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Your reference	Our reference	Date
	D Milo	7 July 2020

Dear President Ramaphosa

PROTECTION OF STATE INFORMATION BILL: ADDITIONAL REFERAL GROUNDS

1. We act for Media Monitoring Africa, amaBhungane Centre for Investigative Journalism, the Right2Know Campaign, the South African National Editors' Forum, and former Minister of Intelligence, Ronnie Kasrils.

2. We refer to your correspondence to the Honourable Ms Thandi Modise, MP, Speaker of the National Assembly and to the Honourable Mr Amos Masondo, MP, Chairperson of the National Council of Provinces, dated 2 June 2020 ("**the Referral letter**"), in terms of which you referred the Protection of State Information Bill, 2010 ("**the Bill**") back to Parliament a second time in terms of section 79(1) of the Constitution, 1996 ("**the Constitution**").

3. The unprecedented nature of such a second referral is clearly acknowledged in paragraphs 1, 2 and 3 of the Referral letter.

4. We are writing to you on two bases:

4.1 First, our clients wish to thank you for taking the steps that you have taken to ensure that the Bill is constitutional as and when it finally is enacted into law. In this regard, our clients wish to acknowledge and agree with the Referral letter's provisions in regard to the following six grounds of constitutional concerns raised by yourself, namely:

4.1.1 the overbreadth of the definitions of national security and state security;

4.1.2 the fact that the defences in s 41 are too narrow and do not include a public interest or a public domain defence;

4.1.3 the lack of clarity in the Bill as to who in an organ of state will actually have the authority to classify or reclassify information and to whom such authority may be delegated;

4.1.4 the lack of timelines for the review by the head of an organ of state of any classifications by delegated classifiers;

4.1.5 the fact that no provision for severance is made in respect of a request for access to a document which is classified only in respect of certain information contained therein; and

4.1.6 the fact that the NCOP needs to be part of the reconsideration process given that provincial archives are affected.

4.2 Second, our clients believe that there are a number of additional aspects of the Bill which require reconsideration on constitutional grounds, particularly given the Constitutional Court's judgment in *Ex Parte President of the Republic of South Africa in Re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) ("**the Liquor Bill case**"), in which the Constitutional Court made it clear that a referral to it in terms of section 79(4)(b) can normally deal only with grounds of constitutional review already put before Parliament by the President.[1] We therefore submit that it is imperative that your referral of the Bill back to Parliament alert both the National Assembly and the National Council of Provinces to all legitimate constitutionality concerns for their reconsideration. In this regard, our clients wish to raise the following five additional constitutional concerns for your consideration.

Inconsistency with the existing access to information framework

5. The Bill does not locate access to classified information within the framework provided by the Promotion of Access to Information Act, 2000 ("**PAIA**") – the constitutionally-mandated mechanism through which to give effect to the right of access to state-held information and subject to the justifiable limitations provided therein. Although the President's letter refers to section 32 of the Constitution, it does not, in our view, articulate fully the role of the PAIA and the need for the Bill to take this into account and comply with it.

6. In particular:

6.1 It does not comply with the present constitutional framework and obligations regarding for access to information to create a whole separate statutory mechanism apart from PAIA to deal with requests for access to classified documents, particularly when the ability to classify is so broadly framed.

6.2 Moreover, even if the Bill could permissibly create a separate statutory appeal mechanism, the manner in which it does so is unconstitutional. We note in this regard that all internal appeals to an information officer refusing access to state-held information are to be made to the relevant Minister in terms of the current provisions of the PAIA. However, due to the sensitive nature of classification decisions and the potential for them to impact on freedom of expression and access to information, our clients are of the view that the Classification Review Panel ("**CRP**") should be the

[1] Paragraphs [13] to [15] of the judgment.

body to whom appeals in respective of unsuccessful PAIA requests for classified information should be made.

Scheme of classification

7. The scheme of classification suffers from defects that go beyond the overbroad definition of "national security" and "state security matter". These include the lack of coherence in the rules and principles for classification. This can be illustrated by s 8(2)(d)(i), which requires that there must be a "clear" need to classify the information, yet under s 11, there need only be a *likelihood or reasonable possibility of harm* requiring classification. In addition, the distinction between the levels of classification is not adequately defined: it is not possible to know what is the distinction between "demonstrable harm" (confidential) and "serious demonstrable harm" (secret). When taken with the requirement in the Bill that the Minister and the head of each organ of state create additional norms, policies and guidelines for the regulation of information, this will create an additional level of rules and procedures for classification that are likely to further complicate the process, and differ between the bodies that have the power to classify. The system of classification contained in the Bill therefore does not in our clients' submission contain sufficient degrees of clarity, comprehensiveness, and coherence to pass constitutional muster.

The Classification Review Panel

8. Our clients submit that the CRP is not imbued with the requisite independence in relation to:

8.1 the procedure to appoint its members, which is open to abuse, and in some respects so unclear that it is not possible to know what the Act intends;

8.2 the remuneration of members of the CRP, which is entirely "*determined by the Minister with the concurrence of the Minister of Finance*" (s 23). There is no protection against reductions of remuneration and no requirement of parliamentary oversight; and

8.3 the power to make rules, which the CRP may only do "*with the concurrence of the Minister*" (s 19(2)). The CRP cannot be independent if the Minister has a veto power over the rules it may adopt. The CRP should be obliged to consult the Minister in relation to its rules, but the Minister should not have a veto over the proposed rules.

Imposition of criminal offences

9. Our clients submit that the imposition of criminal penalties for possessing and disclosing classified information is not constitutionally tenable, for the following reasons:

9.1 the Bill makes it a crime to merely possess information;

9.2 the Bill makes no distinction between public employees – who have a duty to protect state information – and ordinary citizens and journalists who have no such obligation;

9.3 the offences of "espionage", "hostile activity" and "receiving state information" are so over-broad, internally contradictory and often lacking in a rational connection to their

purpose that they criminalise even conduct that should be promoted - and they would punish negligent as well as intentional behaviour; and

9.4 the Bill imposes extraordinarily harsh penalties for non-compliance that are out of sync with international norms and will have a severe chilling effect on the rights to expression and access to information.

Transitional arrangements

10. This transitional regime contained in section 52 of the Bill creates two unjustifiable constitutional difficulties, namely:

10.1 it is entirely unclear when the provisions not listed in s 52(1)(a)-(i) come into force; and

10.2 it perpetuates the unconstitutional regime of classification under the Minimum Security Standards and the 1982 Act.

Parliament should consider the Bill as a whole

11. Lastly, in our clients' view, the severity of the defects in the Bill is such that the unconstitutional effect of the Bill cannot be resolved merely by amending the relevant provisions. The Bill has undergone at least eight iterations, with amendments effected in a piecemeal fashion that has fundamentally undermined its coherence. The defective provisions of the Bill, when taken together, work to exacerbate the potential for infringement of rights. Parliament therefore needs to reconsider the Bill as a whole and its potential to undermine constitutional rights and freedoms, and to ensure that an amended version is internally coherent as well as being constitutional.

12. The *Johannesburg Principles: National Security, Freedom of Expression and Access to Information* are regarded around the world as "authoritative standards clarifying the legitimate scope of restrictions on freedom of expression on grounds of protecting national security". These are attached for ease of reference. Our clients propose that any redrafting of the Bill be approached with serious concern for these 25 principles.

13. Our clients therefore propose that a supplementary letter be directed to Parliament in respect of the Bill, highlighting the additional concerns referred to above and requesting Parliament to consider them.

14. Our clients appreciate the importance of this Bill and offer to collaborate fully in order to address the concerns that we have identified. They are also willing to provide greater detail on any of the issues that we have raised in in this letter.

Yours truly

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