COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE PROTECTION OF STATE INFORMATION BILL (B 6B - 2010)

The following comments flow from a review of the Protection of State Information Bill (B 6B-2010) and the Memorandum on the objects of the Bill.

The comments are intended as preliminary comments on the Bill, rather than a substantive discussion of such issues. The comments are general in nature and do not seek to deal with specific instances / wording within the Bill.

INTRODUCTION

The Law Society of South Africa (LSSA) issued a press release on 27 November 2011 in which its Council unanimously stated it was heartened by the announcement that the National Council of Provinces (the NCOP) would set up an *ad hoc* committee to deal with the Protection of State Information Bill. It is unfortunate that the Bill was passed in the National Assembly.

ESSENTIAL CONTEXT OF OUR DEMOCRACY

Since 27 April 1994 South Africa has been a democratic society, initially under an 'Interim Constitution' and since 4 February 1997 the Constitution of the Republic of South Africa, 1996 (the Constitution).

South Africa is a vibrant and strong democracy that is growing in respect and strength in the eyes of the world. The ruling party has to contend with strong and independent opposition parties. A free and independent press underpins this democracy. South Africa is not a one party state.[1]

The LSSA acknowledges the leadership of the ANC in government. The LSSA also points out that it is not unpatriotic and that it is a democratic right for any person to hold views critical of the government and, in the current context, of the Protection of State Information Bill.

It is precisely in the context of our democratic society that we need to sketch a sober analysis of the issues relating to the Protection of State Information Bill (the Bill).

KEY ISSUES THAT REQUIRE CLARIFICATION

1. It needs to be clarified which draft Bill was considered and passed as the 'final version' in Parliament on 22 November 2011. The LSSA notes with concern the newspaper reports

[1] Human Rights Watch World Report 2012, page 165 refers to 'one-party dominance'.

in which Ben Turok, an ANC MP, explained that at the time of the vote he had not yet read the 'final version'. [2]

Jay Naidoo,[3] in referring to the consensus to limit secrecy to strictly-defined national security matters, points out that whistleblowers have the narrowest protection and ordinary citizens and journalists none. Naidoo then adds: 'Although the minimum mandatory prison sentences for these offences has (*sic*) been removed, the maximum prison sentences are extended to up to 25 years.' With regard to Chapter 11 section 37 Mr Naidoo is correct. However the minimum mandatory sentences remain in section 36. So are we all singing from the same hymn sheet?

2. It also needs to be clarified whether Parliament has grasped the implications and the significance of Chapter 10, Implementation and Monitoring of the Act. Section 35 makes the Agency responsible for monitoring all organs of state for compliance. The Agency is defined as the State Security Agency and includes the National Intelligence Agency, the South African Secret Service, the Electronic Communications Security (Pty) Ltd (COMSEC) and the South African National Academy for Intelligence.

The Act, if assented to by the President in its current form, would centralise control of its implementation in the hands of the Minister responsible for intelligence services. While the classification of information is devolved to the heads of organs of state, defined to include municipal managers, CEOs of public bodies and owners of national key points, final declassification of information requires consultation with the Agency under section 16 (5). This means functionaries would be in complete control of the core features of the Act, not Parliament.[4]

The Act, if assented to by the President in its current form, appears not to be restricted to the intelligence services. Section 7 requires the head of each organ of state, 'where applicable', to establish policies, directives and categories for classifying, downgrading and declassifying state information and such policies *et cetera* must not be inconsistent with the national information security standards prescribed by the Minister for intelligence services under section 54 (4).

So what does the phrase 'where applicable' mean? Does the Act permit the Minister for intelligence services effective control of state information for the entire administration? If so, the LSSA believes that notwithstanding the necessity to protect state information, the current Bill fails on that score.

---

[2] *The Times*: So many questions Q & A: Professor Ben Turok by Chris Barron: 29 November 2011 online at timeslive.co.za.

[3] *Daily Maverick*: Jay Naidoo: The secrecy bill: Welcome back, Magnus Malan & Adriaan Vlok, 22 November 2011 at dailymaverick/opinionista.

[4] See page 3 of the Comments by the LSSA to the Press Council on 21 October 2010.

The current Bill should be strictly and clearly limited to intelligence matters only and leave access to information for the rest of the administration under the auspices of the Promotion of Access to Information Act 2 of 2000 (PAIA) and the Protected Disclosures Act 26 of 2000.

The Promotion of Access to Information Act provides the necessary legal framework to give effect to the right of access to information that is set out in Section 32 of the Constitution. The Protection of State Information Bill, not unlike PAIA, imposes a number of obligations on organs of state. These obligations are however directed largely to the classification and management of information systems in what is deemed to be in the interests of national security. It totally ignores what is deemed "in the public interest".

We concede significant advances in the Bill from its predecessor. However, broad definitions and an unfettered concentration of power within organs of state strengthen the presumption of secrecy over one of openness and accountability. There is a need for a statutory civil society organization with teeth to monitor developments vis-à-vis the Bill.

The reason is that this Bill has a direct contradictory impact on PAIA which, we believe, is one of the most progressive pieces of post-apartheid legislation enacted to increase information sharing and the heightening of public participation, transparency and accountability. While legislation like PAIA has been slow to take root, new legislation like the Protection of State Information Bill could effectively negate gains made by reinforcing a culture of conservatism and secrecy within the public service to the detriment of our nascent democracy where classification, as it is patent from the provisions of the Bill, can too easily be permitted to become the reason for non disclosure of information. Over and above its negative impact on access to information rights, the Bill will have the effect of eroding and severely curtailing the right to freedom of expression, a right which is emphatically recognized by our courts as being central to our democracy.

3. It should be clarified whether there is any reasonable opportunity to include both a public interest defence and a public domain defence. The Freedom of Information Act in the United States of America, passed in 1966, applies only to the executive branch of government. It does, however, contain reference to the public interest.[5] The Freedom of Information Act, 1982 of Australia also allows public interest exemptions in Part III, section 11B. On 27 May 2011 President Goodluck Jonathan of Nigeria signed the Freedom of Information Bill into law. Previously all state information had been classified as top secret. Finally, the Freedom of Information Act, 1997 of Ireland requires the head of a public body, where a request is refused, to disclose 'the findings on any material issues relevant to the

[5] Freedom of Information Act, 5 U.S.C. 552 at (4)(a)(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

> decision and particulars of any matter relating to the public interest taken into consideration for the purposes of the decision'.[6]
>
> Frankly, the LSSA is of the view that, absent the defences of public interest and public domain, especially when taking section 15 into account, the Protection of State Information Bill does not pass constitutional muster and should founder in the Constitutional Court.[7]

OTHER ISSUES THAT REQUIRE CONSIDERATION

The LSSA is concerned about the complex route through the Bill to gain access to classified information and the attendant costs and delays involved which would impinge on access to justice.

The LSSA is also concerned about the harshness of the penalties aimed at the unlawful possession of classified information. The harshness does not seem appropriate when one considers a more realistic punishment of a maximum of two years imprisonment in section 48 which applies to heads of organs of state who wilfully or grossly negligently fail to comply with the Act.

CONCLUSION

The LSSA believes that, as it stands, with the absence of the principle of what is deemed to be in the public interest, the Bill will not pass constitutional muster.

We suggest that the Bill be amended to

- include both a public interest and a public domain defence;
- limit the application of the Bill unequivocally to intelligence matters only;
- reduce the maximum sentences; and
- eliminate all minimum sentences.

[6] The full text of the Freedom of Information Act, 1997 can be downloaded at foi.gov.ie/legislation. The Act generally permits access to information unless granting the requester access would not be in the public interest.

[7] It is of course still possible that when the Bill is sent to the President for his assent, he may decide to grant it, refer it back to Parliament, and ultimately in terms of section 84(2) of the Constitution, 1996, refer it to the Constitutional Court for consideration. See for example, *Ex parte President of the RSA: in re Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC) and *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature* (CCT 94/10) 2011 ZACC 25.