

CONGRESS OF THE PEOPLE

National Council of Provinces

31 August 2012

**PROTECTION OF STATE INFORMATION BILL**

Dennis Bloem, MP

COPE is gratified that the Ad Hoc Committee on the Protection of State Information Bill has striven to take account of the many well argued submissions made by citizens and patriots to achieve a result that keeps the balances right necessary in a human rights culture and which will allow the Bill to be in harmony with our Constitution.

Over and above the many amendments that were considered and taken on board, COPE was further gratified that the ANC component of the Ad Hoc Committee was proposing further amendments. COPE wants to reemphasise that we wholeheartedly support the proposed amendments by the ANC in our informal meeting held on 14 August 2012.

The document presented by the DA, titled "Proposed Amendments to the Protection of State information Bill" wherein the party states it concerns on their amendments that they had initially proposed need further discussion and consideration.

Amendments proposed by the ANC are as follows:

1. COPE accepts the argument of the ANC that the removal of "ought reasonably to have known" as used in sections 36(1)(a), 36(2)(a) and 36(3)(a) will reduce opposition to the Bill. We have always held this to be so and will therefore fully support the removal of that onus on the individual.
2. COPE fully concurs with the ANC's motivation that the imposition of minimum sentence does not "add much to the Bill because the courts discretion cannot be ousted". We are in full support of this recommendation.

3. COPE regards the ANC's stand point that delegation of power by the minister to other ministers would complicate the issue of accountability and therefore encourages the ANC to go along with the recommendation of the LRC to revisit the right of the Minister to delegate some of his powers to other Ministers. The solution that the ANC is offering has merit and must be referred to the state law advisers to act upon and provide the committee with an amendment.
4. COPE agrees with the ANC's proposal that the Bill excludes Municipalities from provisions of this Bill.
5. COPE fully supports the ANC's proposal to reinstate old clause 13 regarding authority to classify state information as such a move will "prevent SAPS Station Commissioners and SANDF" from "classifying to conceal the abuse of power at their stations". COPE supports that a new clause should reflect this and sub-clauses 6-9 should be deleted. The State Law Adviser should be requested to formulate this amendment.
6. COPE agrees with keeping the wording agreed to by NCOP in respect of clause 1(4) as the reference is to an act of Parliament and Provincial legislation cannot be applicable as a Provincial legislature is not Parliament.
7. COPE agrees with the amendments to Clause 43 as this will allow protection for whistle blowers to remain intact and will allow for revelations of fraudulent, corrupt and criminal activities, whether by internal processes or otherwise, to be exposed without any consequences. After all no legislation of Parliament can ever have the effect of shielding crooks, fraudsters and rogues.

The above proposals by the ANC go a long way in accommodating inputs from COPE, the DA, other parties and the public. According to us one area that still needs to be accommodated is:

1. The need to include a Public Defence Clause is still imperative because as the LRC submitted, where public interest "outweighs the harm to the protected interests" it is vital for our society, where corruption is rampant,

to take away protection from those who prey on the state and afford an extra measure of security to those who reveal this and the revelation, on balance, works to the advantage of the people and therefore of the state. So long as the harm to protected interests is less than the good it achieves for society, a parliament of the people must be inclined to give the advantage to the patriotic activist.

2. Therefore COPE still believes that its proposed amendment must receive serious consideration.
3. COPE still proposes that Clause 49 must be removed and in its place COPE's proposed amendment be inserted, namely The Public Interest and Public Domain Defences.

#### **COPE proposal:**

##### **Insert NEW clause 49: The public interest and public domain defences**

49. (1) No person is guilty of an offence under sections 42, 43 and 44 if the person establishes that he or she acted in the public interest.
- (2) A person acts in the public interest if the person has reason to believe that the classified information concerned shows one or more of the following:
- (a) that a criminal offence or breach of the law has been, is being or is about to be committed;
  - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
  - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
  - (d) that the health or safety of individual has been, is being or is likely to be endangered;
  - (e) that the environment has been, is being or is likely to be damaged;
  - (f) that a public safety risk exists;
  - (g) that gross incompetence, mismanagement or impropriety on the part of any person has occurred;

- (h) that an unlawful act, inefficiency or administrative error is being promoted;
- (i) that an undue advantage is being given to anyone in a competitive bidding process; and
- (j) that the public is being misled by an action or statement of another person

(3) No person is guilty of an offence under sections 42, 43 and 44 if the person establishes that the information, or substantially the same information, disclosed was in the public domain at the time of the disclosure.

COPE wants to reiterate its commitment with the speedy finalisation of this Bill and hope and believe that any differences or obstacles can be addressed or removed by dialogue amongst the different Political Parties.