Presentation to *Ad-Hoc Committee on Protection of Information Bill (NCOP)*

Report on legal opinions on recent proposed POSIB clauses amendments

31 OCTOBER 2012

state security

State Security Agency
REPUBLIC OF SOUTH AFRICA

PURPOSE OF THE PRESENTATION

- **In the public interest of making a constitutionally sound operationally implementable law that ensures that national security is protected and advanced –**

  we would like to table feedback and proposals to the NCOP.

- **We remain ready to implement the law, once approved, hoping that we can learn from the errors of the past where laws have been passed that remain on the statute but are unworkable.**

SCOPE OF PRESENTATION

- Background
- Insertion of a definition for ‘espionage
- Response on Deletion of municipalities in definition of ‘Head of organ”
- Response on deletion of Clause1(4)
- Response on proposed approval by parliament for the Opt-in of other departments

- Response on amendments to conditions for classification
- Response on amendment to clause 14(6): Authority to classify
- Response on deletion of “ought reasonably to have known” & other factors that impact on prosecution
- Response on clause 43 on exemptions to the offence of disclosure

Response on Insertion of a definition for 'espionage"

- The definition of espionage is not generally desirable
- We are not aware of any piece of legislation, both locally and abroad, which defines "espionage" in clear and unambiguous terms
- A definition would limit actions described to those in clause 36, but the offences extend beyond espionage
- The concept of espionage is broader and the term is used elsewhere in the Bill, for instance, included in the definition of "*national security*" and the term "*national security*" is used many times throughout the Bill.
- In legislation, the purpose of a definition is to give a meaning that may deviate from the ordinary meaning. Further, legislation uses the word "include" in definitions to enlarge the meaning of terms.

Recommendations

- **The preferable option is not to define espionage**
- **If espionage is eventually defined in the Bill, it is proposed that the following wording is utilised:**
  "**'espionage'** includes the acts constituting the offences referred to in section 36"

•It is proposed that the heading of Clause 36 is changed to read "Espionage related offences"

Response on Deletion of municipalities in definition of 'Head of organ of state"

- As a political solution, it was agreed that municipalities would be excluded from classification, reclassification and declassification but would not be excluded from their duty of protecting valuable information
- Deletion does not solve Ad-Hoc committee's problem as Municipalities are included in the next clause (c) and in other clauses.

Recommendations

- This has been sufficiently dealt with in Clause 3(1) (b) as amended
- Further, amendments have now been made that Parliament must approve the opting in of organs of state and hence Parliament can exclude any organ of state if it so wishes

Response on deletion of Clause1(4)

- Deletion of clause1(4)would make the classification, re4classification and declassification regime ineffective
- The deletion of clause1(4) would lead to legislative confusion and divergent legal opinion
- Clause5(j) operates to inform the interpretation and application of POSIB and does not apply to PAIA
- Variance Clauses exists in other legislation : The Labour Relations Act, 1995, section 210 has such a variance

Recommendations

- **The department is recommending the retention of clause1(4) is necessary and prudent.**
- **The department is hence of the view that the wording in the variance clause in the LRA be utilised as this has passed constitutional muster and was able to withstand against PAJA, a constitutionally mandated legislation. Hence the proposed wording for clause 1(4) would be as follows:**

  "If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressing amending this Act, the provisions of this Act will prevail."

Response on approval by parliament for the Opt-in of other departments

- The deeming provision will not stand constitutional muster.
- The 30 day period and the deeming provision restrains parliament powers
- The deeming provision gives Parliament a role in the first part and then take it away in the second part.

Recommendations

- The Department recommends that the clause should be amended as follows:

  3(2)"Parliament may, within 30 days of receipt from the Minister of an application contemplated in subsection (1)(b), approve such application."

Response on changes to conditions for classification

- **The word “must” in clause 10(3) makes its mandatory that various factors have to be considered.**
- **A closed list of relevant factors would preclude classifying issues of national security that fall under all three levels of classification including confidential.**

Recommendations

- It is recommended that the words “amongst others” should be inserted to allow other considerations to be taken into account.

Response on amendment to clause 14(6) Authority to classify

- SAPS and SANDF raised concerns on the exclusion of ordinary members.
- In the policing environment information that needs to be protected is often generated at a very low level and is not limited to crime intelligence division
- All members of the SAPS must be in the position to protect sensitive information pertaining to investigative methods and sources of information.
- Defence has reservations with the provision referencing ordinary members as ordinary members deployed in hostile territories in conflict areas must be able to classify their reports.

Recommendations

- **The department recommends that the SAPS and SANDF concerns be addressed.**

Response on deletion of “ought reasonably to have known”

- The amendment proposes to delete imputed knowledge as sufficient and requires actual knowledge to commit the offense.
- This would place a greater burden on the state to prove the requisite intention.
- In most cases it would be the accused only who can explain his state of mind

Recommendations

- The phraseology “ought reasonably to have known” is important to ensure that prosecution is possible.
- The suggested amendment requires proof that the person actually knew at the time the consequences of his/her act. It is difficult and possibly impossible to prove a person’s subjective knowledge;
- It is important to include in legislation the requirement that the knowledge required is that which may be ascribed to a reasonable man. The phraseology achieves this in a balanced fashion;
- The phrase is already in our statutes (contained in several other acts): Financial Intelligence Centre Act, Prevention of Organised Crime Act, Protection of Constitutional Democracy Against Terrorist and Related Activities Act, Consumer Protection Act, Convention on Agency in the International Sale of Goods Act.
- Judgements have endorsed the concept of “ought reasonably have known” in case Law: s v Boggards and Supreme court Appeal case of Powell No v van der Merwe.
- The phrase does not impose a reversal of onus as the state would still have to lead evidence and prove its case.

Offences

- The NPA has serious concerns about the viability of prosecution irrespective of whether the phrase “ought reasonably to have known” is included or not. This view is shared by the state law advisors.
- The problem of the utilisation of the word "would" in clause 36, 37 and 38 effectively means that even if you insert the phrase "or ought reasonably to have known", the burden of proof through the word “would” constitutes an additional 4 elements of proof to be present over and above the proof that the person committed the act in question.
- In common law crime, such as theft, further assessments are not required

Recommendation

The NPA opinion to the department states that the problem with the formulation of the offences section is that:

- ***Essentially once it has been proved that the person “unlawfully and intentionally committed the act in question, the courts will be called to make a further four fold assessment:***
- ***Whether the state information would benefit the foreign state (directly or indirectly)***
- ***Whether this was to the detriment of the national security of the Republic***
- ***Whether the person knew that it would benefit a foreign state***
- ***Whether the person knew that it would be to the detriment of national security of the Republic.***

For this reason the NPA states that prosecution would hence be unlikely as the state would have to prove sufficient facts in all 5 elements.

The NPA and the department are requesting time to redraft this section.

Response on 43 (b) on exemptions to the offence of disclosure

Clause 43 (b) :

- **Department consulted and obtained legal opinion on this sub-clause.**

- **The department now suggests that clause 43(b) be amended to read "is authorised in terms of this Act."**
- **This will cover the situation where authority is obtained in terms of regulations to be promulgated in terms of section 54(1)(l).**
- **The wording for 54(l) suggested that the section be amended to read as *"the procedure to be followed and the manner in which employees, officials, staff members or any other person who in any manner assists or has in the past assisted in carrying on or conducting the business of an organ of state may disclose breaches of the law or unlawful acts, or omissions, incompetence, inefficiency or administrative error."***
- **It is not necessary to prescribe who may apply for such authority as this is a matter that may be covered by the proposed regulations (which will be approved by Parliament).**

- **Clause 43 on amendment to penalty:**
  - **Removal of specific 5 year penalty means that this offence must be linked with another offence in the Act.**
  - **The department would hence support the reinstatement of a specific 5 year penalty in clause 43**

- **The department support the reinstatement of the specific penalty of 5 years in Clause 43**

Response on 43 (c) on exemptions to the offence of disclosure

- **Clause 43 (c) :**
  - **The clause seems to unworkable as only the court can determine whether the criminal activity is alleged or actual.**
  - **Inclusion of "ulterior purpose" is improper as this cannot be proved and only factual criteria can be utilised.**

Recommendations

Clause 43(c) negates the purpose of the Act.
It is proposed that clause 43 (c) be rewording as follows:

"any person who unlawfully and intentionally discloses or is in possession of classified state information in contravention of this Act is guilty of an offence and liable to a fine or imprisonment for a period not exceeding 5 years, except where such disclosure or possession is –

(a) Protected under the Protected Disclosures Act, 200 (Act No.26 of 2000) or section 159 of the Companies Act, 2008 (Act No. 71 of 2008);

(b) authorised under section 34 of the Prevention and Combatting of Corrupt Activities Act 2004 (Act No. 12 of 2004; or

(c) Authorised in terms of this Act."

We would like to thank the NCOP for its efforts to improve the Bill.

THANK YOU