

Protection of State Information Bill Oral Submission by Media Monitoring Africa 28 March 20

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Overview of Presentation

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About Media Monitoring Africa (MMA)

Formerly the Media Monitoring Project (MMP)

- ❑ Vision:

A responsible media that enables an informed and engaged citizenry in Africa and across the world

- ❑ Promoting Human Rights and Democracy through the media since 1993

- ❑ Supporting ethical, quality media and promoting media freedom

About MMA (cont.)

- ❑ We have conducted over 120 media monitoring projects:
 - ❑ Race and xenophobia (SAHRC, CSV),
 - ❑ Elections (all democratic ones);
 - ❑ Gender (GMMP, MME:G);
 - ❑ Children (ECM);
 - ❑ HIV (WITS, MAP), and more

About MMA (cont.)

Impact on media policy, submissions:

IBA and ICASA

- Broadcasters Code of Conduct;
- SABC Licence Conditions;
- Elections report;
- Disability code of conduct, and more!
- Individual media, SABC Editorial Policies;
- Press Council Review;

Parliamentary Committees;

- Broadcasting Bills;
- Advertising & Transformation Hearings;
- Indaba on Media Transformation

MMA Bias and Assumptions

- Human Rights Bias
- We love our constitution
- Print and broadcast media and Government intend to do good
- Public and citizen informed participation essential for democracy

MMA Welcomes Much of the POIB

- SA demonstrating leadership in:
 - repealing repressive and Colonial or Apartheid-era security laws
 - replacing these with progressive laws that:
 - protect genuine national security interests
 - respect constitutional rights of citizens
 - are in line with AU treaty obligations
- Much of the POIB is progressive, in line with international best practise and Parliament is to be congratulated
- SA needs to play leading role in the Continent

MMA Welcomes Much of the POIB

- But, some of the provisions of the POIB are very problematic:
 - Unconstitutional
 - Not in accordance with SA's AU Treaty Obligations
 - Not in line with international good practice
- MMA trusts that the NCOP will make the relatively few amendments (7 proposed here) to the POIB that are necessary to ensure that the whole of it is to be welcomed.

SA's AU Obligations

- AU – critically NB to political and economic development in Africa and provides political guidance and direction to African states
- SA plays a leading role in the AU and its organs
 - eg Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights

SA's AU Obligations

- SA treats the AU with respect and signs and ratifies its treaties, conventions etc
- A number of AU treaties which SA has ratified give the NCOP guidance on what provisions the POIB should/should not contain

SA's AU Obligations

- African Charter on Human and People's Rights
 - Article 9.1: right to receive information
 - Article 22.2: states parties to ensure exercise of right to development
- Declaration on Principles of Freedom of Expression
 - Article IV Freedom of Information:
 - No one shall be subject to any sanction for releasing, in good faith, information on wrongdoing or that would disclose a serious threat to health,

SA's AU Obligations

- Declaration on Principles of Freedom of Expression cont
 - Article IV Freedom of Information: cont
 - safety, or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society
 - Secrecy laws shall be amended to comply with freedom of information principles

SA's AU Obligations

- Declaration on Principles of Freedom of Expression cont
 - Article XIII Criminal Measures:
 - States to review criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society
 - Freedom of expression should not be restricted on...national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal connection between the risk of harm and the expression

SA's AU Obligations

- AU Convention on Preventing and Combating Corruption
 - Art. 9: Each state party shall adopt legislative measures to give effect to the right of access to any (our emphasis) information that is required to assist in the fight against corruption

SA's AU Obligations

- AU Convention on Preventing and Combating Corruption
 - Art.12: States Parties undertake to:
 - create an enabling environment to enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs
 - ensure that the media is given access to information in cases of corruption provided the dissemination of such information does not adversely affect the investigation process and the right to a fair trial

SA's AU Obligations

- African Charter on Democracy, Elections and Governance
 - Aim: to promote and strengthen good governance through the institutionalisation of transparency, accountability and participatory democracy
 - Article 3 requires states parties to implement the Charter in accordance with the following principles:
 - Respect for human rights and democratic principles

SA's AU Obligations

- African Charter on Democracy, Elections and Governance
 - Article 3 requires states parties to implement the Charter in accordance with the following principles: cont
 - Exercise state power in accordance with Constitution and the rule of law
 - Transparency and fairness in the management of public affairs
 - Condemnation and rejection of corruption and impunity

SA's AU Obligations

- African Charter on Democracy, Elections and Governance
 - Article 27: to advance political, economic and social governance, states parties must:
 - Undertake regular reforms of legal systems
 - Improve efficiency and effectiveness of public services and combating corruption
 - Promote freedom of expression, especially freedom of the press and fostering a professional media

SA's AU Obligations

- African Charter on Democracy, Elections and Governance
 - Article 44.1: states parties to implement as follows:
 - Legislative, executive and administrative actions to bring national laws and regulations in conformity with Charter
 - Promote political will to attain goals of the Charter
 - Incorporate commitments and principles of the Charter into their national policies and strategies

SA's AU Obligations

- Overview of what is required:
 - Democracy and socio-economic development depend on open, transparent and accountable government
 - Corruption is a threat to economic and social development on the Continent
 - Corruption flourishes where there is no transparency

SA's AU Obligations

- Overview of what is required cont.:
 - Ability of the media to obtain and publish information regarding corruption is key to developing transparency and accountability
 - Rule of law and a free press is critical to the success of democracy and the broader goal of development

International Good Practise

- Johannesburg Principles on National Security, Freedom of Expression and Access to Information:
 - Developed in SA under auspices of Article XIX
 - Endorsed by UN Special Rapporteur on Freedom of Expression
- Key provisions critically important to NCOP's deliberations on the POIB

International Good Practise

- Johannesburg Principles
 - Principle 1(d): No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

International Good Practise

- Johannesburg Principles cont.
 - Principle 1.1(b): The law must provide adequate safeguards against abuse, including judicial scrutiny of the validity of the restriction by an independent court or tribunal
 - Principle 2(a): Government must demonstrate that purpose of a restriction on freedom of expression or information is to protect:
 - a country's existence or territorial integrity
 - against the use or threat of force

International Good Practise

- Johannesburg Principles cont.
 - Principle 2(b): A restriction on national security grounds is NOT legitimate if its purpose or effect is to:
 - Protect interests unrelated to national security including
 - to protect governments from embarrassment or exposure of wrong doing or
 - to conceal information about the functioning of its public institutions

International Good Practise

- Johannesburg Principles cont.
 - Principle 15: No person may be punished on national security grounds for disclosure of information if
 - disclosure does not actually harm and is not likely to harm a legitimate national security interest
 - the publish interest in knowing the information outweighs the harm from disclosure.

International Good Practise

- African Platform on Access to Information Principles
 - Developed at the Pan African Conference on Access to Information organised by
 - UNESCO
 - AU Commission
 - AU Special Rapporteur on Freedom of Expression and Access to Information.

International Good Practise

- APAI Principles cont.
 - Principle 8: Right of access to information shall be limited:
 - only by strictly defined exemptions
 - withholding info allowed only:
 - If significant harm would eventuate if information is released
 - if the public interest in withholding is clearly shown to be greater than public interest in disclosure
 - For so long as harm would occur ie limited period

International Good Practise

- APAI Principles cont.
 - Principle 8: Right of access to information:
 - No information re: human rights abuses or imminent dangers to public health, environment or safety, may be withheld.
 - Principle 11: Whistleblower Protection: adequate protections against legal, administrative and employment related sanctions should be provided to those who disclose information on wrong-doing and other information in the public interest.

Problematic Provisions of the POIB: Limitations on Access to State-held Information

- s1(4): provides that POIB takes precedence over PAIA in respect of classified info.
- s19 and subsections 34(2) and (3): specific non-PAIA procedures for dealing with requests for classified info.
- Chapter 8: non-PAIA appeals in respect of refused access to classified information
- Note: first version of POIB did not oust PAIA

Problematic Provisions of the POIB: Limitations on Access to State-held Information

- PAIA:
 - not ordinary legislation
 - constitutionally mandated to give effect to a s32 of the Constitution - right of access to information
 - protects:
 - the right to information
 - legitimate state interests requiring non-disclosure
 - s5 specifically provides that PAIA applies to the exclusion of any provision of other legislation that prohibits disclosure of a record of a public body

Problematic Provisions of the POIB: Limitations on Access to State-held Information

- PAIA: already contains a sufficient array of grounds for withholding state info, including:
 - Defence, security and international relations – s41
 - Safety of individuals and protection of property – s38
 - Economic interests and financial welfare of RSA – s42
 - Research information of public bodies – s43
 - Operations of public bodies – s44

Problematic Provisions of the POIB: Limitations on Access to State-held Information

- Amendments required to POIB ensure constitutionality and compliance with AU treaty obligations re access to information:
 - Delete s1(4) of the POIB
 - Replace s19 with:

“Request for Access to Classified Information
19. A request for access to a classified record that is made in terms of the Promotion of Access to Information Act must be dealt with in terms of that Act”.

Problematic Provisions of the POIB: Limitations on Access to State-held Information

- Amendments required to POIB ensure constitutionality and compliance with AU treaty obligations re access to information: cont.
 - Delete Chapter 8 – provided for in PAIA
 - Delete s34(2) and (3) – provided for in PAIA.
 - Note this will require a consequential amendment to delete reference to s34(1) which will become s34.

Problematic Provisions of the POIB: Limitations on Freedom of Expression

- s43: any unlawful and intentional disclosure of classified information in contravention of the Bill is an offence – period of imprisonment not exceeding 5 years
- S49: creates a number of offences with penalties ranging from 10-15 years imprisonment for, eg, disclosing classified information to any unauthorised person.

Problematic Provisions of the POIB: Limitations on Freedom of Expression

- Amendments required to POIB to ensure constitutionality and compliance with AU treaty obligations re freedom of expression:
 - s43 insert: “the disclosure of which causes or is likely to cause serious or irreparable harm to the national security of the Republic” between “information” and “in”.
 - s49 insert: “Subject to the Protected Disclosures Act, 2000 (Act No. 26 of 2000)” at the beginning of the section.

Problematic Provisions of the POIB: Limitations on Freedom of Expression

- Amendments required to POIB ensure constitutionality and compliance with AU treaty obligations re freedom of expression cont:
 - s49(a) insert: “and the disclosure thereof causes or is likely to cause serious or irreparable harm to the national security of the Republic” at the end of the subsection.

Problematic Provisions of the POIB: Grammatical Errors

- Amendments required to s47 of POIB ensure clarity:

Improper Classification

47(1) Any person who intentionally classifies state information as –

- (a) top secret;
- (b) secret; or
- (c) confidential,

in order to achieve any purpose ulterior to this Act, including the classification of state information in order to –

- (i) conceal breaches of the law;
 - (ii) promote or further an unlawful act, inefficiency or administrative error;
 - (iii) prevent embarrassment to a person, organisation or agency; or
 - (iv) give undue advantage to anyone within a competitive bidding process,
- is guilty of an offence.

Problematic Provisions of the POIB: Grammatical Errors

- Amendments required to s47 of POIB ensure clarity:

(2) Any person convicted of an offence under sub-section (1) is liable, on conviction, to imprisonment for a period not exceeding:

- (a) 15 years, in the case of an offence under sub-section 1(a);
- (b) 10 years, in the case of an offence under sub-section 1(b); and
- (c) five years, in the case of an offence under sub-section 1(c).

Conclusion

- NCOP is facing a stark choice
 - pass an excellent world-class POIB that represents a clear break from Apartheid-era security legislation characterised by:
 - undue secrecy
 - state impunity

OR

Conclusion

- NCOP is facing a stark choice cont.
 - Pass a POIB that is:
 - unconstitutional
 - violates SA's AU treaty obligations, re: fighting corruption and promoting development
 - contrary to international good practise
 - almost certainly going to be ruled unconstitutional by our courts putting strain on the relations between branches of government

Conclusion

- MMA has suggested changes to only seven sections which, if enacted by the NCOP, would:
 - would find an appropriate balance between protecting the public interest in:
 - legitimate national security interests
 - a free press and the free flow of information in order to further democracy and development
 - assist in encouraging other African countries to repeal and replace their Colonial-era security laws with progressive development-oriented laws.

Thank you

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