



LAW SOCIETY
OF SOUTH AFRICA

PRESS RELEASE

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**LAW SOCIETY CONCERNED AT THREAT TO MEDIA FREEDOM AND
RIGHT TO ACCESS TO INFORMATION**

The Law Society of South Africa (LSSA) has noted with concern two recent developments which threaten to undermine press freedom, which is a fundamental pillar of democracy.

The Protection of Information Bill as well as the proposed establishment of a Media Appeals Tribunal each has the potential seriously to erode transparency, accountability by public officials, the public's right of access to information and media freedom.

The Bill suffers from several defects which render it constitutionally suspect and which need further consideration:

- First, the Bill includes several impermissibly broad and vague definitions, such as the definition of 'national interest'. This definition is so broad that it could potentially cover every aspect of a citizen's life.
- Secondly, the thresholds for classification which are set out in the Bill are unacceptably low and would allow for information to be classified on the basis of harm that is hypothetical and speculative. For example, a document could be classified as 'Classified' if it 'may be harmful' to the 'national interest'.
- Thirdly, the Bill permits classification of commercial information held by the State, including commercial information that belongs to private companies. This option opens the way for possible concealment of fraud and other impropriety in relation to commercial transactions.
- Fourthly, the Bill does not provide for an independent oversight mechanism to review classification decisions and thus leaves the final decisions in this regard in the hands of State officials who may well have an interest in continuing to conceal certain information.

The Bill will also legislate a number of criminal offences, such as accessing, disclosing and continuing to possess classified information; communicating classified information which directly or indirectly benefits another state or directly or indirectly prejudices the Republic; and publishing a 'state security matter', being any matter that is dealt with by or relates to the functions of the various state security and intelligence agencies. The maximum penalties for these offences range from 5 to 25 years in jail.

'No public interest indemnity is proposed for these criminal offences. The result is that the offences will inevitably censor the publication of matters of public interest by the media and others,' say LSSA Co-Chairpersons Max Boqwana and Peter Horn.

They add: 'Whereas the LSSA recognises the legitimate need for every government to take steps to protect information that is crucial for national security, such legislation should be narrowly tailored and should not be drafted in a manner that fails to take into account the important role played in a democracy by the media, and indeed every citizen who seeks to expose corruption, nepotism, hypocrisy and maladministration.'

The LSSA welcomes the recent assurance by Minister of Justice and Constitutional Development, Jeff Radebe that the Bill will be considered in a democratic manner and that the input given by civil society will be given due consideration. 'We trust that appropriate changes will be effected to ensure that the final version of the Bill is constitutionally compliant, and addresses the fatal constitutional defects that we have identified above, say Mr Boqwana and Mr Horn.

A further threat to media freedom is the proposal for the establishment of a Media Appeals Tribunal.

The LSSA notes with concern that the Discussion Document on Media Transformation, Ownership and Diversity ('the Discussion Document') recently issued by the ruling party and which is due to be discussed at the ANC National General Council in September 2010, once again highlights the need for a Media Appeals Tribunal. The Discussion Document points out that '[t]he media is a contested terrain and therefore not neutral, but reflects the ideological battles and power relations based on race, class and gender in our society'. The LSSA accepts that the media is indeed a contested terrain and notes that the function of the media in a democratic society is not to reflect the ideologies, values and principles of the government of the day, but to reflect the various perspectives that exist in a pluralist society. Accordingly, the LSSA welcomes the call for further diversity and competition in the media which will facilitate the expression of a broader range of views from all sectors of South African society.

The LSSA also accepts that the media has a duty to report fairly, objectively and responsibly. This is so in view of the powerful position the media occupies in society.

However, the LSSA is greatly concerned about the suggestion that the media requires external regulation. What appears to be envisaged is a government-appointed 'independent' tribunal which would serve as a forum for appealing decisions made by the Press Ombudsman, and which would be accountable to Parliament. The fact that the Tribunal would be accountable to Parliament is cold comfort – ultimately what this will amount to is government oversight over the media, which cannot be countenanced in a democratic state. It appears that the purpose of the Media Appeals Tribunal is essentially to remove self-regulation, which has been criticised in the Discussion Document on the basis that the appointment of a former journalist as the Press Ombudsman automatically leads to bias in favour of the media. This criticism is not borne out by the jurisprudence that has emanated from the Press Ombudsman. The Ombudsman has issued a number of highly critical findings against the media and ordered the publication of several prominent apologies, including front page apologies. The right of individuals to approach the court in cases of defamation is entrenched and the discussion should actually be how best to utilise this, including accessing lawyers for such acts.

Of further concern is the call for journalists to be criminally sanctioned or fined for publishing inaccurate stories. Such a step would entirely negate the right to freedom of the media and place South Africa amongst the ranks of several autocratic states around the world where criminal sanctions are used to silence the media. 'The LSSA is of the view that the concerns about lack of accountability among certain sections of the media should be addressed by an improvement on the current system of self-regulation together with strengthening of the Ombudsman's powers,' say Mr Boqwana and Mr Horn.

- The LSSA plans to host a public discussion to debate these issues.

ISSUED ON BEHALF OF THE CO-CHAIRPERSON OF THE LAW SOCIETY OF SOUTH AFRICA, MAX BOQWANA AND PETER HORN

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Editor's note:

The Law Society of South Africa brings together its six constituent members – the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces, the Black Lawyers Association and the National Association of Democratic Lawyers – in representing South Africa's 20 000 attorneys and 5 000 candidate attorneys.