includes"* creates the impression that the decision maker has a choice to use similar criteria or possibly even other criteria. Decision makers in terms of the Act (who would not necessarily be lawyers) would, generally, not realise that the word "includes" has a specific legal connotation which does *not* necessarily include the authority to decide the matter under an undefined additional criterion.[2] I must add that the Constitutional Court[3] has given strict guidelines as to the said phrase, but an official might just believe that he or she even has a wider authority than the criteria set out in the Act. The word "includes" should be substituted with "means".

Secondly (iv) would seem unnecessary. It might open the door for decisions which do not affect the national security. It is suggested that at least one of the other criteria would take care of these interests. **It is suggested that paragraph (iv) be deleted since it is, what is called in Constitutional terminology, "overbroad".**

Thirdly, also see clauses 14(3) (d), (e) and (f)

["Specific considerations with regard to the decision whether to classify state information may include whether the disclosure may (d) seriously and demonstrably impair relations between South Africa and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities in the Republic; (e) violate a statute, treaty or international agreement, including an agreement between the South African government and another government or international institution; (f) cause life threatening or other physical harm to a person or persons"]

when these interests relate to *national security* they would be addressed in the above definition. They need not be addressed separately. As they stand, they could also be used to classify information which has nothing to do with national security. They are

[2] See *De Reuck v Director of Public Prosecutions and Others* 2004(1) SA 404(CC) at para [17]-[19].
[3] See previous footnote.

overbroad and, with respect, unconstitutional. To make sure that they are not misused in classification, the words "impair the national security" should at least be added to the three subparagraphs.

The motivation for this argument is that overbroad legislation is regarded as unconstitutional and invalid. This appears clearly from a number of judgments of the Constitutional Court which are dealt with hereunder:

The Rule of Law, which is a foundational value of our Constitution, requires that legislation must be clear and accessible (which also means that it must be understandable). See *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paragraph [17] where **Chaskalson P** (as he then was) states that the exercise of public power is regulated by the Constitution: "One of the constitutional controls referred to is that flowing from the doctrine of legality."[4] A few quotes from Constitutional Court judgments, illustrate the importance of these norms well.

Deputy Chief Justice Moseneke requires objective rationality for *validity* of legislation granting powers and says the following in *Law Society of South Africa & Others v Transport* 2011 (1) SA 400(CC):

"[33] *A decision whether a legislative provision or scheme is rationally related to a given governmental object entails an objective enquiry. The test is objective because:*

Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.'

[34] It is by now well settled that, where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.

[35] It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. *Its use is restricted to the threshold question whether the measure the lawgiver has chosen is*

[4] Also see *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) and *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para [148] where it was held that the holder of public power must act in good faith and not misconstrue its powers.

properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad.

[36] Unlike many other written constitutions, our supreme law provides for rigorous judicial scrutiny of statutes which are challenged for the reason that they infringe fundamental rights. That scrutiny is accomplished, not by resorting to the rationality standard, but by means of a proportionality analysis. Our Constitution instructs that no law may limit a fundamental right, except if it is of general application and the limitation is reasonable and justifiable in an open and democratic society. *(Emphasis added in italics and/or bold)*

Justice Ackermann said the following in *De Lange v Smuts and Others* 1998(3) SA 785(CC):

[47] It must be borne in mind that we are here dealing with the *rule of law in relation to personal freedom*. In the sphere of personal freedom, particularly, the 1996 Constitution must be seen as a decisive rejection of and reaction against the severe erosion of the rule of law in relation to personal freedom in the apartheid era by a government which fits very closely Dicey's description, quoted in the preceding *paragraph, namely one 'based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of restraint'. The nature and extent of these inroads is detailed by Mathews, who reminds us that as recently as 1988 internal security law made provision for no less than six forms of what may be called administrative detention, three of which fell into the category of preventative detention and three into that of pre-trial detention.* The singular importance of the Judiciary as the protector of constitutional guarantees, seen also as a manifestation of the separation of powers doctrine, is well illustrated by the judgment in Minister of the Interior and Another v Harris and Others. (Emphasis added in italics)

In *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) **Justice O'Regan** states the following at paragraph [47]:

"It is an important principle of the rule of law that rules be stated in a clear and accessible *manner. It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application.* Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision." *(Emphasis added in italics)*

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) **Deputy President Langa** (as he then was) states at paragraph [24]:

"On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that

is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. *A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."(Addition in italics)*

Also compare what **Chaskalson P** (as he then was) states as to the **unacceptability of arbitrariness in legislation** in *S v Lawrence; S v Negal; S v Solberg 1*997(4) SA 1176 at para [33].

Also compare as to legislation which is not narrowly tailored, *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002(4) SA 294(CC) at par [51], where **Deputy Chief Justice Langa** (as he then was) required that the Code for Broadcasters should be "appropriately tailored and more narrowly focused", insofar as it prohibited broadcasts which were likely to harm relations between sections of the public. The Court limited the said phrase by way of notional severance to what is prohibited in section 16(2) of the Constitution. Also see the Court's observations as to certain other (vague) provisions of the Code in par [52] of the judgement.[5]

Vague language in the definition of "child pornography" in the Films and Publications Act 1996 (inserted [6] in the Act in 1999) was also read down substantially in *De Reuck v Director of Public Prosecutions and Others* 2004(1) SA 406(CC). In *Case v Minister of Safety & Security; Curtis v Minister of Safety & Security* 1996 (3) SA 617 (CC) the terms "indecent" and "obscene" in the Indecent or Obscene Photographic Matter Act 1967 were held to be unconstitutional as a result of their being too vague and open to subjective interpretation.

The terminology referred to above in the present issue of POSIB is likely to be subjected to the same finding, in spite of the offence created in clause 47 if a classifier *intentionally* classifies according to norms other than those provided for in the Act.

Constitutional legality cannot be attained by the existence of a criminal offence against intentional unjustified classification or whistle-blowing or even a provision which makes

[5] This vagueness was addressed in new Regulations published by ICASA in 2003 and again in 2009.Although the BCCSA added two provisions to the 2003 Code with the permission of ICASA, it ultimately accepted the new 2009 Code in 2010.

[6] And amended the 1996 Act's definition of child pornography into an extremely vague definition excluding context. This vagueness was successfully attacked in *De Reuck* in the sense that the definition was read down to almost what it initially was in the 1996 Act as formulated by the Task Group which advised the Minister of Home Affairs,

prosecution dependent on authorisation of a Director of Public Prosecutions.[7] If legal criteria are bad in law,[8] they cannot be cured by creating an offence, the possibility of whistle-blowing or permission by the Director of Public Prosecutions to prosecute.

The principle countering overbroad legislation is illustrated well by what **Mokgoro J** states in *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC):

[22] A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. When confronted with legislation which includes wording not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required, as discussed above, to declare the legislation unconstitutional and invalid. As was noted by the minority judgment in Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others:

'(t)here is a real danger that, in [reading down] an overbroad statute, we will simply substitute for the vice of overbreadth the equally fatal infirmity of vagueness'. [Footnote omitted.]

It is indeed an important principle of the rule of law, which is a foundational value of our Constitution, 26 that rules be articulated clearly and in a manner accessible to those governed by the rules. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.

[23] This court has recognised that the process of determining the constitutionality of legislation requires a resolution of the following inherent tension:

'On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read in conformity with the Constitution. Such an interpretation should not, however, be unduly strained.' [Footnote omitted.]

Whilst I do not doubt that the international relations of the Republic or the safety and life of an individual could be at risk within the realm of national security, the *Constitutional* question is whether the unqualified statement of life threatening or physical harm to a person or persons" and the interests mentioned in clause 14(3) (d) or (e) are justifiable within the national security of the State parameter. Following from this principle, the individual and international relations can, most certainly, be protected when national security is indeed

[7] See clause 51 of the PIB.
[8] Which means that they can be invalidated by the Constitutional Court,

placed at risk within the parameters set by the Bill. But then it is, with respect, unnecessary and Constitutionally overbroad to isolate these three interests or even mention them. The mere fact that, for example, airfields or the buildings which house the Houses of Parliament are not mentioned explicitly, would not exclude them from the national security protection when they are, indeed, in need of protection from a national security perspective and within the parameters set by the Bill – also taking into consideration the strict guidelines set out earlier in clause 14 of the Bill.

The argument should start from section 32 of the Constitution, which provides as follows:

Access to information

(1) Everyone has the right of 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.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

In this connection **Ngcobo J** (as he then was) stated the following in *Brümmer v Minister for Social Development and Others* 2009(6) SA 323(CC):

"The importance of this right . . . in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that ***transparency*** must be fostered by providing the public with timely, accessible and accurate information." (Emphasis added)

Of course, reasonable limitations, as set out in section 36 of the Constitution may be imposed by legislation. The legislation may, however, not go outside the protection which is reasonably necessary. In *Islamic Unity Convention v Independent Broadcasting Authority of South Africa* 2002(4) SA 294(CC) Langa **DCJ** (as he then was) stated as follows:

[51] There is no doubt that the inroads on the right to freedom of expression made by the prohibition on which the complaint is based are far too extensive and outweigh the factors considered by the Board as ameliorating their impact. As already stated, no grounds of justification have been advanced by the IBA and the Minister for

such a serious infraction of the right guaranteed by s 16(1) of the Constitution. It has also not been shown that the very real need to protect dignity, equality and the development of national unity could not be served adequately by the enactment of a provision which is appropriately tailored and more narrowly focused. I find therefore that the relevant portion of clause 2(a) impermissibly limits the right to freedom of expression and is accordingly unconstitutional."

In the matter before the Court a provision of the Broadcasting Code, which was in a supplement of the IBA Act, was held to be Constitutionally overbroad. The provision was that any material broadcast which was likely to harm relations between sections of the population, would be in contravention of the Code and thus lead to a sanction being imposed by the IBA against a broadcaster. The Court ruled that section 16(2) of the Constitution explicitly stated what, within this context, the limitation on freedom of speech would be. Section 16(2) provides as follows:

"(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.

From the above it is clear that the rule in the Broadcasting Code was overbroad. The same approach was followed in *Case and Curtis v Minister of Security* 1996(3) SA 617(CC) when the terms "indecent or obscene" were found not to have been narrowly tailored and interfered unreasonably with the privacy of a person, where these concepts were employed as criteria to prohibit possession of photographic materials. Also see *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) (2006 (1) SACR 78 where the general prohibition of nudity (also within theatrical context) was found to be overbroad and Constitutionally invalid.

In *De Reuck v Director of Public Prosecutions* 2004(1) SA 406(CC) an overbroad definition of child pornography was read down by the Court, which then even added an artistic defence, whilst the Act, in fact, excluded the artistic defence.

Even a cursory glance at Lexis Nexis and Jutastat will demonstrate under "overbroad" how regularly our Constitutional Court has had to decide on this subject. The basic message is that

where the criteria go wider that the protection, which is Constitutionally reasonable (see section 36 of the Constitution), the legislative prohibition which follows upon the application of the said overbroad criteria, would also be unconstitutional and invalid.

Let me, in closing on this point, quote two recent Constitutional Court judgments:

Mogoeng J stated the following in *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (6) SA 1 (CC):

[38] As was found in Coetzee v Government, albeit in a different context, the impugned provisions **are overbroad**. Although they are meant to facilitate the adjudication of the dispute in the country and the effective execution of a subsequent judgment debt against a debtor who has the means to pay, but refuses to do so, **they also strike at debtors, like the applicant, who cannot pay. This is what led this court in Coetzee v Government to find that a similar limitation cannot be justified as reasonable.**

[39] Even in the writings of the first Roman-Dutch authors, arrest tanquam suspectus de fuga was treated as an extraordinary remedy and the rules of court originally set a high monetary threshold for the granting of this remedy. A paltry amount of R40, which is the threshold for the deprivation of a person's liberty, probably the cost of two small chickens, highlights the disproportionality of the means and the purpose. Although the employers' claim is about R100 000, this does not detract from the fact that a debtor could potentially be deprived of freedom for being suspected of intending to flee the country to avoid the adjudication of a claim for R40.

[40] Freedom is an important right. The detention of any person without just cause is a severe and egregious limitation of that right. It is difficult to imagine the circumstances in which a law that allows detention without just cause could ever be justifiable." (**Emphasis in bold added**)

It is clear from the above judgment that the criteria went too wide. It is submitted that the same conclusion is likely to be reached in regard to the criteria under discussion in section 13 of the POSIB

On the other hand in *Thint (Pty) Ltd v NDPP; Zuma v NDPP* 2009 (1) SA 1 (CC) the search warrant was held not to have been authorised by overbroad legislation.

My advice is that clause 14(3) (d), (e) and (f) must be removed in the light of the above clear guidelines from the Constitutional Court. The existing criteria, if properly applied, will in any case cover security risks in connection with the said matters. To leave the criteria in clause 14, would, objectively, be open to misuse in cases which do not, indeed, touch upon the national security of the state. They stand to be invalidated by the Constitutional Court based on being overbroad unless the words "impair the national

security" is added to each of them.

[4] **Public Interest.** Much has been said in the media and elsewhere about the necessity for a public interest defence. By including the protection of the Protection of Disclosures Act in clause 43, a public interest defence for employees has been provided for.

The next question is whether disclosures by other persons, e.g. journalists, could also be accommodated.

Public interest has, except in the case of criminal defamation,[9] not been recognised as a defence in criminal law.

It should be mentioned that the Publications Act 1996 as well as the Broadcasting Code do include public interest as a factor when deciding whether a publication, film or broadcast amounts to hate speech. The Broadcasting Code and Press Code also allow for this defence in cases where privacy and defamation are concerned. However, the decisions taken under the Publications Act amount to administrative decisions which, if later transgressed, can only then lead to criminal sanctions. In the case of the Broadcasting Code and Press Code, one has to do with an administrative inquiry which could lead to administrative sanctions. Of course, the Films and Publications Act and the Broadcasting and Press Codes do not deal with national security, which is a much more important right than rights of personality or rights protecting groups against hate speech – the latter, in any case also being important but usually within a particular context and not on a national level.

Before attention is given to the possible addition of a general public interest defence in the Bill, other inherent defences should be considered.

First: It would be surprising if a Court would not permit an accused to attack the validity of the classification if it emerges that the classifier had contravened clause 47 of the Bill: in other words classified for ulterior purposes and thus committed an offence.

Second: There is authority that where a certificate has been issued (*in casu* a marriage certificate) fraudulently, it is invalid.[10] The same principle should apply; it is submitted, to prosecutions in terms of the Protection of Information Act where fraud or *mala fides* was

[9] *Hoho v S* 2009(1) SACR 276(CC).
[10] See *RAF v Mongalo; Nkabinde v RAF 2003(3) SA 119(SCA)*, which dealt with a marriage certificate which had been issued falsely and where the Court set it aside for this reason.

present during classification.

Third: When the above is considered, it could be argued that the public interest defence has already been accommodated to a certain extent. The United States and Canadian Courts would also not seem to leave much room for such a defence within this sphere. The recent judgment of the **United States Supreme Court** in *Holder, Attorney General, et al, v Humanitarian Law Project et al 561 US 2010* in October 2009 illustrates well how, even within that freedom of speech orientated society, a defence which is akin to public interest, was not accepted. It was held by the majority of the Court that the provision of materials to a terrorist organisation for the purpose of assisting that organisation to evolve into an organisation which would rather negotiate than undertake subversive activities is not protected by the freedom of speech and freedom of association aspects of such communication. In reaching its conclusion that certain powers given to the Police were overbroad and invalid, the (**Canadian**) Ontario Supreme Court of Justice [11] considered whether there was a common law public interest defence which could be used by Canadian courts to reasonably limit the scope of the offence of publication of secret information. The Court concluded that "the present availability in Canada of a general public interest defence for these leakage offences is dubious and speculative."

Fourth: the public interest defence has had a limited application by our courts in the area of privacy[12] and is also recognised as a defence in defamation cases where a statement was also true.

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[11] *O'Neill v. Canada (Attorney General)* (2006), 82 O.R. (3d) 241, 272 D.L.R. (4th) 193, 213 C.C.C. (3d) 389.

[12] See *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) Corbett CJ said in delivering the majority judgment (at 464C-D): "(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known . . .(2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest..." Quoted with approval by Hoexter JA in *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A) at 779 and Hefer JA in *National Media Ltd v Bogoshi & Others 1998(4) SA 1196(SCA) at 1212* where reference is made to Asser *Handleiding tot de Beoefening van het Needelands Burgerlijk Recht (9th Ed vol III at 224 para 238:* "Een belangrijke grond ter rechtvaardiging van de uitlatingen, waarop in zaken van aantasting van eer en goede naam veelvuldig een beroep wordt gedaan, is het algemeen belang. . . . In de praktijk wordt zij vooral ingeroepen ter zake van uitlatingen die via de pers en radio en televisie worden verspreid: het algemeen belang is hier uiteraard gelegen in de, door Grondwet en verdragen gewaarborgde, vrijheid van meningsuiting die de pers in staat stelt al dan niet *vermeende misstanden aan de kaak te stellen*. Met name - doch niet alléén - in deze gevallen berust het oordeel omtrent de onrechtmatigheid op een afweging van belangen, waarvan de uitkomst afhankelijk is van alle omstandigheden van het geval."(italics added)

Fifth: the public interest argument is expressly available when an application for declassification is made in terms of clause 19 of the Bill: **"the public interest in the disclosure of the state information clearly outweighs the harm that will arise from the disclosure".** A denial of declassification may be taken on appeal to a Court in terms of clause 32.

In *De Reuck v Director of Public Prosecutions WLD and Others* 2004(1) SA 406(CC) De Reuck was not permitted to be in possession of child pornography for purposes of research to make a film on the abuse of the internet for the spreading of child pornography – in effect a public interest defence. It was held that the Films and Publications Act in section 22 provided for a mechanism according to which he could obtain permission to be in possession for *bona fide* purposes. It is thus not unlikely that the Constitutional Court might follow the same route with the question whether the public interest defence should apply to a prosecution in terms of the Protection of State Information Act. A declassification should be sought, the Court might argue within the thinking of *De Reuck*.

It could be argued that in spite of all the defences set out above, the public interest defence could still be of overriding value for the common good of South Africa. But then there will be a duty on the accused to lead evidence that in spite of the declassification procedure (supported by the *De Reuck* case) it was absolutely necessary to inform the public on grounds of necessity (a common law defence). In other words, there was no other reasonable way out but to publish. This would also mean that the value of the publication must be of a substantial greater importance than the national security which could be compromised by the publication. **It is submitted that within this limited sphere the public interest defence will be valuable to include in the Bill. Alternatively, it might be argued convincingly that the defence of necessity need not be included explicitly in the Bill, since a common law defence, such as necessity, will always be a defence, whether it is mentioned in the Bill or not.**[13]

[6] Lastly: A question which should be addressed is the following: if the material is classified by an organ of state and then published in conflict with that classification, but that material had not reached the Review Panel for review, **whether a person could be prosecuted**

[13] See James Grant "Public interest defence and other defences in the Protection of Information Bill" (unpublished draft for an article, 2012) who argues that the defence of necessity, as well as other common law defences, will in any case be available to an accused.

without that review having taken place. Since the classification will formally be valid, such prosecution would seem to be in order. This would, however, be highly unsatisfactory. A solution would be for the Court to refer the decision to the Review Panel for review before the trial may proceed. If the classification is set aside, the classification would simply fall away and, thereby, also the prosecution. **It is submitted that this possibility be provided for in the offence section.**

15 February 2012

As briefed by Doron Joffe, Director of Edward Nathan Sonnenbergs, Johannesburg, acting for the South African Jewish Board of Deputies