SUBMISSION TO THE SPECIAL COMMITTEE OF THE NATIONAL COUNCIL OF PROVINCES REVIEWING THE PROTECTION OF STATE INFORMATION BILL (POSIB)

Tuesday, 14 February 2012. Mamelodi, Pretoria

Presented by NPC chairperson, Yusuf Abramjee

The National Press Club (NPC/Press Club), formerly the Pretoria Press Club, was established in 1975.

The NPC currently has over 400 members – and they include editors, journalists, communication practioners from both the private and the public sector and students.

The Press Club not only brings the media and the PR/Communications/Marketing fraternities together to socialize and network, but we also take a leading role in issues affecting the industry. We host newsmakers regularly. The NPC has become synonomous with the Newsmaker of the Year award which we host annually. Over the years, we have commissioned independent research to look at various issues affecting the media. We have also taken a leading role in engaging stakeholders on issues such as media freedom, freedom of expression and operation challenges such as the relationship with government.

I am making this submission as chairperson of the NPC. I need to also point out that I am head of news and current affairs for Primedia Broadcasting, Head of the anonymous tip-off service- Crime Line and a member of the South African National Editors' Forum (SANEF). The Press Club's submission is separate from possible submissions that some or all of the entities have or may still make to your committee.

The NPC wishes to place on record that we did not make submissions to the National Assembly when the POSIB was first tabled for discussion and debate because the submissions of SANEF, the Press Council of South Africa and the Right2Know campaign were in line with our views.

However, we are here today to make a submission and to raise our concerns directly because of the on-going widespread opposition to certain sections of the POSIB. We thank the NCOP for engaging communities. We believe the National Assembly's original

consultation process was flawed…It was not well advertised. In some instances Parliamentarians arrived late or did not pitch at all.

If one reads the Protection of State Information Bill (POSIB), much of it is technical and legal. This is one of the reasons we believe that ordinary citizens are not fully aware of the possible consequences that will arise if the Bill becomes law. Many fail to realise what can and will happen to ordinary citizens if the POSIB becomes law.

There is a perception that the proposed piece of legislation will affect us in the media only. That's not true. This Bill has major and serious consequences for civil society at large. We will point out specifics shortly.

Allow us to make some general points first:

-The reality is that there is still much dissatisfaction and even anger over the POSIB.

-Many politicians including former cabinet ministers, business leaders, media owners, editors, journalists and ordinary South Africans have come out against the proposed, what some term, "secrecy law."

-I have been on many platforms talking about the Bill over the past twelve months.

-In all my engagements, it is clear that the majority of people are opposed to some sections of the POSIB.

-I have made it clear and I repeat it today: Every government needs secrets. But, the proposed clauses that clearly infringe on the constitutional rights of ordinary citizens and those of the media have serious implications for all of us.

-Our Constitution guarantees freedom of expression which includes freedom of speech and freedom of the media as well as the right of access to information. But, there are some clauses in the POSIB which are in clear conflict with the Constitution.

-Hundreds of NGO's, tens of thousands of ordinary citizens and the likes of Archbishop Desmond Tutu and other religious leaders, Cosatu, business leaders are among those who have raised their voices. We need to ask: Can they be all wrong?

-We will continue to urge South Africans to stand up for what's right.

-The reality is that if the POSIB, in its current form, becomes law, we are going to see many black blocks and empty spaces in newspapers and hear bleeps on radio and television. Is this what South Africa wants? Surely not!

The NPC needs to explain why we launched "Black Tuesday" last year- the day the POSIB went before the National Assembly for a vote on Tuesday 22 November 2011.

The term “Black Wednesday” is synonymous with the apartheid government. This is when the National Party regime banned some newspapers and arrested outspoken editors.

-22 November 2011 would go down in history as a black day for our country - “Black Tuesday” – because it was the first step in our free and democratic South Africa where our Constitutional guarantees of free speech, freedom of expression and media freedom were threatened. MP’s from the ruling party voted in favour of the POSIB.

The ANC failed to allow their parliamentarians to vote on the POSIB in line with their beliefs and on their conscious. Is this a fair democratic process? It’s no secret that some MP’s from the ruling party stayed away from the House on the day because they are also unhappy with certain clauses.

We need to acknowledge that the parliamentary committee had in fact made a number of concessions to the original proposed law. Clearly, it does not go far enough.

We cannot sit back and allow unconstitutional laws to be passed.

For State Security Minister, Siyabonga Cwele, to suggest that anti POIB campaigners are driven by “foreign spies” is disingenuous.

We cannot have censorship of any form in a democratic country. Public interest must be considered.

The bulldozing of unconstitutional laws is simply unacceptable.

It was because of these and other arguments that the NPC called on the nation to wear black – as we do today - to show our opposition to certain sections of the bill.

The ANC in Parliament said at the time the likening the POSIB to “Black Wednesday” is “nothing short of reckless hyperbole aimed at peddling misinformation and distorting history.”

But, they seem to forget that this proposed law has many similarities to the tactics used by the apartheid government.

Let’s be honest, had it not been for the media, a lot of the corruption would not have been exposed and the looting would have continued.

We call for a further review of the draft Bill because we believe it is not in line with our Constitution.

We acknowledge that the term “national interest” has been changed to “national security.” However, the definition here is very wide and it is open to abuse.

The provisions for review by an “independent committee” are not specific. There are no time frames which are stipulated .The declassification process is also very broad and will result in long delays.

The Bill in its current form is clearly open to abuse. If anyone has a vendetta against an editor or journalist, for example, they can simply get classified documents to them, tip-off authorities, resulting in raids, arrests and long jail terms.

On the issue of classification of documents, the Bill provides for wide-ranging powers. Officials, including junior civil servants, and members of security services are authorized to classify documents with the authority of heads of department. This is in conflict with a clause that stipulates that it needs to be classified on a senior level.

Of concern is the provision that stipulates that being in possession of classified documents “knowingly or unknowingly” is a crime. While the adage that ‘ignorance of the law is no excuse” holds true, the NPC believes that this stipulation is too broad.

The POSIB makes provision for jail terms of up to 25 years. We submit this is excessive.

Whistle-blowers are going to be scared to lift the lid on corruption fearing long jail terms.

Much has been said about the lack of a public interest defence clause. To suggest that other countries don’t have it is not accurate. They don’t need it because of the various laws they have in place. We appeal to the NCOP to consider including a public interest clause in line with the spirit of our Constitution.

We wish to place on record the argument for a public interest defence clause as submitted in detail in a submission by Print Media South Africa (PMSA) in June last year to the Ad-Hoc Committee of Parliament dealing with the POSIB.

The need for a public interest defence

3.1.4 In probably the most significant omission from the perspective of media freedom and the constitutional imperative of holding the government to account, the Bill does not provide for an explicit public interest defence to any of the offences we have outlined (nor is such a defence implicit). PMSA submits that the case for a public interest defence is overwhelming. Such a defence would allow a journalist who publishes classified information to argue that the disclosure was justified, for instance because it revealed evidence of significant incompetence, criminality, wrongdoing, abuse of authority or hypocrisy on the part of government officials. It is noteworthy that in the **Explanatory Note on the 2008 Bill** which was issued by the Ministry of Intelligence on 13 June 2008, it was stated that "**the Minister has no objection to the inclusion of a public interest exemption**".[28] It is unfortunate that this salutary approach has not filtered through to the Bill.

3.1.5 We submit that public interest is already a defence in a number of contexts in our law that are analogous:

3.1.5.1 **Section 46 of PAIA** governs the mandatory disclosure of information in the public interest. It states as follows:

[28] At para 120.7.

Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in… section 41(1)(*a*) or (*b*), if:

(*a*)the disclosure of the record would reveal evidence of —

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(*b*) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

3.1.5.2 The effect of this provision of PAIA is that, inter alia, section 41 (the provision that regulates the disclosure of records concerning defence, security and international relation) may be overridden if it is in the public interest. We contend that, if documents can be released under PAIA in the public interest despite the threat that the contents pose to national security, it would be anomalous and inequitable in parallel circumstances to criminalise the access, disclosure and continued possession of classified documents that are significant for the public.[29]

3.1.5.3 The criminal offence of publishing hate speech, contained in **section 29(1) of the Films and Publications Act of 1996,** also contains a public interest override. Section 29(4) provides that the offence of knowingly distributing a publication which advocates hatred based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm, does not apply to a publication which "**amounts to a bona fide discussion, argument or opinion on a matter of public interest**". This has the effect that in respect of categories of speech which are regarded as so antithetical to our democracy that they do not

[29] The philosophy of the Protected Disclosures Act 26 of 2000 is also apposite in this context. The Act allows employees to make certain disclosures about their employers which are in the public interest (e.g. that a criminal offence has been committed or that a person has failed to comply with his legal obligations: section 1 of the Act), without suffering reprisals, even, in some circumstances, where disclosure is made to the public at large (section 9).

even receive constitutional protection (such as hate speech), there is nevertheless a statutory public interest override.

3.1.5.4 That a publication is in the public interest already functions as a defence to an infringement of privacy at common law, even in circumstances where the media has obtained the information illegally. In the *locus classicus* of **Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another**,[30] the Appellate

Division held as follows:

It might well be that, if in the case of information obtained by means of an unlawful intrusion the nature of the information were such that there were overriding grounds in favour of the public being informed thereof, the Court would conclude that publication of the information should be permitted, despite its source or the manner in which it was obtained.[31]

3.1.5.5 And in **Tshabalala-Msimang v the Sunday Times**,[32] the High Court held as follows:

This is a case where the need for the truth, is in fact overwhelming… The overwhelming public interest points in the direction of informing the public about the contents incorporated in the medical records in relation to the first applicant, albeit that the medical records may have been unlawfully obtained.[33]

3.1.6 It is submitted that the decision of Yacoob J in the **Masetlha** case is compelling in this context. The case was not concerned with criminal liability on the part of the media for publishing classified documents, but rather whether such documents should be made public. The decision of Yacoob J nevertheless illustrates the potency of a public interest-based analysis in national security cases:

On the other hand, the circumstances in which an intelligence agency came to improperly and unlawfully infringe upon the privacy of an innocent citizen are not

[30] 1993 (2) SA 451 (A).

[31] At 463. See also **MEC for Health, Mpumulanga v M-Net** 2002 (6) SA 714 (T) at para 27.

[32] 2008 (6) SA 102 (W).

[33] At para 50. English breach of confidence law also recognises a public interest defence: see eg **Attorney-General v Guardian Newspapers (No 2)** ("**the Spycatcher case**") [1988] 2 All ER 545) at 659 (the public interest in maintaining government confidentiality must be weighed against the public interest of disclosure). A similar principle applies in Australian law: see **The Commonwealth of Australia v John Fairfax & Sons Ltd** 147 CLR 39 (1980) at 52.

merely matters of public curiosity. They would be issues of immense public interest. The degree of public interest is an important factor to be put into the balance and would, in my view, not be of insignificant weight if the interest is one that must be fulfilled…[34]

The public importance of and interest in these events can neither be gainsaid nor over-emphasised. A member of the public was unlawfully and improperly harassed and he and his family suffered an egregious and inexcusable invasion of privacy. All this consequent upon secret government action. The public is entitled to know all except that which cannot be revealed on account of important national security considerations. I would put the strong public interest to know as well as the extent to which the material is already in the public domain on the one side of the scale and the appropriate weight to be attached to the government objection on the other side of the scale in order to determine where the balance falls in the interests of justice enquiry. … [35]

The starting point of the enquiry into whether the document should be released is that it was of great public importance and justified considerable public interest. [36]

3.1.7 We note that the positions in the United Kingdom and the United

States of America have been trenchantly criticised by commentators because of the failure in those jurisdictions to legislate for a public interest defence in the context of disclosing secret government information.[37] As one commentator has said of the position under the OSA in the United Kingdom:

The absence of a public interest defence for the media will contribute to a climate of caution and inhibit legitimate discussion for fear of breaching the [OSA].[38]

3.1.8 The House of Lords (now England's Supreme Court) has considered whether the OSA is defective in not providing a public interest

[34] At para 88.

[35] At para 103.

[36] At para 121. Although Yacoob J's decision was a minority decision, his analysis illustrates for present purposes the importance of ensuring that a public interest defence to the disclosure of classified information should be crafted, lest the media is chilled from disclosing matters of immense public significance for fear of the severe penalties that may ensue.

[37] See e.g. D Feldman *Civil Liberties and Human Rights in England and Wales* (2nd edn, 2002) at 894-5; H Fenwick and G Phillipson *Media Freedom under the Human Rights Act* (2006) at 947-8; Barendt (above) at 196; S Sandler 'National Security versus Free Speech' (1989) 15 *Brooklyn Journal of International Law* 711 at 751.

[38] S Palmer 'Tightening Secrecy Law: The Official Secrets Act 1989" 1990 Public Law 243 at 255.

defence for a former member of the security services who had published information that he contended showed that the intelligence services were being abused. Although the House of Lords held that such a defence was not required as a matter of freedom of expression,[39] its context is limited to a disclosure by a member of the security services, which is treated differently under the OSA to disclosures by third parties. And the comments of Lord Hope are, we submit, encouraging for the development of a public interest defence in the latter context:

Institutions tend to protect their own and to resist criticism from wherever it may come. Where this occurs it may require the injection of a breath of fresh air from outside before institutional defects are recognised and rectified.[40]

3.1.9 We note that Canada has introduced a public interest defence, albeit in the context of disclosures by members of the security services.

Section 15 of the Security of Information Act, 1985 states that:

(1) No person is guilty of an offence under section 13 or 14 [the disclosure sections] if the person establishes that he or she acted in the public interest.

(2) Subject to subsection (4), a person acts in the public interest if:

(*a*) the person acts for the purpose of disclosing an offence under an Act of Parliament that he or she reasonably believes has been, is being or is about to be committed by another person in the purported performance of that person's duties and functions for, or on behalf of, the Government of Canada; and

(*b*) the public interest in the disclosure outweighs the public interest in non-disclosure.

(3) In deciding whether the public interest in the disclosure outweighs the public interest in non-disclosure, a judge or court must consider:

(a) whether the extent of the disclosure is no more than is reasonably necessary to disclose the alleged offence or prevent the commission or continuation of the alleged offence, as the case may be;
(b) the seriousness of the alleged offence;
(*c*) whether the person resorted to other reasonably accessible alternatives before making the disclosure
[39] **R v Shayler** [2002] 2 WLR 754. The House reached this conclusion because the OSA contained procedures for such disclosures, which were subject to judicial review (at para 36).
[40] At para 70.

and, in doing so, whether the person complied with any relevant guidelines, policies or laws that applied to the person;
(*d*) whether the person had reasonable grounds to believe that the disclosure would be in the public interest;
(*e*) the public interest intended to be served by the disclosure;
(*f*) the extent of the harm or risk of harm created by the disclosure; and
(*g*) the existence of exigent circumstances justifying the disclosure.[41]

3.1.10 PMSA submits that the failure to provide for a defence of public interest – at least to members of the public and the media, as opposed to members of the security forces – coupled with the vagaries of the offences created and the severe penalties involved, will create a chilling effect on freedom of expression. This will drastically undermine public discourse, discussion and debate on matters of political speech, which ought to receive heightened protection.

3.1.11 The reason provided by the drafters of the revised version of the Bill for failing to include a public interest defence (despite the fact that the proposals to include this defence had already been accepted by the previous minister) is that such a defence would create legal uncertainty.[42] PMSA submits that this concern is misplaced because, as set out above, our courts are well versed in applying the public interest defence in a range of contexts in our law and would accordingly be able to develop similar jurisprudence to address any public interest defence included in the Bill. In any event, the desire to create legal certainty cannot outweigh the public and the media's constitutional right to freedom of expression.

3.1.12 It has also been suggested by some members of the drafting team that a public interest defence is unnecessary because such a

[41] Section 15(5) goes on to provide that the member of the service must first have provided all relevant information to certain government functionaries, and not have received a response within a reasonable time.
[42] This statement was made in the Presentation to the Ad Hoc Committee on the Bill dated 7 May 2010. A copy of the presentation is available at www.pmg.org.za (Accessed on 2 June 2010).

defence already exists under the common law.[43] This suggestion is,

with respect, incorrect. There is no general common law defence of 'public interest' which is available to a person accused of committing a statutory offence. If a public interest defence is not specifically included in the Bill it will not be open to the public and the media to raise such a defence.

The NPC concurs fully with the submission of PMSA.