



THE ANTI-CENSORSHIP PROGRAMME

OPINION ON LEGISLATION AFFECTING FREEDOM OF EXPRESSION IN SOUTH AFRICA

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1. ANTI-TERRORISM BILL, 2002

INTRODUCTION

The draft Anti-Terrorism Bill (“the Bill”) has been published for comment and debate. It is expected to be given priority in parliament and an Anti-Terrorism Act is expected to be in place during the next sitting. The Bill replaces the Internal Security Act of 1982 and forms part of a battery of legislation dealing with crimes against the state and organized crime such as the Financial Intelligence Centre Act of 2001, the Interception and Monitoring Prohibition Act of 1992 and the Interception and Monitoring Act of 2002. The Bill contains provisions that integrate South African judicial and prosecutorial processes with what its drafters take South Africa’s international anti-terrorism obligations to be.

SOCIO-POLITICAL DETERMINANTS

Any strictly legal and literal analysis of the Anti-Terrorism Bill 2002 runs the risk of occluding the broader political, economic and ideological interests that tend to underlie legislation concerned with maintaining the security of existing state formations. The present ruling party in South Africa was for years denoted by legislation as “terrorist” both in South Africa and the United States. This bears witness to the fact that, unlike being a murderer, being a “terrorist” is often a function of being on the wrong side of power rather than possessing any inherent and universally disagreeable qualities or having committed a readily identifiable act. This introduces a fair amount of uncertainty and scope for politically-coloured interpretation¹ into the definition of the proscription

¹ An aside which demonstrates the politically-loaded manner in which the definition applies, is that, but for diplomatic immunity, it is legally conceivable that a person like former president of Indonesia, Suharto, could have been prosecuted for “terrorist acts” had the Bill been an Act at the time he visited South Africa in 1998. He is instead, the recipient of South Africa’s highest civilian honour, the Order of the Southern Cross, first class. The same obvious double-standard will, one has good reason to suspect, apply in respect of all manner of eminent persons whose arrest and prosecution will simply never occur even were they to come under the jurisdiction of a South African Court.

the Bill provides for the offence of terrorism. In terms of both criminal and constitutional jurisprudence this is problematic.

The Bill also tampers with various long-established elements of a criminal offence such as intention and causality which make the securing of convictions for “terrorism” much easier. What may lie behind the significantly enhanced capacity of the state to imprison persons that act in accordance with ideologies other than the dominant one, is not for me to speculate. It is not my brief to provide specific commentary in regard to how the political and economic values of the day shape the notion of terrorism. It is also not suggested that any piece of legislation and, in particular, the interpretation thereof, is free of all value judgment.

However, it should be borne in mind that terrorism is an offence in which those who legislate have very immediate, often personal, and certainly vested ideological interests. The law should not have the effect of advancing sectional and elite interests under the guise of ensuring the safety of the public. Terrorism should also not be allowed to become synonymous with anti-government or, even, anti-state activism nor should the law include in the compass of “terrorism” most of the vigorous, direct and effective tactics of political activism that are common in this country and which are more than adequately mediated and handled in terms of existing legislation and policing practices. There should be an understanding by law-makers that the political expressions of many oppositional groups, particularly those rooted within marginalised sectors of society, will often be “militant” and, even, in rhetoric, seditious.

To have drafted legislation in such a way that militant student or community activists are apt to be sent to prison for the stiff terms provided in the Bill, is to create a very dubious domestic political instrument indeed. Since the stuff of politics is often about struggling against the policies of government or for a completely different kind of state, legislation that purports to deal with terrorism must be scrutinized very carefully to be sure it does not proscribe legitimate struggle, inhibit fundamental rights and freedoms and ensconce the powerful.

The Bill does not survive even casual scrutiny in this regard. As indicated below it overreaches, unduly impinges on constitutional freedoms, recklessly criminalizes and, moreover, is largely unnecessary.

Some Western nations, like Britain, have enacted legislation to deal with terrorism without creating a special crime of terrorism. Since the acts committed by terrorists usually fall within the ambit of a number of common-law crimes such as murder, attempted murder, malicious damage to property and the like, legislation in Britain has focused on such matters as the outlawing of terrorist organizations (as defined), the deportation of suspected terrorists, the prohibition of support for terrorist groups and short term arrest for the interrogation of suspects [see the Prevention of Terrorism (Temporary Provisions) Act 1984].

South Africa, both the previous and present government, (whose security situation does not seem to warrant it), has unfortunately not adopted the same legislative restraint and decided to enact the independent crime of terrorism.

WHAT CONSTITUTES TERRORISM UNDER THE BILL

Legislation must be clear and sufficiently precise for the public to know and be certain of what conduct is prohibited. The definition of “terrorist act” does not comply with this rule.

The definition is broad enough to cover a number of common-law crimes (such as malicious injury to property, murder, attempted murder, kidnapping and arson) which ordinarily would be dealt with under the less drastic common law principles of criminal law and the Criminal Procedure Act. The consequence of this is that, even if the accused/suspect never intended a terrorist act, potentially he/she can be subjected to the extraordinary detention provisions and penalties in the Bill. The wide definition thus creates the potential for abuse and confusion.

The definition does not provide for conduct which is indicative of a relevant or specific frame of mind, namely to commit an act that will bring about a specific consequence; factors to indicate the purpose for which the act has been committed. A real act of terrorism is committed with the intent to bring about a specific social and political end. Acts of terrorism must be distinguished by way of the consequences brought about and the specific intent with which they were committed (Ester Steyn, SACJ (2001) 14).

The Bill has tampered with established principles of criminal law, namely “intention”, an essential element for criminal liability.

The notion of “intention” is stretched in the meaning of “facilitation”. Section (7) under the heading “Participation in and facilitation of terrorist act and harbouring and concealing” attempts to explain what is meant by the “facilitation” of a terrorist act. We are told that such facilitation, which attracts a possible 15 year sentence, is committed whether or not:-

- a.) the facilitator knows that a particular terrorist act is facilitated;
- b.) any particular terrorist act was foreseen or planned at the time it was facilitated; or
- c.) any terrorist act was carried out.

This, with respect to the drafters who perhaps wanted to say something else, the section not only violates a hallowed principle of criminal law that requires knowledge aforethought but introduces, even after several readings, an element of absurdity into the definition of the proscription. If a terrorist act is truly facilitated, it is hard to envisage how knowledge of that facilitation or recklessness in regard thereto [in which case knowledge is, in a sense, presumed] does not need to be present before someone can be sent to jail therefore. While a facilitator might not know the details of the eventual terrorist act, logic dictates that he or she must at least know, with some particularity, that they are facilitating. This is the nature of the verb, “to facilitate”. To hold otherwise is

not only to do violence to the notion of intention but also create an offence for conduct several removes from the actually “terrorist act”.

In terms of public law jurisprudence, a chain of causation needs to be shown to exist between an act and the proscribed behaviour, in this case, terrorism. In terms of the Bill, it may well be that certain links within that chain are, now, criminal in and of themselves whether or not that chain actually connects with the act itself. Since it is really “terrorist acts” that are meant to be sanctioned by this law – the Bill institutes, rather than a chain of causation, a temporal chain as an element of guilt. In this way an act connected to, but not necessarily productive of a terrorist act, creates criminal liability as long as it happened before the said act.

A further problem is that a number of provisions in the section headed “Participation in and facilitation of terrorist act and harbouring and concealing” facilitate proof by the prosecution of intent. If the act alleged to have been committed by the accused resulted, or was likely to have resulted, in the achievement of the objects specified in the intent provision, the accused seems to be presumed, unless he proves to the contrary, to have committed the act in question with the intent of achieving those objectives. In effect, this brings into being a “reverse onus”; an instrument which the Constitutional Court has revealed deep misgivings about and, in fact, recently declared unconstitutional in drug related crimes.

Clever but deceptive drafting gives the impression that political “advocacy” or protest is exempt from the otherwise oceanic definition of terrorism. This is not so. The example of the unsurprising if no longer very common political tactic of boycotts and sit-ins illustrates the workings of the definition. Suppose, a community group, called the Anti-Bank Campaign, unhappy about the attachment of houses in Soweto by financial institutions owing to default, institutes a boycott of repayments which spreads. They chase away the sheriff of the Court whenever he arrives to serve papers on residents making the repossession process unworkable. The banks lose money and, just as during the Bredell land-invasions, the JSE drops two-percent. With this as context, some among

the Anti-Bank Campaign occupy the offices of Absa head-office and insist that they will not leave until it is agreed that the attachments are lifted. They say that the manager of the bank will have to sleep there with them until this agreement is signed, not only for them but for all township homeowners. They say they do not care if the banks fail because of these debt write-offs because they are against both capitalism and banks. Some among the crowd threaten to hit the manager when he tries to leave.

The definition of a “terrorist act” consists of two subsections, (a) and (b), coupled conjunctively. The sub-paragraphs of paragraph (a) are themselves connected with “and”. The Anti-Bank Campaign have acted, at least, in part for an ideological objective or cause *and* with the intention of intimidating² or compelling a person to do or refrain from doing something. Their actions fall within the definition of paragraph (a). Importantly, the various sub-paragraphs of paragraph (b) are disjunctively joined [see (iv)]. This means that only one of them have to apply for the definition of a terrorist act to be logically activated. Sub-paragraph (ii) is vague and incredibly wide and may well apply in the situation described above. But it is not necessary that any of sub-paragraphs (i-iv) apply for the definition of a “terrorist act” to be activated. It is certainly arguable that “serious interference” (although not quite disruption) is being caused to a “private” financial “system” (credit) as well as a “public” administrative “system” (service of Court processes) by the Anti-Bank Campaign; a terrorist organization.

Similarly strikers during the July 2002 South African Municipal Workers Union (Samwu) industrial action who refused to pick up rubbish after 14 days would be liable to be guilty of a terrorist act. How so? They have a partly ideological objective. They act to compel their government and their employer to give them a wage increase and, although no-one is killed or maimed, they disrupt essential services (as determined by the Essential Services Commission). The rebuttal that this sort of action is exempted from the definition of a “terrorist act” by virtue of the workings of paragraph (b)(v), misses an important qualification within the phrase that exempts. This is that the “advocacy,

² What is “intimidation”? Does an objective test apply or is it the subjective sensibilities of the person in whom fear is inspired that count, as is the case at present in terms of the Intimidation Act.

protest, dissent or stoppage of work” must be “lawful” to qualify for the exemption. Garbage collectors may not lawfully refuse to pick up “organic refuse” after 14 days. Their strike, at the stage they refuse to do so, is no longer lawful, nor are pickets that they organize in support of this action. In terms of the definition, prosecuting authorities have the latitude, should they wish to use it, to treat these actions as terrorism.

The drafters need to come to terms with the fact that there are a multitude of acts of protest and dissent which, although unlawful and designed to compel outcomes based on ideological grounds, are not terrorism. The current definition does not exclude these.

An associated question is whether merely uttering or writing words can constitute an act. The definition does not exclude this, and since the Bill has evacuated intention of some of the content it enjoys as an element of an offence, it is conceivable that one may be guilty of “facilitation” of “terrorist acts” by making a statement that inspires or incites a “terrorist act”. There are obvious constitutional problems here. Numerous statements that do not fall within the definition of ‘hate-speech’ (an explicit limitation to the right to freedom of expression contained in section 16 (2) of the Constitution) may nevertheless be said to facilitate “terrorist acts” “whether or not the facilitator knows that a particular act is facilitated”. It is conceivable that a call made on a community radio station for people to participate in a gathering in which “services” or “systems” are seriously interfered with could attract the sanctions provided for in the Bill even if these events were not planned by him or her. As noted above, the Bill may also be seen, in this way, to criminalize conduct several removes from a violent deed and to depersonalize guilt [see *Noto v United States* 6 L Ed 2nd 836 and *Scals v United States* 6 L Ed 2nd 782 for the problems with this approach]

The Bill (see section 2 of definition section regarding the definition of a person who is deemed to have knowledge of terrorist activities and section 17 headed : “Duty to report information on terrorist acts) further imposes what amounts to a duty to act on citizens in respect of “obtaining information to confirm or refute the existence of a fact” concerning a possible terrorist act. This creates an almost Orwellian situation in which citizens have

to take steps not only to report suspicions but to investigate them. In particular, journalists – who by reason of “the general knowledge, skill, training and experience” (definition section) of people in that situation – who reasonably suspect or, even, ought to have suspected a fact that may disclose a terrorist act, commit an offence if they do not report it. Since, in the real world, the knowledge if a fact is often inextricably linked to the identity of the provider of that fact or the cause of suspicion of that fact, it is hard to see how the identity of informers, foreign or domestic, may now be lawfully withheld from the police. In fact it is an offence to wait until one is asked for these details. One must take active steps to report. If the definition of “terrorist act” and “terrorist” was sufficiently narrow, one might agree that a duty exists to inform, but that is not the case.

The problems with the definitions of a “terrorist act” have roll-on consequences for all other aspects of this piece of legislation. The already problematic aspects around informing authorities of suspicions, “facilitation” and the duty to investigate facts are made so much worse because there are so many potential “terrorist acts” to cause suspicions, facilitation or the duty to investigate.

One can also never in terms of section 3 of the Bill (“Membership of terrorist organizations and proscription) profess belonging to organizations that the Minister has proscribed (“banned”). Does it follow that a person may never support a proscribed organization without being guilty of an offence even if that person’s activities are lawful and not functional to any terrorist act?. It would seem not. One wonders then which individuals will be signing affidavits to move the application provided for in section 3 (8)?.

DETENTION AND QUESTIONING PROCEDURES

BAIL IN RESPECT OF OFFENCES UNDER THIS ACT

Section 16 provides that where an accused stands trial on a charge under this Act, the provisions relating to bail in the Criminal Procedure Act apply as if the accused is charged with an offence referred to in Schedule 6 of the Act (the CPA).

One of the most controversial amendments to the CPA and one apparently open to constitutional challenge was section 60(11) of the Act. This section singles out for more stringent treatment applicants for bail who are arrested in schedule 6 offences (termed the “more serious offences” such as murder and rape and armed robbery). The section requires that an accused on a Schedule 6 charge must adduce evidence (that is the onus is on the accused) to satisfy a court that “exceptional circumstances” exist which permit his or her release. Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail will be resolved in favour of the denial of bail, unless “exceptional circumstances” are shown by the accused to exist (SA Constitutional Law: The Bill of Rights, Cheadle Davis Haysom p635).

Whereas an accused on say a Schedule 5 charge (the less serious offences) need only satisfy the court that “the interests of justice” permit his or her release. The Constitutional Court in *S v Dlamini; S v Dladla and others; S v Schietekat* 1999 (7) BCLR 771 (CC) found that the amendment was not unconstitutional but emphasized that it can only be used for very serious offences.

For the purpose of this opinion the problem lies in the fact that all persons charged under this Terrorism Act will be treated as Schedule 6 offenders. It is problematic because the definition of terrorism and other sections create such a vast range of offences, many of which will not always be objectively serious offences or even offences, which should seriously be classed as terrorist related activities. This is exacerbated by the fact that the definitions and offences created are also very wide. See discussion above. The effect is that, for the purposes of bail and securing one’s liberty, a people involved in public protest or a person who unwittingly has knowledge of another deemed by the state to be a

terrorist will be treated in exactly the same way as a person who places a bomb in a public place to cause death and destruction.

Recommendation - each offence should be treated individually and/or the legislator should identify and list the more serious offences in the Bill.

This is an important matter and should be focused on at any further hearing on the bill because it affects the liberty of individuals.

INVESTIGATIVE HEARINGS (Section 20 to 26)

LEGAL REPRESENTATION

Section 23 does not make it clear that the detained person or person called in for questioning has a right to legal representation in the proceedings. The section states the person has the right to “retain and instruct a legal practitioner”. This is not equivalent to legal representation. The section should be amended to make it clear that legal representation is included or meant. This may not be so serious because further on in section 30, the word “legal representation” is used, so in a dispute regarding the interpretation of section 23, it is arguable that proper/full legal representation is meant in section 23.

THE OBLIGATION TO ANSWER QUESTIONS AND PRODUCE THINGS (section 24)

Subsection 1 thereof only permits a person to refuse to disclose information or answer questions or produce a thing if such information is protected by any law relating to non-disclosure of information or to privilege. Since the hearing will not be a section 205 hearing in terms of the Criminal Procedure Act, the state may argue that the many defences and excuses that s205 permit under “just cause” do not apply. They will probably submit that the section instead refers to some specific legislation and specific sections therein that protects against disclosure. The concept “just cause” embraces and

includes more than a defence based on “information protected by a law relating to non-disclosure of information or privilege”. I do not see why investigative hearings should not be held under section 205 of the Criminal Procedure Act which give more protection under the “just cause” concept. The Constitutional Court has found that the provisions of section 205 of the CPA “are as narrowly tailored as possible to meet the legitimate state interest of investigating and prosecuting crime” (*Nel v Le Roux*). However if you succeed in convincing the legislator to amend the Bill to use the available section 205 or the concept of “just cause”, the provision stated in section 26(2) of the Bill should still be retained, with one amendment - it should rather read: “...necessary for the security of the state”. This is because the Bill is dealing with the very serious subject of terrorism and not the everyday administration of justice.

COMBATING FINANCING OF TERRORISM (section 32 to 37)

The Bill amends section 35 of the Financial Intelligence Centre Act 38 of 2001 to provide for the following (although a reading of the Act shows that section 35 already states this):

The Centre can apply to a judge designated by the Minister of Justice for the purposes of the Interception and Monitoring Prohibition Act, 1992 for an order directing any financial institution to report to the Centre in secret on transactions conducted by a client if there are reasonable grounds to suspect the institution is being used for unlawful or terrorist activities.

I have the following concerns:

Since the financial institution will be summonsed in terms of the Interception Act and/or the Financial Intelligence Centre Act and must report to the Centre, there is no provision for the questioning or interrogation of the institution to be supervised by a judicial authority or for legal representation during such questioning. We already dealt with certain concerns regarding the objectivity and partiality of a designated under the Interception Bill.

Although the Bill contains a chapter: “Combating Financing of Terrorism”, a reading of the Bill and the related Acts (Monitoring Act and Financial Intelligence Centre Act) show that in order for the state to avoid affording financial institutions the very limited rights provided in chapter two of the Bill, it will apply for interrogation orders under the two Acts, instead of those provided in the Bill or s205 of the CPA.

PROVISIONS OF DIRECT RELEVANCE TO FREEDOM OF EXPRESSION

While the definition of a “terrorist act” is of obvious and fundamental relevance to the right to freedom of expression, sections 20, 24, 25 and 26 have special relevance. Chapter 2 of the Bill creates the legal framework for the interrogation of terrorist suspects and creates an obligation in section 24 to answer questions and produce things.

It goes without saying that this provision is inconsistent with section 16 of the Bill of Rights because it compels, without excuse or way-out, compliance and is in this sense an invasion of privacy and a violation of the freedom not to speak. The shield from prosecution that is provided to those compelled to answer questions in such an interrogation before a judge is oddly incomplete in that such a party is still exposed to civil-claims, (although this is possibly an oversight by the Bill’s proof-readers).

Both the language and content of section 24 of the Bill are incapable of being read down. The supposed qualification, “is protected by law relating to non-disclosure of information or to privilege” would apply to the rare individual like an attorney or spouse. While the compellability of witnesses is already a feature of our Criminal Procedure Act, the Bill severs the fetters of “just cause” theoretically provided for in section 205 and 189 of the CPA.

This is of obvious concern to journalists because it is not unthinkable that the state would begin to use section 24 of the Bill, instead of section 205 of the Criminal Procedure Act, to force journalists to disclose and hand over information. All the state has to do is situate the act or activities being investigated within the confines of the Anti-Terrorist Act.

IS THE BILL CONSISTENT WITH THE CONSTITUTION?

This inquiry involves two parts. First, whether a fundamental right contained in the Constitution has been infringed. If so, the second part of the enquiry is whether such an infringement can be justified in terms of s36 (1) of the Constitution.

Because the Bill allows the state to use extraordinary measures against individuals suspected of having committed a ‘terrorist act’ (e.g. a denial of bail) and imposes extremely harsh sentences on persons convicted of a ‘terrorist act’, the definition of ‘terrorist act’ must be limited to actual acts of terrorism that require drastic measures.

As submitted above, the definition of ‘terrorist act’ is wide, vague and lacks precision. This could lead to abuse and will cover people who never intended committing acts of terrorism.

If the crime of terrorism absolutely has to be created, it is best to keep it simple and signify what most people understand by the word. A provisional suggestion would be:

1. The use of serious violence (or violence) for political ends, including its use for demoralizing or putting the public, or any sections of it, in fear; and/or
2. The encouragement of acts of serious violence (or violence) for political ends, including encouraging its use for demoralizing or putting the public, or any section of it, in fear.

For these reasons the definition of ‘terrorist act’ is inconsistent with the Constitution.

The Bill is possibly unconstitutional in respect of section 24 as well in that there are insufficient reasons to limit the rights which presently exist for examinees (persons under interrogation) at present, namely the concept of “just cause” under s205, by introducing a different interrogation process. As stated above, the Constitutional Court has found that

s205 is adequate to meet the legitimate state interest of investigating and prosecuting crime.

OTHER SUGGESTIONS

The removal of principles that change the common law regarding intention, causation and proof in determining criminal liability or involvement.

BENITA WHITCHER

February 2003

2. CONVENTIONAL ARMS CONTROL BILL (B50-2000)

Compared to the other bills analysed so far, the Arms Bill appears to have had the benefit of an astute and sensible legal mind.

The object of the Bill is the regulation of the arms industry. Most of the relevant provisions, except section 23, has all the constitutional checks and balances, namely authorisation by a proper judicial authority to enter, search and seize, and reasonable search and seizure powers. Furthermore the Bill creates an opportunity to challenge the search and seizure warrants as well as the conduct of the executing inspectors before and after the fact. The powers to search and seize is restricted to search and seizure in respect of arms manufacturers and their business premises, not ordinary citizens or journalists.

No self-incriminating statements made during the searches etc may be admissible as evidence, except perjured statements in a perjury offence. Section 25(1)(e) does not prevent a person from refusing to answer questions which may infringe any of his rights.

Section 23

The only section that justifies closer scrutiny is section 23 because it potentially offends the right to freedom of expression in a manner that is not justifiable.

Since section 25 creates an offence with an attendant sanction of 10 years imprisonment, the offending section 23 carries quite a punch. Section 23(2) in practice will only affect information officers and bureaucrats who hold information in a formal or official capacity. It regulates the release of information by such persons.

Sub-section (a) of 23 (2) protects bureaucrats and marketers of arms acting in their official capacity.

Sub-section (b) provides for the release by the minister after notification to the body concerned of details that may have a detrimental affect on a manufacturer.

Sub-section (c) envisages compliance with the Promotion of Access to Information Act (“the PAIA”) and presumably is there to enable the provision of certain information to persons who have a right to such information in terms of that Act. Unfortunately the phrasing of the sub-section envisages that a formal application in terms of the PAIA will have to be made.

For our purposes, section 23 (1) is the problematic. This section will directly affect disclosure by journalists, the public and watchdog organisations.

In effect it creates a blanket prohibition on the publication and so forth of any information which would be detrimental to the national interests or to the commercial interests of a manufacturer except where (in terms of section 23 (2)) this is necessary strictly for the use of bureaucrats or marketers; when the minister decides to publish this information after notification to the parties concerned; and when the processes in a law dealing with access to information are invoked.

For a journalist, for instance, who has verified information at his or her disposal concerning an aspect of an arms deal that, if revealed, may be to the detriment of the manufacturer, such journalist would not, simply because this information is of interest to the public, be able to publish same. It must be borne in mind that since the information is already in the possession of the journalist, there is no need, nor would there be the time, to invoke laws dealing with access to information.

The clause in effect, through the very narrow exceptions to the overall prohibition on the disclosure of detrimental information, limits the right to freedom of expression of the media and other relevant watchdog bodies.

It is conceded that the notion of “national interest” is one that, if much abused by governments, is sufficiently fixed to attract the protection of the Courts in matters pertaining to conventional arms trade and media freedom.

However it is submitted, the concept of “commercial interest” is so vague and so apt to encompass even relatively minor infractions that it may not safely be employed as a threshold by which to judge misconduct. In other words, while the term “national interests” has the ring of awe and magnitude about it, “commercial interest” may quite plausibly be argued to be anything that has a (negative) influence on share price or profits.

It is questionable why businesses need special protection specifically in this industry. The pharmaceutical, petrochemical and information technology industries are not free of abuse and corruption and the nature of their businesses affect the wider community in numerous respects.

Further there is no justification why the right to freedom of expression and the right to freedom of the press should be given less weight in this regard than “commercial interests” rights.

The qualifications on the prohibition of disclosure, namely in (a) to (c) do not, unfortunately, restore the general right to freedom of expression to its full constitutional shape.

Recommendation

1. The definition of “commercial interests” should be more clearly and strictly defined;
2. A far better way to go about drafting clause 23 would be:

- (a) To reverse the order of the prohibition and qualifications thereto. Instead, one would have a general enabling clause expressing the constitutional right to freedom of expression and then limiting such a right to the extent that disclosures may be detrimental to the national interest or security of the Republic; or

- (b) The addition of a sub-section (d) to section 23(2) to read as follows: “where the public interest in the disclosure of the information clearly outweighs the harm contemplated in section 23 (1) or the addition of the following phrase to the end of section 23 (1): “...or where the public interest in the disclosure of the information clearly outweighs the harm contemplated herein”.

BENITA WHITCHER

November 2002

3. CODE OF CONDUCT FOR BROADCASTING SERVICES – INDEPENDENT BROADCASTING AUTHORITY ACT 153 OF 1993 (“IBA Act”)

The present Code of Conduct

All broadcasters (broadcasting licensees) in South Africa are subject to and must adhere to a Code of Conduct, as contained in Schedule 1 of the IBA Act.

The most controversial section of the Code is Clause 2(a) which *inter alia* prohibits the broadcasting by broadcasting licensees of:

“Any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of the population or likely to prejudice the safety of the State or the public order or relations between sections of the population”.

The remainder of clause 2 provides that broadcasters must:

“Not, without due care and sensitivity, present material which depicts or relates to brutality, violence, atrocities, drug abuse and obscenity.

Exercise due care and responsibility in the presentation of programmes where a large number of children are likely to be part of the audience”.

Section 3 of the Code requires broadcasters to report news “truthfully, accurately and objectively”, without intentional negligent departure from the facts, whether by (a) distortion, exaggeration or misrepresentation; (b) material omissions or (c) summarisation.

Section 4 of the Code states that broadcasters are entitled to comment on and criticise any actions or events of public importance. The comment has to be presented in such a

manner that it clearly appears to be comment and must be made on facts truly stated or fairly indicated and referred to.

In the Constitutional Court case of *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC), the Court focussed on the following section of clause 2(a) namely: “likely to prejudice relations between sections of the population” *vis-à-vis* to the right to freedom of expression in s16 of the Constitution. It found the section unconstitutional and declared it invalid.

The Court held that freedom of expression was applicable not only to information or ideas that are favourably received or regarded as inoffensive “but also to those that offend, shock and disturb. What was clearly outside constitutional protection was expression or speech that amounted to “advocacy of hatred based *inter alia* on race, ethnicity, gender or religion and which amounted to incitement to cause harm (s16 (2)).

The Court held that the clause limited the right to freedom of expression and was too broad in that the phrase “section of the population” was less specific than “race, ethnicity, gender or religion” as spelt out in s16 (2) of the Constitution. The Court also found that the phrase or prohibition was so widely phrased and so far reaching. This meant that it was difficult to know beforehand what was really prohibited or permitted and that its wide ambit might also impinge on other rights, such as the right freedom of religion, belief and opinion guaranteed in s15 of the Constitution.

Although the other parts of the clause were not the subject of the court case, in light of the decision in the *Islamic Unity Convention Case* and *Curtis v Minister of Safety and Security* 1996 3 SA 165 (CC) the same complaints can be directed against the remaining part of Clause 2(a). In essence it is unconstitutional on the grounds that it is vague, over-broad, does not minimally impair the right protected by section 16(1) and unreasonably goes beyond the limitations set out in section 16(2).

The proposed new Code of Conduct

Schedule 1 of the Act which contains the Code has been repealed by the Broadcasting Amendment Bill, 2002. A new Code of Conduct has been published and it came into effect on 4 February 2003.

The proposed new Code will probably pass constitutional muster in that:

1. Clause 2(a) has not been included in the proposed new Code;
2. It is significantly less restrictive than the “old” Code and does not unduly restrict the rights in section 16(1);
3. It clearly defines the conduct it proscribes and therefore cannot be said to be vague.

BENITA WHITCHER

JANUARY 2003

4. DEFENCE FORCE ACT 44 OF 1957

SECTIONS DECLARED UNCONSTITUTIONAL BY THE COURTS AFTER THE IMPLEMENTATION OF THE BILL OF RIGHTS

Section 126B(2) read with section 126B(4) was declared unconstitutional and a violation of section 16 of the Constitution by the Constitutional Court in the case of *South African National Defence Union v Minister of Defence 1999 (4) SA 469*.

The invalidated sections prohibited all members of the SANDF from joining or participating in any *trade union activities* and any *protest action*, namely from acting in support of any cause, public or private.

FURTHER PROVISIONS OF THE ACT WHICH RESTRICT FREEDOM OF EXPRESSION AND INFORMATION AND WHICH ARE CONSTITUTIONALLY QUESTIONABLE – SECTION 118 and 119

The Act prohibits the publication in any newspaper, magazine, book or pamphlet or by radio or any other means of four classes of information without ministerial authority:

- (1) Any information relating to the composition, movements or disposition of the SANDF or any auxiliary or voluntary nursing service established under the Act, or any force of a country which is allied to the Republic, any South African or allied ships or aircraft used for naval or military purposes, any engines, rolling stock, vehicles, vessels, aircraft of any railway, road, inland water or sea transport system or air service over which the SANDF has control or anything which has been supplied on requisition by the minister. A statement, comment or rumour, which directly or indirectly conveys such information, is also prohibited.
- (2) Any statements, comments or rumours relating to a member or activity of the South African or a foreign defence force ‘calculated’ to prejudice or

embarrass the government in its foreign relations or to alarm or depress members of the public.

- (3) Secret or confidential information relating to the defence of the Republic, including information relating to actual or proposed works connected with fortification or defence.
- (4) Section 119 prohibits the taking of photographs or sketches or notes and so on of military places or any property or premise or thing directly or indirectly under military control.

Information relating to the defence of the Republic is presumed secret or confidential unless the contrary is proved and information relating to military equipment is deemed secret unless publication has been authorised.

Contravention of the provisions is an offence and attracts fines of up to R10 000.00 and/or imprisonment for a maximum 5 years.

Obviously sections 118 and 119 will have to be interpreted and read down if possible with reference to the public's information rights in section 32 of the Constitution, the Promotion of Access to Information Act 2 of 2000 ("PAIA") and section 16 of the Constitution (freedom of expression). The peculiar nature of the Defence Force may well mean that these rights may be justifiably limited. However, if the government wants to limit these rights, the limitation contained in sections 118 and 119 will have to be reasonable and justifiable in an open and democratic society as provided for in section 36 of the Constitution (limitation clause).

THE RESTRICTIONS IN SECTIONS 118 AND 119 IN THE DEFENCE FORCE ACT ARE NOT JUSTIFIABLE UNDER THE CONSTITUTION

In order to determine whether s118 and 119 are justifiable limitations on the freedom of expression and the right to information held by the state, it is necessary to consider its purpose.

The Constitution does not set out any express purpose for limiting information about the defence force. However the Promotion of Access to Information Act 2 of 2000 provides a guideline. It provides that the disclosure of records which could “reasonably be expected to cause prejudice” to the defence, security or international relations of the Republic may be refused in terms of section 41 thereof.

Further, as a general principle, it can be accepted that there is a legitimate purpose in suppressing information on defence matters, namely to prevent the enemy accessing information about battle strategy and projected military action. It is also legitimate to suppress information of a scientific and technical nature to prevent the enemy learning about weapons systems.

Significantly the limitation in the PAIA is subject to a public interest override. Section 46 mandates an information officer to grant a request for information, which would otherwise be protected under section 41 where the disclosure would reveal evidence of:

- (a) 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 clearly outweighs the harm contemplated in the provision in question.

It is submitted that sections 118 and 119 require amendment because the limitations are too broad, overly restrict the right to information and freedom of expression and lack clear standards.

The limiting provisions do not provide a balance between valid defence secrets on the one hand and the provision of information, freedom of expression and the government’s duty of accountability on the other hand.

The effect of the prohibitions is to place a blanket ban on all knowledge about defence matters. They do not, nor they can be interpreted to, permit the disclosure or publication of even information that would reveal corruption or contravention of the law and public safety, which is in the public interest. Thus the provisions go beyond what is reasonable and justifiable to achieve the legitimate objective of security and defence.

The limitations on information that may “alarm and depress the public” do not provide objective standards or clear guidelines to ascertain what may depress and alarm the public. In any event a “reasonable” public would want to be informed, even if it is depressing or alarming.

The range of information, which is illegal, is so broad and vague or general that it is difficult to know beforehand what information is actually an offence to publish.

The Act also places absolute power to control defence reporting at the disposal of the authorities and thus prevents, for example, reporters from presenting an alternative view to the public.

The presumptions of secrecy and confidentiality appear procedurally unconstitutional in that it places a heavy; even impossible evidentiary burden on the media since information relating to the defence of the Republic is presumed secret or confidential unless the contrary is proved. With a blanket ban on information and the bureaucratic procedures in the PAIA how is the media supposed to discharge this burden of proof and in time?.

The Promotion of Access to Information Act 2 of 2000 will be of no practical assistance to, for example, a reporter who has to work within urgent deadlines and who already has in his or her possession information and wishes to break the story timeously. The PAIA is for obtaining information. It also requires the requester to become involved in time consuming administrative procedures, which can be further delayed by the state who has 30 days to respond to requests. Accordingly it cannot be submitted that the PAIA resolves the inadequacies of the Defence Act.

Recommended amendment to sections 118 and 119

Sections 118 and 119 could be amended to read along the lines of section 41 and 46 of the PAIA, namely:

“Improper disclosure of information

(1) No person shall publish in any newspaper, magazine, book or pamphlet or by radio or any other means any information, photographs or images if disclosure thereof-

(a) could reasonably be expected to cause prejudice to-

- (i) The defence of the Republic; or
- (ii) The security of the Republic.

(2) Information contemplated in subsection (1) include information-

- (a) relating to military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities;
- (b) relating to the quantity, characteristics, capabilities, vulnerabilities or deployment of weapons and related equipment and materials;
- (c) relating to the characteristics, capabilities, vulnerabilities, performance, potential, functions or deployment of any military force, unit, personnel, or body or person responsible for the dealing with subversive or hostile activities;

- (d) held for intelligence purposes relating to the defence of the Republic and/or the dealing of subversive or hostile activities;
- (e) on the identity of a confidential sources and any source of information referred to in paragraph (d).

(3) Despite the above provisions/sections 118 and 119 no improper disclosure shall/will arise if: -

- (a) The disclosure reveals or would reveal evidence of-
 - (i) a substantial contravention of, or failure to comply with the law; or
 - (ii) an imminent and serious public safety risk; and
- (b) The public interest in the disclosure of the information clearly outweighs the harm contemplated in the prohibiting provision/ sections 118 and 119”.

The Armaments Development and Production Act 57 of 1968, which also installed a blanket ban on all knowledge and publication on the acquisition of armaments by the state and Armscor was similarly, although in less detail, amended in terms of the Conventional Arms Control Bill, 2000.

BENITA WHITCHER

JANUARY 2003

5. ENVIRONMENT CONSERVATION ACT 73 OF 1989

The Act provides for Environmental Impact Assessments to be requested by the Minister in relation to proposed developments or expansion projects. These assessments are very critical, especially in respect of developments and expansion of projects connected to operations and companies that deal with hazardous products or substances. In Durban community organisations, such as the South Durban Community Environmental Alliance, are constantly at loggerheads with chemical producing and storage companies situated right at the edge of residential areas over the disclosure of Environmental Impact Assessments.

No provision is made in the Act for the publication of such assessments. Once a decision has been made that a development or expansion should go ahead, no reasons have to be furnished and it is difficult for environmental groups to argue against the proposed development or expansion.

The Promotion of Access to Information Act, 2000 has removed this obstacle or problem to an extent. However, it is submitted that such important reports should be published as a matter of routine and general public awareness. They should be gazetted or lodged with the local Department of Agriculture and Environmental Affairs for public scrutiny. In terms of the Promotion of Access to Information Act, information is only obtained if one makes application therefore and establishes that the information is required to exercise a right.

BENITA WHITCHER

February 2003

6. THE INTERCEPTION AND MONITORING BILL, 2001 (the ‘IMB’)

In a nutshell the IMB gives the state extensive powers to pry into, record, seize and/or divert the private postal/electronic/computer communications and websurfing habits of any person. And because of the nature of the equipment used by all parties, the tap follows the person, not the telephone or room as in the old days. Further, in the main, people will be unaware that they have been the subject of an interception or intrusive surveillance.

I have been asked to provide an opinion on aspects of the IMB that may infringe certain freedoms in the Bill of Rights that it is consultant’s duty to uphold through lobbying, advocacy and activist work. This has involved a detailed analysis of key sections of the IMB. I have spent a little time spelling out the implications of these sections on society in general and the exercise of the freedoms and rights in question since these implications are not always self-evident.

THE CONSTITUTIONAL CONTEXT

The Constitution is the supreme law of the land. All legislation and acts on the part of the executive have to comply with the values expressed in the Bill of Rights.

Section 14 of the Constitution states:

“Everyone has the right to privacy, which shall include the right not to have-

- (a) their person or home searched;*
- (b) their property searched;*
- (c) their possessions seized;*
- (d) the privacy of their communications infringed”.*

In terms of Bernstein v Bester NO 1996 (2) SA 751 (CC), the Court held that breaches of privacy include entry into private premises, the reading of private communications/documents, listening into private communications, the shadowing of a person and the wire-tapping or bugging of private communications.

The Court also held that the scope of the right to privacy is not absolute; it has to be demarcated with reference to the rights of others and the interests of the community, subject to lawful conduct and can be limited in terms of lawful justification.

It is submitted that any law that provides for an infringement of the right to privacy, almost *a priori*, exerts downward pressure on the associated right, in this instance, of freedom of expression. This is not only because legal and administrative action may be instituted against certain of those whose communications are intercepted, monitored or deciphered but because the knowledge that private communications are subject to interception, monitoring and deciphering causes self-censorship. Should the law that enables interception, monitoring and deciphering be too wide in application and the procedures that authorise same be too loose in oversight, many reasonable and informed persons may safely be assumed not to express certain views or opinions. A discussion of the problems associated with the broad and subjective bent of “serious offence” and the appointee “designated judge”, below, give flesh to this point.

The essential question, however, is whether the IMB constitutes a lawful limitation to the rights of privacy and it is to this question that I now turn.

Definitions in the IMB (section 1)

For ease of reference I have summarised some of the definitions.

A ‘communication’ includes the full or part of a conversation or message in any form (speech, writing, music, sound, visual, signals, electronic codes and so on).

To monitor includes the recording of communications by a ‘monitoring device’.

A ‘monitoring’ device is any equipment to ‘listen to or record’.

To intercept means the monitoring or acquisition or diversion of the contents of any communication, including the diversion of communication from its intended destination.

A party to a communication includes a participating or active party, a person in whose immediate presence a direct communication occurs regardless of whether the communication is directed to the person and intended senders or intended recipients.

Applicants (who can apply) for a directive/order – certain designated ranks from the Police Services, Intelligence Services, the Defence Force, Special Operations and the Independent Complaints Directorate and the head of the Directorate or an Investigating Director.

A serious offence – any offence mentioned in the Schedule (or any offence that is allegedly being or has or will probably be committed by a person or group or syndicate acting in an organised fashion) which includes involvement in at least two incidents of criminal or unlawful conduct or conduct which could result in substantial financial gain or an attempt to commit any of the aforementioned.

Schedules offences – high treason, any offence relating to terrorism, any offence involving sabotage, sedition, any offence which could result in the loss of a person’s life or serious risk of loss of a person’s life, any offence in the Rome Statute of the International Criminal Court, any specified offence defined in the National Prosecuting Authority Act.

A “designated judge” means any judge of a High Court discharged from active service under section 3 (2) of the Judges’ Remuneration and Conditions of Employment Act,

2001 (Act No 47 of 2001), or any retired judge, who is designated by the Minister to perform the functions of a designate judge for the purposes of this Act.

The general rule – section 2

The IMB prohibits the interception and intentional monitoring of communications. The general rule is that no person may without the knowledge or permission of the communicator intercept or monitor a past, occurring or intended communication.

Permitted interception and monitoring

There are various exceptions to the general rule.

Section 4 - A person may monitor with a monitoring device any communications where the person is a party to the communication and/or if the other party to the communication consents thereto. This allows, for example, a company to monitor and record telephone calls and email communication of its employees and calls made to them from the public. It is submitted that this should only be permitted if the employer has an email or telephone call policy which is made known to the employees and if the policy expressly permits such. This important rider does not find any place in the IMB. The notion of private life and freedom of expression can extend to the office and to business and professional activities.

Section 5 - Any person who is a party to a communication may, in the course of the carrying on of any business and without the knowledge or permission of the other party to the communication, intercept and monitor it by means of a monitoring device. This may be done to monitor and keep records of business transactions.

This means that a person who enters into a contract with a business can in terms of this provision not complain if the transaction is recorded. For example, when applying for insurance over the telephone or telebanking, conversations are often recorded. The Act

thus permits this. It is submitted that it would not be onerous for the business to prior inform the other party that the communication is being recorded and the Act should provide for this.

It is clear from the provisions above that the IMB is aimed at preventing third party interception and monitoring in the sense of ‘eavesdropping’. Of course interception and deciphering play no role in communications between addressees but certain bi-lateral relationships may, unilaterally, be monitored. I have made suggestions above regarding amendments that are necessary to afford certain classes of persons, such as employees or customers, protection from an undisclosed monitoring.

Third Parties – Interception and Monitoring by the State

The important parts of the IMB are those that create exceptions to the general rule prohibiting third party interference and involvement in private communications.

The IMB provides for state interception of postal articles and communications and for the monitoring of communications in the case of “serious offences” or in the cases of where the security of the state is threatened. However, the IMB purports to provide for oversight in the sense that interception and monitoring must be authorised by a “designated judge”.

A “designated judge” may upon a written or oral application issue a directive (an order or warrant) that a particular (or all) postal article or communication (or all thereof) to or from a person or organisation be intercepted and/or monitored by a monitoring device (s16).

The duration of this directive/order is for a period of three months, but it can, on application, be extended for three more months at a time.

The judge must be satisfied, on the facts in the application, that there are reasonable grounds to believe that a serious offence has been or will probably be committed or the security or other compelling national interests of the Republic are threatened or information is sought in connection with property which is or could probably be used in a serious offence or could probably be the proceeds of unlawful activities. The judge must also be satisfied that the matter cannot be adequately investigated in another appropriate manner.

The last requirement, namely the non-availability of alternative investigation methods, is not required in an application where it is alleged that a serious offence has or is being or will probably be committed in connection with organised crime or if it is alleged that property is being used in this respect.

The general rule is that the application must be in writing and contain details of all the facts and circumstances in support of the application. However an oral application can be made if the Applicant is of the opinion that it is not reasonably practicable, having regard to urgency to make a written application. The process must be confirmed in writing within 48 hours.

The IMB goes on to create caveats within this exception. The circumstances in which no prior application is required are:-

- 1) Any law enforcement officer may intercept any communication without an application to the judge if he/she is satisfied that serious bodily harm may be caused and is of the opinion that the matter is urgent and it is not reasonably practicable to make an application. The officer must, as soon as practicable, submit an affidavit to the judge setting out the information obtained from the intercept and the results thereof (s6);
- 2) The same considerations apply if any law enforcement officer wants to determine a location in the case of an emergency (s7).

Execution of the directive/order/warrant – in executing the directive the enforcing officer has vast powers. He/she may take possession of and examine or listen into or make a recording of any communication material/article (for example postal article, email, computer data) to which the directive applies. He/she may also at any time enter or board any premises, vehicle, vessel or aircraft to intercept and monitor the relevant communication.

The enforcing officer may dispose of the communication material or postal article that was taken into possession if the officer is of the opinion that the article cannot be returned without prejudice to the public health, security or national interest or the maintenance of law and order.

On being served a directive addressed to it, a service provider has to, as soon as possible, intercept the relevant communication, failing which it may be liable to a fine not exceeding R1 million and to a further fine of R50 000 for every day that it fails to comply.

Entry warrants (s22) – On application, a designated judge may also grant an entry warrant if he/she is satisfied that it is necessary for intercepting a postal article or communication, or for installing and maintaining an interception device on or for removing an interception device from, the premise specified in the application.

Execution of the entry warrant (s27) – The enforcing officer may enter the premise and perform any act relating to the purpose for which the warrant has been issued.

Besides applications for interception, monitoring and entry warrants, written or oral applications can be made to a designated judge for an order to obtain ‘real time’ and ‘archived’ communication related information on an ongoing basis for the purposes of gathering evidence and investigating an offence. The state applicant may request for the information to be routed to a designated interception centre (s17, 19, 23).

The judge has to base his/her decision on the same grounds as the applications for interception and monitoring, including the ground that the information is needed for evidence and to investigate an offence.

Such information relates to any information in the records of a service provider and includes switching, dialling or signalling information that identifies the origin, destination, termination, duration and equipment used and the location of the user in the system.

On being served a directive, the relevant service provider will be legally obliged to provide such communication-related information in respect of a customer.

Provisions that bolster or assist the state in its interception activities

Assistance by decryption key holders –s29

Strong encryption is critical to e-commerce and confidential communication on-line. It guarantees that sensitive commercial or personal data will not fall into the wrong hands. Without it privacy and safe e-commerce are impossible. However the IMB can require any person to decrypt data on demand. The word “must” in the section indicates that, if called upon, any person who has the password to access communication material or equipment or the ability or knowledge to decipher communication material is legally bound to actively assist the enforcing officer. The state will probably use s205 of the Criminal Procedure Act in this process. See the amendment of s205 in the IMB (s59).

Service providers have to obtain and stockpile certain information

A service provider has to obtain the full names, all addresses, identification numbers and registrations details of all its clients or customers. Clients include contract and prepaid cellular phone users. The service provider is obliged to provide such information to the

enforcing officer. It appears that no separate warrant application is required to obtain such information.

Failure to obtain and keep and hand over such information may render the provider guilty of an offence and liable to a fine not exceeding R200 000 (s15).

Prohibition on certain telecommunication services

No service provider may provide a service which is not capable of being monitored or intercepted. Every provider has to acquire, at its own cost, the necessary equipment and facilities to enable such. Considering the wide definition of ‘telecommunications service provider’ this could mean that if you operate a website, email server or any other service which uses telecommunications, you could be deemed a provider and required to foot a substantial bill for monitoring equipment.

Revocation of the licence of service providers

Notwithstanding any penalty imposed or which may be imposed, the Minister may revoke the licence of a provider who contravenes a directive of the Minister more than once.

State interception and monitoring centres

The Police Services, Defence Force, Intelligence Agencies and Directorate must, at state expense, establish such centres.

The use of information obtained by a directive/warrant

It may be admissible in criminal proceedings contemplated under the Prevention of Organised Crime Act (s47).

Offences and Penalties for contravention and non-compliance in terms of the Act (s51)

Harsh penalties are provided for persons and businesses who contravene the Act and fail to co-operate in investigations under the Act or fail to comply with directives issued under the Act.

Conflict between the Act and other laws regarding offences

A magistrate's court may impose any penalty imposed in terms of the Act, notwithstanding any other law (s15).

S205 of the Criminal Procedure Act

It is to be amended to provide for the subpoena of any person in respect of an investigation under the Act.

Prohibition on the manufacture, possession and advertising of listed interception and monitoring equipment (s45 and 46)

The prohibition does not cover persons or businesses who have obtained a certificate of exemption.

Legal duty to report lost, stolen or destroyed cell phones or SIM cards

The duty falls on the owner or person in possession or control of such items. They must obtain a case number from the police.

Any person found in possession of a suspected stolen item and is unable to give a satisfactory account of such possession is guilty of an offence.

Any person who acquires possession of such an item from another without having reasonable cause for believing that the item is the property of the person is guilty of an offence. In the absence of proof to the contrary, possession is sufficient evidence of the absence of reasonable cause.

Assessing the safeguards

It is the habit of drafters of legislation to create a fairly wide right and then to detract from it bit by bit by giving the assurance that while the general right continues to be enjoyed, these detractions will only be permitted if some stringent substantive requirements or procedural hurdles are overcome.

It is the task of those analysing the practical workings of proposed legislation to look very closely at how high exactly these hurdles are and to keep in mind that a law that purports to set basic standards of conduct only meaningfully sets such a standard to the extent that there is an absolute final bar beyond which no further indulgence is permitted.

The “Designated ‘Judge’”

It goes without saying that the IMB enables fairly far-reaching violations of fundamental rights such as the right to privacy. As noted above it also has censorious effects over communications that the public is aware may be intercepted or monitored and thus affects the right to freedom of expression and, even, free political activity. It does not have to be in the hands of a state apparatus that is oppressive but merely sensitive to party-political objectives, that the monitoring and interception capabilities enabled by the Act could be used to provide the executive with almost unbridled power.

The Act purports to allay any fears in this regard and to provide “checks and balances” by bringing into being an institution or, as it turns out, an individual of oversight. This is the “designated judge” who is defined as:

“Any Judge of a High Court discharged from active service under section 3(2) of the Judges Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), or any retired judge, who is designated by the Minister to perform the functions of a designated judge for the purposes of this Act.”

It is to this authorising authority that *ex parte* applications are brought to permit the said acts of monitoring and interception. The question is whether this authorising authority is a proper judicial authority and/or will be perceived by a reasonable person to be an independent authority. In terms of the analysis below it would seem not.

The Constitution and the appointment of judges and judicial officers

When dealing with the appointment of judicial officers, the Constitution distinguishes between judges and other judicial officers. Judges are appointed through procedures involving the Judicial Service Commission (s174 (6) of the Constitution). The composition of the Judicial Service Commission includes a Constitutional Court judge, High Court judges, lawyers in private practice, members of the National Assembly, including members of the opposition and an academic. Other judicial officers (e.g. magistrates)

“must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice” (s174(7)).

The magistrates are appointed in terms of the Magistrates Commission. The composition of the Commission is similar to the JSC.

Judicial officers are required to act independently and impartially and at an institutional level it requires structures to protect courts and judicial officers against external interference. Judicial independence thus connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status of relationship to others, particularly

to the Executive branch of government, that rests on objective conditions or guarantees (see Van Rooyen & others v S and others 2002 (8) BCLR 810 (CC)).

Regarding what constitutes a proper and independent judicial authority, the Constitutional Court found that the functioning of the judicial officer in an independent court is necessary. It further found that the material requirement for an independent judiciary (and thus a ‘judge’) was an independent organisation that was responsible for the appointment and removal of judicial officers and security of tenure.

It found that judges and magistrates who serve in the courts could be said to be independent and part of an independent judiciary because the JSC and the Magistrates’ Commission recommended them for appointment. The nature of the panels made them relatively un-open to political abuse. Importantly the Commissions’ objectives included ensuring that the appointment, promotion, transfer or discharge took place without political favour or prejudice. Thus there were important safeguards of judicial independence. There were also constitutional and judicial safeguards in place to prevent interference with the Commission by the executive or the legislature.

The IMB does not provide for such bodies or process of appointment and discharge of the ‘designated judges’ nor is there a provision that the designated judges will be part of the ordinary judiciary.

The fact that the person nominated by the Minister to provide oversight of law enforcement officers who wish to intercept and monitor private communications is referred to as a “designated judge” is disingenuous. The term “judge” refers strictly to the employment history that the Minister’s chosen delegate must have and not to this person being part of an independent institution or structure or existing in any sort of relationship to the executive that may be described as truly judicial.

Being a judge rests on more than perceptions of an individual’s integrity. As suggested above, the ability of the judge to be perceived as neutral and impartial rests on numerous

structural factors such as the fact that he or she is part of a collective Bench, is selected as part of a process in which the legislature, the profession and academia also have a say and has his or her tenure secured in a manner which limits their exposure to fear or favour.

All of these aspects are absent in respect of the designated judge. The supposed check to executive misuse of the need for a level of interception and monitoring in society is completely vitiated by the fact that the designated judge is, purely and simply, a Ministerial appointee. Since this person is appointed under the authority given to the Minister in terms of the IMB and since there are no provisions for the dismissal of a designated judge, it is to be assumed that such a 'designated judge' ceases to be one when Ministerial authority is withdrawn. While it may be that the Minister him or herself will not replace a "designated judge" because rulings are not going the executive's way, the absence of any structural safeguards to prevent this, in my view, will create in any reasonable person the perception of partiality.

While more than one 'judge' may be designated, structurally, there is the capacity of the executive to pick their judge; something that is prevented by the independence of the real judiciary which is vested in the Judge Presidents' prerogative to enrol matters and assign Judges. It is one and the same person or group of person upon whom the Minister may rely to give answers that, in the world of *real-politik*, will be thought of by many reasonable and informed persons to have informed his or her selection in the first place.

By analogy, and although this would, ironically, have been a preferable situation, the offensiveness of this "designated judge" provisions are brought home in the following example. Imagine that the "designated judge" was a serving judge whom the Minister was empowered to select from amongst all sitting judges. This would certainly be seen as compromising the independence not only of the particular Judge but of the institution of an independent judiciary whose task it is to hear any matter without fear or favour and, moreover, to be seen to be doing this. The fact that one can never be absolutely sure which Judge will hear a matter provides the public with this sort of assurance.

The question of who authorises interceptions is considered an important one by international jurists. The European Court of Human Rights has on several occasions stressed the importance of real judicial oversight. In Klass v Germany and Huvig v France (1990) the courts emphasized that supervisory control must be entrusted to a judge, preferably a senior judge. They were referring to proper judges who were part of the judiciary.

It is therefore recommended that an amendment is sought to provide authorisation by normal judges of the High Court.

The designated judge's discretion is fettered

In a written application for a direction, the judge's discretion is qualified by words that give the appearance that he or she will be able to make a reasonable and objective decision, namely "on the facts" "satisfied", "reasonable grounds" and "serious offence". However the decision will have to be made within the definition of a "serious offence". It is submitted that the wide definition negates the ability to make a reasonable and objective decision. Besides the scheduled offences which do include offences that are objectively serious, the definition also covers unspecified offences and conduct which is widely and vaguely defined, for example '...or any offence that is allegedly being or has or will probably be committed. It further covers conduct, which the applicant alleges "probably" or "could" happen. Thus the subjective opinion of the applicant and the wide definition of "serious offence" is ultimately defining.

The judge's discretion is further fettered by the wide definition of party to a communication since it can include persons in whose immediate presence a targeted communication was made. Accordingly the direction/order can cover and make a target for interception and monitoring and seizure of communication material someone who worked with or lived next door to or sat on a park bench with or has been seen in the company of or whose telephone line was called by the main target.

The state can bypass even this limited and dubious “judicial” control and track email and telephone conversations in emergency situations without having to prove probable cause (reasonable belief of the likelihood that a crime has been or is being committed) before a judge or if the applicant is of the opinion that the situation is urgent or if the applicant is of the opinion that serious bodily harm may be committed by a suspect. The word “opinion” denotes a subjective rather than an objective view.

In other words it covers a belief or judgement held without proof and is dependent on the applicant’s own personal views of the situation. The fact that the applicant must, as soon as practicable, furnish the judge with an affidavit setting out the results and information obtained from the intercept, will be no comfort to the person whose privacy is secretly being invaded with no process at all. It is significant that no set time period is required in which the executing officer must report to the judge. The words “as soon as is practicable” leaves the officer free to intercept and monitor indefinitely without a direction/warrant.

Accordingly there is no objective standard, as determined by a neutral arbiter, for the limitation of the right the IMB supposedly recognises at the onset. It is a tenet of administrative law and the Constitutional Court that objective criteria should be set for the exercise of any executive or administrative function (see Van Rooyen, p838-9).

These sections can be remedied by deleting the words ‘in his opinion’ and ‘as soon as is practicable’ and substituted with objective standards and definite time periods. The wide and vague part of the definition of “serious offence” should also be deleted.

The common law and constitutional principles regarding intrusive measures and search and seizure are infringed by the IMB

The provisions that empower the state to intrude in a person’s communications, search, seize and dispose of communication data and information contains significant changes to the Criminal Procedure Act and the rules of evidence.

In a normal situation a warrant is required under the Criminal Procedure Act and the grounds and procedure for obtaining the warrant are much more stringent. Notice and knowledge are also key elements in the CPA. The warrant is served on the target so that he/she has an opportunity to challenge it or ensure the intrusion, search or seizure is restricted to the terms of the warrant. A valid warrant is also relevant to whether evidence obtained through it would be admissible in any subsequent proceedings. These principles are confirmed in the Constitution.

In terms of the IMB, a warrant of sorts (the directive) is obtained. However it is executed without the knowledge of the target and without an opportunity to challenge it.

Since search and seizure provisions violate the right to privacy, they must be justified under the limitation clause of the Constitution. To comply with s36, the empowering legislation must provide clear guidelines within which the executing officer must carry out their functions. Wide discretionary powers must be avoided. As set out above the enforcing/executing officers have wide discretion and subjective powers in deciding to intercept and in executing the directives.

Secondly the warrant has to be issued by an impartial and independent judicial authority. We have already dealt with this issue and concluded that the warrants will not be issued by an impartial and independent judicial authority.

Thirdly the empowering legislation must require the judicial authority to be persuaded by evidence on oath that there are reasonable grounds, at common law, for believing that something that will afford evidence of the offence may be recovered. The IMB does not make provision for evidence under oath in its written or oral applications.

(see SAAPIL v Heath 2000 (10) BCLR 1131 (T), Park-Ross v Director, Office for Serious Economic Offences 1995 (2) BCLR 198 ©).

No Exemptions for privileged material

There are no provisions for special procedures covering intercept material that is legally or otherwise privileged material. The European Court of Human Rights in Campbell v UK stated that a high level of protection is to be accorded to these sensitive categories of material.

Thus the IMB should contain a provision which prohibits covert surveillance of such material.

Intercept material as evidence

The Interception Bill in the UK prohibits the use of intercept material as evidence (see clauses 16 and 17). Accordingly there is no reason why the IMB cannot do the same.

BENITA WHITCHER

October 2003

7. INTERNAL SECURITY ACT 74 OF 1982

It is trite to say that the Internal Security Act, 1982 formed part of the former government's security legislation promulgated to maintain political control and apartheid.

The new government has a duty through Parliament to bring our law into line with the Constitution or new political order. Yet, although it has repealed most of the provisions of the Internal Security Act, 1982, it has retained some of the provisions.

Those that have been retained have adverse consequences for freedom of expression.

Affected area: Public Protest

Section 46: Powers to prohibit gatherings in certain cases or to impose conditions for the holding thereof

Section 14(3) has been retained and provides that the Minister may, if he deems it necessary or expedient in the interest of the security of the State or for the maintenance of the public peace or in order to prevent the causing, encouraging or fomenting of feelings of hostility between different population groups or part thereof, prohibit any gathering (private or public) at any time or place.

This provision obviously affects the right of assembly and gatherings as a means of communication and expression.

Section 46(3) is clearly unconstitutional and should be repealed for the following reasons:

- (i) One of the objectives of the Regulation of Gatherings Act 205 of 1993 ("the Gatherings Act") is to draw together and codify the law on assembly in South Africa. This objective cannot be achieved with the existence of s46 of the Internal Security Act.

- (ii) The Gatherings Act adequately regulates and limits the right of assembly and public protest.
- (iii) It makes the government, itself a participant in the political process as the ruling party, the arbiter of the right to gather in public and private places (*A Mathews, Freedom State Security and the Rule of Law*, p139).
- (iv) It violates the principle that such extensive intrusive powers should be given to an impartial and independent judicial authority who would be bound to act judicially.
- (v) The grounds on which the Minister may act are nebulously stated – he must deem it necessary or expedient to act in the interests of state security, the maintenance of public peace or order or the prevention of inter-group hostility. The wording of the Act seems to be designed to ensure that the courts have no power to review the grounds upon which a ban is imposed and the procedure by which the order is made is simply a ministerial fiat. Not a single principle or rule of procedure of the rule of law is left intact by this provision for ministerial banning. There is no limit on the scope of the minister’s power (*A Mathews, Freedom State Security and the Rule of Law*, p 256).
- (vi) The prohibition goes beyond the categories of expression excluded from protection in section 16(2) of the Constitution. It does not, for instance, require or imply that the gatherings or content thereof should or have real potential to amount to advocacy of hatred and which amounts to “incitement to cause harm”; “propaganda for war” or “incitement of imminent violence”.
- (vii) The provision is vague. It does not provide reasonable certainty and specifics what acts amount to hostility or could be proscribed under the provision.
- (viii) Hostility is not excluded under s16(2) – many acts and gatherings can cause hostility without causing the harm or imminent violence or propaganda for war contemplated by s16(2). Thus there is overbreadth in the limitation.

Section 54 – Terrorism and related offences, and penalties therefore

Terrorism and sabotage are still retained as offences under section 54 of the Act. This provision affects the right to freedom of expression in so far as a person is prohibited from committing certain acts which are deemed to constitute terrorism or sabotage.

Numerous categories and subcategories of conduct are listed in the section 54 which potentially create hundreds of different kinds of proscribed acts. As stated by one commentator on the Act in 1986, the provision is “statutory chaos” and it is extremely difficult to describe the range of conduct punishable and impossible to know what activities are likely to land one in the dock.

The provision will not pass constitutional muster for this reason and because of overbreadth and vagueness. The offences are broadly defined, proscribing a wide array of conduct, including expression, which is not necessarily connected to state security or proper acts of terrorism or sabotage.

One assumes that the Anti-Terrorism Bill is meant to replace this provision but this has not been explicitly indicated in the Bill. Further the Anti-terrorism does not deal with sabotage.

BENITA WHITCHER
JANUARY 2003

8.. INTIMIDATION ACT 72 OF 1982

History of the Act

The predecessor of the Intimidation Act was the notorious Riotous Assemblies Act of 1956, which originally regulated employer-employee relations and, in particular, with the use by employees and unions of economic muscle and power play. The provisions were later given universal application by the elimination of the requirement that the intimidatory or similar conduct had to be in ‘respect of employment’. In 1982 the Intimidation Act repealed these provisions of the Riotous Assemblies Act and replaced them by a single crime. The Intimidation Act was part of a battery of security legislation, for example the Internal Security Act of 1982, enacted in the days of the ‘total onslaught’.

The Internal Security Act of 1982 still exists but is due to be repealed in terms of the ‘Terrorism Bill’ of 2002. There is at present no similar move to repeal the whole Intimidation Act, despite its history. The Bill merely makes reference to the repeals of section 1A. The remaining sections of the Riotous Assemblies Act were repealed under the Justice Laws Rationalisation Act 18 of 1996.

PROVISIONS THAT VIOLATE THE RIGHT TO FREEDOM OF EXPRESSION

Section 1 (b) of the Act still exists and reads as follows:

“Any person who acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication-

- (i) Fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person shall be guilty of an offence and liable on

conviction to a fine not exceeding R40 000.00 or to imprisonment or to both such fine and imprisonment”.

Analysis of the provision

The Act should be directed at persons who, by words or physical conduct, intend to and do frighten to influence and/or subdue.

However the provision will not pass constitutional muster because it is too wide, unclear and has no rational connection to the real meaning of intimidation.

In order to obtain a conviction of the crime created in subsection (b) the prosecution need not necessarily prove that the prohibited result (ie that a person fears for his safety etc) necessarily ensued. Instead of the actual ensuing of the result, it is sufficient that “it might reasonably be expected that the natural and probable consequences” of the conduct would be that a person fears for his safety or that the other possible consequences which are mentioned ensue. Subsection (b) is wide enough to cover cases where X had already committed the particular act aimed at intimidating a certain group of people, but has not yet succeeded in bringing the intimidatory message to the attention of the group.

An example of such action is where X had drawn up and printed a pamphlet but has not yet succeeded in distributing the pamphlet among the members of the group of people he wishes to influence. Subsection (b) is also wide enough to cover cases where, because of the very (alleged) intimidation, the (alleged) victims of the intimidation are not prepared to come forward and give evidence that X’s conduct resulted in their fearing for their own safety or, for example, the safety of their property (C.R. Snyman, *Criminal Law*).

In subsection (b) intention is not required. The words “that it might reasonably be expected that the natural and probable consequences thereof would be that ...” embodies a test which is difficult to square with the subjective test which the courts apply to determine the existence of intention (Criminal law, C.R.Snyman).

There is even no requirement that the alleged perpetrator directed his or her act at the alleged victim or that he or she intended the alleged victim to fear for his or her safety/property.

The provision could cover activities in which the alleged perpetrator may not even be aware or reasonably have known that his or her conduct was making a person fear for his life/property.

Basically the connection in the provision between the perpetrator and victim is very tenuous and very unclear.

It fails to clearly define the conduct it proscribes and is susceptible to too wide an interpretation. Accordingly it does not provide reasonable notice to the public of what is prohibited so that individuals can act accordingly. It places in doubt what can lawfully be done and what cannot. As a result it exerts an unacceptable “chilling effect” on freedom of speech, since people will tend to steer clear of its potential zone of application to avoid censure.

The provision is so wide that it technically covers the following situations:

A journalist writing a sensational article that a particular country is threatening to declare war on South Africa and it has nuclear weapons. In this scenario the public would reasonably fear for their safety and property. Similarly, a journalist who writes a sensational article that the high murder/rape/robbery rate in South Africa is on the increase and the state is failing to solve the problem.

Workers who verbally and through pamphlets threaten to stage a lawful/unlawful strike/protest/sit-in/consumer boycott in respect of a particular company.

Proposed amendment

The legislature should restrict the provision to the following or something similar:

“Any person who utters or publishes words to put fear in another or others in order to influence the person/s conduct or subdue the person/s shall be guilty of an offence...”

Or, better still:

“Any person who utters or publishes words which are intended to and have the effect of instilling fear in another person or persons for his or her life or property in order to influence the person/s conduct or subdue the person/s shall be guilty of an offence...”

BENITA WHITCHER

February 2003

9. NATIONAL KEY POINTS ACT 102 OF 1980

In terms of section 2(1) the minister may, whenever it appears that a place or area is so important that its loss, damage, disruption or immobilisation may prejudice the Republic, or whenever he considers it necessary or expedient for the safety of the Republic or in the public interest, declare that place or area a national key point.

Basically the law is designed to protect places and premises and areas deemed to be of strategic interest against sabotage or other forms of attack.

The Act also makes the provision of the Protection of Information Act relating to prohibited places applicable to National Key Points. This means that in general the disclosure of information carries the penalties provided for in the by the Protection of Information Act. This means the disclosure of information about almost anything may become subject to the drastic penalties of the Protection of Information Act.

The anti-disclosure provisions in the Act make it a crime to “furnish” without legal obligation or right, or without the authority of the minister, any information relating to the security measures applicable at a key point or *relating to any incident that occurred there (my emphasis)*. “Incident” means “any occurrence arising out of or relating to terrorist activities, sabotage, espionage or subversion”.

The press may not publish any news relating to the incident unless the publication is authorised by the minister.

This drastically curtails the right to report on political campaigns or environmental protests etc. This is very relevant today because many of the national key points in South Africa today are also plants or companies that are embroiled with local communities and organisations over environmental and occupational hazard issues. In my interview with a local community and environmental organisation, it was clear that the companies are using the National Key Points Act to avoid communicating information and news

regarding these issues. A S Mathews comments that this anti-disclosure provision of the Act enable the authorities to keep the public in the dark about the kind of place that is becoming dangerous or about the direction and magnitude of any campaign.

Recommendation for amendment

There are some restrictions on disclosure which are more precise and justifiable – for example the publication of information about security measures in force at a key point or concerning the composition, duties, movements and methods of security personnel who operate there. If the legislature amends and restricts itself to such prohibitions instead of putting a blanket ban on disclosures, the intrusion on freedom of speech and information would be negligible and defensible (A S Mathews).

BENITA WHITCHER

February 2003

10. NATIONAL SUPPLIES PROCUREMENT ACT 89 OF 1970

The main purpose of the Act is to grant vast powers to the Minister to take over production and supply, prohibit it or requisition goods and services whenever he deems it necessary or expedient for the security of the Republic. In particular, the Minister can acquire or control strategic supplies and operations.

A liberal interpretation of this power is that it is to safeguard strategic commodities and to ensure services and goods are available.

The most contentious provision, for our purposes, is the anti-disclosure clause. In terms of section 8 when the minister has taken action in terms of his vast powers it becomes a criminal offence to disclose to any person any information relating to the affected goods or services unless the minister has authorised it.

The prohibition extends to any statement, comment or rumour calculated directly or indirectly to convey such information or anything purporting to be such information.

Of greater concern is that the Act goes even further and, in another provision (8B), authorises the Minister to prohibit *generally* (my emphasis) the disclosure of any information relating to any goods or services (or statement or comment or rumour calculated to convey it directly or indirectly if he deems such prohibition to be necessary or expedient for the security of the Republic. This prohibition authorises secrecy in relation to goods or services *even if the minister has not exercised his powers under the Act in relation to them* (my emphasis).

Commentators on the Act submit that in certain circumstances secrecy is essential to safeguard strategic commodities, but it is questionable whether the minister can have such vast powers. Another comments: “What are we to make of a law which empowers an official to make a state secret of the whole of commerce and industry?!”.

It is submitted that if such drastic legislation is necessary then the powers and circumstances under which the Minister can commandeer goods, services and operations should be more clearly and narrowly defined and there should be some judicial supervision or parliamentary oversight provided. A recommendation is that such powers should only be invoked in a state of emergency, a war situation or public emergency and where there is clear and imminent threat to the availability of such goods, services or operations. The power should also be subject to a prior judicial or parliamentary directive, similar to the application for seizure and/or forfeiture of assets judicial applications.

A provision should also be made for a duty to provide reasons to any affected person/company, and or for any affected person/company to apply to the High Court to review the Minister actions.

The secrecy and anti-disclosure provisions constitute a blanket ban and are overbroad. Though there may be a legitimate interest to protect certain information, the concealment and anti-disclosure clauses prohibit disclosure in such an indiscriminate way that everything, both sensitive and non-sensitive, is protected. It is unlikely that they will pass constitutional muster.

The prohibited information should be more clearly defined or set out and must relate to that which could reasonably prejudice the defence, security or economic welfare of the Republic, and the prohibition should be subject to a public interest override.

Petroleum Products Act, 120 of 1977

Similar secrecy provisions are provided in this Act. Heavy penalties are provided in the Act for the unauthorised publication of a wide range of information relating to petroleum products, including crude oil.

Here again the anti-disclosure and concealment clauses will not pass constitutional muster because they are overbroad. They protect all kinds of information and do not discriminate between sensitive and non-sensitive information.

The potential for abuse and the danger of such legislation is illustrated in the following sagas, which occurred in relation to this Act:

1) The Salem Affair. Details of this fraud, in which South Africa was defrauded to the tune of millions of rands in a contract for the purchase of oil only came to the public's notice long after the matter in 1983. The government hid behind this Act and stated that it was not in the public interest to disclose this information. The provisions of the Act has effectively silenced the media (see Y Burns, *Communications Law*, p277).

2) In *S v Marais* 1983 (1) SA 1028 (T) the accused was convicted of contravening the relevant clause of the Petroleum Products Act by alleging in a speech at a public meeting that there was no shortage of petrol in South African and that the government was in fact supplying petrol to neighbouring states. The accused was not accused of revealing genuinely sensitive information such as the sources and location of South African crude oil stocks.

In a sense he was convicted for political criticism of the government. Obviously under our new Constitution the Court is unlikely to give such a broad and wide meaning to the Act and offences created by the Act, but the point is that the wide ambit of the provisions are open to abuse.

Recommendation

The Act should be amended along the principles similar to those set out in the Conventional Arms Control Bill and the analysis thereof to give accountability and permit publication in the public interest.

BENITA WHITCHER

February 2003

11. JOURNALISTIC PRIVILEGE AND PROTECTION OF JORNALISTS' SOURCES: A DISCUSSION OF SECTION 205 OF THE CRIMINAL PROCEDURE ACT

Section 205 of the Criminal Procedure Act is the legislation used in South Africa to compel, among others, journalists to reveal information relevant to criminal investigations.

Section 205 of the CPA reads as follows:

- (1) A judge of the High Court or a magistrate may, subject to the provisions of subsection 4, upon the request of an attorney –general (“AG”) or a public prosecutor authorised thereto in writing by the AG, require the attendance before him or any other judge, regional court magistrate or magistrate, for examination by the AG, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the AG or public prosecutor concerned prior to the date on which he is required to appear before a judge or magistrate, he shall be under no further obligation to appear before a judge or magistrate.

- (4) Any person required in terms of subsection (1) to appear before a judge or magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in s189 unless the judge or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

Section 189, the contempt of court provision, is the sting in the tail. It makes possible the sentencing of a recalcitrant witness to imprisonment for contempt of Court (usually 14 days at a time) unless the person has a “just cause” for not answering questions. In other

words a person is not compelled to answer questions or give information in a section 205 inquiry if the presiding officer finds that he or she has a “just cause” for failing to do so.

No statutory privilege is afforded to communications between journalist and source as is the case, for instance, with attorneys and clients. Reporters have, from time to time, been required to provide evidentiary material for the prosecution, which they have generated in the course of following a story.

Progressive journalists and media-watchers have raised concerns about the inhibitory effects of sections 189 and 205 on the ability of the media to practise their vocation and thus keep the public properly informed. These concerns have been far from theoretical. In recent times, a series of fairly high-handed invocations of section 205 have occurred at the instance of prosecuting authorities and it is with some degree of luck that no journalist has actually yet been thrown in jail.

Record of Understanding between SANEF and government

In response, on 19 February 1999 the Minister of Justice, the Minister of Safety and Security and the South African Editors’ Forum signed a Record of Understanding about the implementation of existing laws that relate to the duty to testify and the protection of journalists’ sources and information. It was accepted that there was “a need to balance the interests of the maintenance of law and order and the administration of justice on the one hand with the right of freedom of expression and specifically freedom of the press and other media”.

The parties agreed to investigate the possibility of amending s205 in order to accommodate the concerns of the representatives of the press. I am advised that this process is stalled and that it is unlikely that the State will agree to dispense with their s205 powers. In any event, it is questionable whether editors are necessarily the best class of media-workers to be relied upon to wring concessions from the establishment.

The Record of Understanding creates certain interim, special procedural obstacles should a prosecutor wish to compel a journalist to give evidence.

The Record of Understanding principally displaces to the national office of the Directorate of Public Prosecutions the level at which decisions are taken regarding subpoenaing journalists and allows for representations to be made by SANEF before a final decision is taken. If the state wants to subpoena a member of the press in order to give evidence or to deliver documents, the matter may be referred to the National Director of Public Prosecutions for consideration.

After hearing the interested parties, the Director undertakes to make a determination with regard to the issuing of the subpoena by weighing the need to uphold the maintenance of law and order and the administration of justice against the right of freedom of expression and freedom of the press and other media. As will become clear later, this simply provides that the state has to abide by the existing laws interpreted within the current constitutional context. No new rights or privileges are afforded to journalists by the record of understanding and should the State really wish to lay its hands on confidential information, the National Director has, subject to what the Court may say regarding relevance and “just cause” the final say-so.

Terms of reference for censorship project

1. Evaluate whether section 205 in the circumstances is inconsistent with the Constitution and the possibility of campaigning for the amendment thereof to give journalists protection against revealing information and sources;
2. review the 1998/1999 proposals regarding the amendment of s205 made at the FXI workshop entitled “Protection of Journalist Sources”;

3. review of the SANEF's Record of Understanding with government on the issuing of subpoena's;
4. Interview relevant stakeholders on the issue;
5. On the basis of all the above, recommend a programme of action to FXI and its relevant campaign partners.

This paper addresses paragraphs 1,3 and 5 and to some extent paragraphs 2.

Introduction to Proposals

It is unlikely that section 205 read with section 189 of the CPA can be successfully constitutionally challenged either by it being struck down or an order made which provides for the inclusion of special rights for journalists. However, developments in our constitutional law jurisprudence post the FXI workshop, the Benny Gool saga and the proper reception of foreign cases dealing with revealing of sources, now makes it possible, I submit, to construe a sort of journalistic privilege and/or protection of sources and information within the currently applicable discourse of "just cause".

It will further be suggested that this real, if indirect, legal protection should be strengthened by journalists and editors positioning themselves as a strong lobby or collective bargaining force and by embarking on a vigorous public education campaign.

A review of relevant law.

Before expanding upon the above submissions, a review of local and international case law is in order. This is important because there is no authoritative *locus classicus* in the post-constitutional era available that is directly on point. Thus to get an idea of where the Constitutional Court may go if presented with such a case, some statutory interpretation and analysis of similar local and international cases is called for.

The Constitution

In terms of section 16(1)(a) of the Constitution, freedom of the press and other media is constitutionally guaranteed but thus is as a subsection of the general right to freedom of expression.

(1) “Everyone has the right to freedom of expression which includes:

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

Notwithstanding the ringing tone with which rights are proclaimed in the Constitution, the structure and rationale of South Africa’s constitution is such that the extent of every right is subject to possible limitations. Should these be imposed they have meet the requirements of section 36 of the Bill of Rights.

Section 36(1) sets out the criteria for the limitation of rights. The limitation must be by means of a “law of general application” only and determining what is fair and reasonable is an exercise in proportionality, involving the weighing-up of various factors in a balancing exercise to determine whether or not the limitation is reasonable and justifiable in an open and democratic society (see *Islamic Unity Convention v IBA and others* 2002(5) BCLR 433 (CC) at 446).

Legislation and Policy

In South Africa the protection of journalists’ sources is not accorded specific protection in the Constitution or in any other legislation. There is the Record of Understanding as described above. Moreover, the SASJ requires that a journalist protect his/her sources of

information. There are also various international instruments, namely the Resolution on Journalistic Freedom and Human Rights – 4th European Ministerial Conference on mass media, 1994; Resolution on the Confidentiality of Journalistic Sources – European Parliament, 1994 cited with approval in *Goodwin* that are useful. However these are resolutions, ethical codes and understandings. Should matters come to Court, they are of persuasive value but are not “law” binding on the State.

Case law

Although the Court in *Holomisa v Argus Newspapers* 1996 6 BCLR 836 (W) recognised the importance of media/press freedom in a democracy, Cameron J did not accept the concept of “press exceptionalism”. In his view journalists should not enjoy constitutional immunity beyond that granted to ordinary citizens.

Further, in most other countries, the protection of journalists’ sources is not accorded specific protection in the Constitution or in any other legislation. Even in cases in democratic societies and international Courts, where there is explicit recognition of the importance for the freedom of expression in journalists not disclosing confidential information, the Courts did not find that journalists had an absolute right to refuse to do so or that there can never be circumstances where journalists should be so compelled.

In an English case, *British Steel Corporation v Granada Television LTD (1981) 1 ALL ER 417* the court held that there was no immunity based on public interest which protected journalists from the obligation to disclose their sources in a court of law, when such disclosure was necessary in the interests of justice. Of course, this displaces the enquiry into the murky, value-judgement laden realm in which the true “interests of justice” or “necessity” are debated, but, the law has actually always been making these kind of value-judgements whether openly or not.

In *Goodwin v United Kingdom (1996) 22 EHRR 123*, the majority of judges in the European Court of Human Rights held that a Court order requiring a journalist to reveal

his source of information and the penalties imposed on him for refusing to do so violated the journalist's right to freedom of expression in the circumstances of the case in question.

Although the court came out strongly against disclosure and held that the protection of journalistic sources is one of the basic conditions of press freedom, it did not rule out disclosure completely and in all circumstances. Instead it imposed very strict conditions; based on 'necessity' and 'proportionality (i.e. the restriction must be proportionate to the legitimate aim pursued)' and held that limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court.

Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. In my view, this is going to be an important case in any future similar determination by the South African Constitutional Court, not only because of the stature of the European tribunal but also because it has enunciated principles justifying a limitation of rights.

Chapter 3, Article 1 of the Swedish Freedom of the Press explicitly prohibits the investigation or disclosure of a journalist's sources, with certain limited exceptions. A journalist who reveals his or her source without consent is subject to criminal liability. The responsible editor may be compelled by a court order to disclose the identity of a source which would otherwise be entitled to confidentiality in criminal cases where the published information could jeopardise state security or in which freedom of the press is not the central issue and the court finds that the disclosure of a source is justified by an overriding public or private interest (See paper by CALS entitled "Legislation infringing freedom of expression: a call for amendment, 5 April 2000, page 20).

In America, journalistic privilege is recognised under the First Amendment and American jurisprudence, but the privilege is not absolute. In other words journalists can be forced to reveal information in certain circumstances. The United States Supreme Court in *Brazenburg v Hayes* 408 U.S 665 (1972) held that the state must prove that: -

- (1) There is reason to believe that the reporter has knowledge of relevant information to the case;
- (2) There is no other means of obtaining the information which would infringe on the freedom of the press to a lesser degree; and
- (3) That there is a compelling and overriding interest in the information.

It was also held that there should be a balancing of interests and there must be very compelling interests proved by the state for disclosure (ibid, p20).

In Zimbabwe in *Nathan Shamuyarira v Zimbabwe Newspapers t/a The Chronicle and Geoffrey Nyarota 1994 (1) ZLR 445 (H)*, the Court found that journalists do not have absolute immunity but in that case it upheld the journalist's right to protect his sources of information, and laid down certain principles to be considered in weighing whether a journalist might be required to disclose his sources under certain circumstances.

The Zimbabwean Civil Evidence Act of 1992 is very interesting. It provides that a court of law may declare any evidence to be privileged in the public interest if the court is satisfied: -

- (a) That it would be detrimental to the public interest for the evidence to be given; and
- (b) That such detriment would outweigh any prejudice to the parties or to the interests of justice that might be caused by non-disclosure of the evidence.

The Court weighed up the following considerations *against compelling disclosure* of a journalist's confidential source of information: -

- (a) Whether it is in the public interest to preserve the liberty of the press;
- (b) Whether it is in the public interest that there should be a free flow of information;

- (c) A promise of confidentiality may stringly support a countervailing public interest;
- (d) Whether there is a public interest in upholding the claim of the media to immunity from disclosing their sources.

In balancing the conflicting interests in the case before it, the court outlined a number of interests that weighed in favour of compelling the editor to disclose his source, as well as a number of interests against compelling him to do so:

Interests in favour of compelling disclosure:

- (a) It was in the interests of justice that Nyarota be ordered to identify his sources and it would be prejudicial to the minister's case (civil case of defamation) if the editor's sources were not identified;
- (b) The editor had solicited the information surreptitiously and the police had shown him a confidential police list of suspects, which was in breach of the police code of conduct;
- (c) The wrongs of the editor and police were connected;
- (d) The editor had acted irresponsibly and thus forfeited his claim to protection of sources.

Interests against compelling disclosure:

- (a) If the sources of the information were not identified, it would not prejudice the plaintiff (minister) but would effectively prejudice the editor, because his

refusal to identify the sources which supported his evidence would increase the burden on him to prove the truth of the information;

- (b) The purpose behind the giving of the information to the editor for publication was not one for financial gain or other personal benefit, but to expose corruption. Thus it was justifiable in the circumstances that the police source should perceive his proper duty to be in that direction and for the editor, as a journalist, to publish the information, because of the real danger that the information could be suppressed by powerful politicians;
- (c) The serious nature of the information given to the editor by the police source counterbalanced the illegal manner in which the information was obtained.

The Court came to the conclusion that it had been in the public interest for the editor to expose the corruption taking place. Further the editor had been justified in giving his sources personal guaranteed that their identities would not be revealed. The Court found that it was in the public interest that it should bend over backwards to protect journalists' sources, where the journalist had publicly uncovered corruption or some form of iniquity on the part of those in office.

A country which appears to be the exception, in terms of there being no absolute privilege for journalists, is Mozambique. Article 74(3) of the Mozambique Constitution states that freedom of the press includes the protection of professional independence and confidentiality. Article 30(1) of the Mozambique Press Law provides further that journalists enjoy the right to professional secrecy concerning the origins of the information they publish or transmit, and their silence may not lead to any form of punishment.

Thus journalists appear to have an absolute right to protect their sources and material. However it could be argued that this right may be limited in certain circumstances by the limitation clause in their Constitution although I am aware of no such matters.

Could section 205 read with section 189 of the CPA be constitutionally challenged?

It is necessary to very briefly glance down at the philosophical ground on which the South African Constitution stands because it is this ground that affects both its structure and the way political problematics such as the one at hand are received and logically processed by it. The Bill of Rights lists several rights and freedoms to which every citizen, at least, is entitled. One would expect many of these rights, particularly those which cost nothing and do not demonstrably affect the rights of others, to be able to be claimed in a straightforward manner.

For instance should a Judge sentence an accused to death, it would be a pretty simple affair asserting his right to life on appeal. However, none of the rights in the Bill of Rights are asserted in absolute terms, particularly those that can only be exerted at the expense of the rights of other individuals or the public at large.

One patient claiming multimillion rand treatment at the expense of the fiscus for a rare terminal disease because of his right to life is unlikely to succeed in circumstances where it can be shown that this money would have to be extracted, say, from the Aids prevention budget. In the end, it is a question of balancing the exercise of any one given right that an individual may possess over the often competing rights of others.

Given the structure of the South African Constitution, it is not the end of the world for a lawyer representing the State to admit that her client has violated or sought to limit a fundamental right of a particular applicant. Such a violation or limitation may be justifiable because it is accomplished on behalf of rights, interests and purposes that far outweigh the harm caused by the limitation.

The situation is different in the United States for example, where a lot of fancy rhetorical footwork often has to be done to deny that a particular act actually constitutes “speech” or “expression” or, at least, a class thereof anticipated by the Founding Fathers. This footwork is necessary to avoid the absolute protection that is then given to such acts once

they are deemed to be protected since the American constitution has no limitation clause. Indeed, many laypersons and organisations wishing to lay out a legal strategy in support of their goals seem captive of the logic of the American system where everything goes into showing that a constitutional right has been infringed.

It is of course, an important first step to establish that a right has been limited by, in this case, a piece of legislation also in the South African context. But there is no magic in this. The final question is, in the balance, was the limitation justifiable in “an open and democratic society” (see section 36 of the Constitution).

In other words, because of the structure and logic of the South African constitution, advocacy work that seeks to show simply that an infringement has occurred is naïve and inadequate. Effective advocates on the other hand will, more often than not, find themselves grappling with the altogether more slippery forms of argument and value-judgement proper to the balancing act required in terms of section 36 of the Constitution.

It is unlikely that the actual provisions of the Criminal Procedure Act could be successfully challenged, that is, set aside as unconstitutional or an order made that legislation be enacted that provides privilege to journalists. It seems to be accepted that forcing a journalist to reveal the confidential source of a story or otherwise testify at a trial for the State would create a situation where that journalist and the profession in general would be viewed with suspicion, hostility and distrust in the future by other sources as well as people participating in events covered by the press.

The further logical step also seems beyond question. This is that causing the aforementioned hostility and distrust would interfere with the freedom of the press and, indeed, the freedom of society at large to receive information and generate expression of their own. But because there are instances where the limitation to the right to freedom of expression is, for all right-thinking persons perfectly justifiable, the fact that the possibility of compulsion exists is not enough to kill section 205. In my view, only the

implementation of section 205 and 189 is open to attack, first in the ordinary courts, and as a last resort the constitutional court.

For good or for bad, this will, initially, probably be on a case-by-case basis. Depending on the facts of each case, only the conduct of the relevant judge or magistrate in sentencing a journalist could conceivably be challenged. In other words the judge or magistrate's interpretation of s205, s189 within a constitutional context and his or her exercise of discretion within the meaning (interpretation) of the provisions could be reviewed.

To illustrate this point I refer to a case which, although it did not deal with s205/s189, is relevant to the question in hand.

In *Bernstein v Bester* (1996) 2 SA 751 (CC) the applicant challenged, in the constitutional court, certain the provisions of the Companies Act, namely s417 and 418 on the basis that the provisions infringed his right to personal privacy, freedom of expression and private communications. S418 provides that a person who, having been duly summoned under s417 or 418 of the Act to an examination (a statutory hearing into the conduct of a business),

‘fails, **without sufficient cause...**to answer fully and satisfactorily any question lawfully put to him in terms of s417(2) or this section...shall be guilty of an offence’.

The Court rejected the challenge to the provisions on the following basis:

That nothing in the challenged provisions compelled the presiding officer of the hearing to infringe any fundamental rights. A form of “reading down” or section 39(2) interpretation of the provisions were possible and could be invoked by the applicant and the presiding officer to avoid any infringement of any fundamental rights. The Court stated that the mechanism created by s417 and 418 of the Companies Act arguably

permitted an invasion of privacy, but did not compel such an invasion. A door was introduced by section 418(5) of the Act which stated that it was only an offence if the examinee (the applicant) failed to answer, without sufficient cause, any question lawfully put to him.

A question which would unconstitutionally infringe the examinee's right to privacy will not be 'lawfully' put and the examinee will have 'sufficient cause' to refuse to answer such a question. Insofar as the presiding officer did infringe upon any of the applicant's rights and or 'did not read' down the provisions, the proper remedy was to seek a review of the commissioner's or presiding officer's conduct/judgment. Only if a provision is not capable of being 'read down', will the Court be able to strike it down as unconstitutional.

What does reading down a provision mean? Section 39(2) of the Constitution places a general duty on every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation (provisions in an Act). Further in terms of s39(2), where legislation is capable of being read in two ways – as a violation of fundamental rights or, if read more restrictively, as not a violation of rights – the latter reading was to be preferred.

If we relate *Bernstein* to s205 and s189, it could be argued by the state that there is no constitutional defect in these provisions; that is, they are not inconsistent with the Constitution because they provide a mechanism of 'just cause' to escape the encroaching & punitive effects of the provisions. One may go a step further to say that, read down properly, these clauses provide qualified privilege against disclosure and they give a discretion to the judge or magistrate to compel disclosure through imprisonment or not. The judge or magistrate has a duty to exercise his discretion fairly and in a way that does not infringe the journalist's constitutional rights.

In *Nel v Le Roux* 1996 (3) SA 562 (CC), the Constitutional Court did examine the provisions of s205 but not in relation to journalistic sources. It concluded that the provisions, for reasons similar to those described above, were not unconstitutional.

The present position of journalists in respect of s205 hearings and “just cause”

It must be remembered that the existing cases, which involved an attempt to compel journalists to disclose their sources or material in terms of s205, were decided before the present Constitution. Significantly where disclosure was ordered and the matter was taken on appeal or review, the disclosure orders and sentences were overturned on the basis that the relevant magistrates had not properly exercised their discretion (eg *Cornelissen v Zeelie & others* 1994 (SACR) 41 (W)).

In *Cornelissen* the court found, amongst other things, that “the potential public advantage to be gained from subjecting him to questioning did not outweigh the potential public prejudice caused thereby, namely prejudice to press freedom and the journalist’s trust relationship with the community”.

Of further comfort is that these cases do not reflect the post-constitutional position. In terms thereof s39 of the Constitution will now require that s205 be construed by all courts (including the magistrates courts) having due regard to the spirit, purport and objects of the Constitution and more specifically s16 (1)(a). In other words in any section 205 hearing, s205 and 189 will have to be construed in a way that does not infringe or threaten s16 (1)(a) and the objects of the Constitution in general (a similar approach was suggested by the Constitutional Court in *Nel v Le Roux*).

Therefore in future s205 hearings the journalist now has greater scope to obtain protection and qualified privilege under “just cause”. The journalist would be able to invoke s16 of the Constitution and now strongly contend that the compulsion infringes or threatens to infringe the journalist’s (and perhaps the public’s) right to freedom of expression and freedom of the press.

Freedom of the press enjoys specific constitutional protection under section 16(1)(a).

Section 16 reads as follows:

(1) “Everyone has the right to freedom of expression which includes:

- (e) freedom of the press and other media;
- (f) freedom to receive or impart information or ideas;
- (g) freedom of artistic creativity; and
- (h) academic freedom and freedom of scientific research.

Most commentators and academic writers on the constitution submit that:

- (a) Section 16(1)(a) includes the right to gather and publish information on matters of topical or daily interest, ranging from political matters to entertainment; that is gather and publish news of public interest;
- (b) The right is extended by section 16(1)(b) which relates to the freedom to receive and impart information and ideas. The right to receive and impart information gives scope and meaning to section 16(1)(a).

Further grounds for establishing privilege

The famous author Wigmore, on evidence, concludes that:

“Four fundamental conditions are recognised as necessary to the establishment of a privilege against the disclosure of communications:

- (a) The communications must originate in a confidence that they will not be disclosed.
- (b) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
- (c) The relationship must be one which in the opinion of the community ought to be sedulously fostered.

- (d) The injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

It could be strongly argued that these considerations apply in the field of journalism as it is now trite that an integral part of and a longstanding practice of gathering news involves and is dependent on confidential sources. Therefore, as stated by Victoria Bronstein, it is arguable that the journalist can begin with the rebuttable presumption that the interaction between journalist and informer is cultivated in the public interest.

When the court seek to compel disclosure from the journalist of his or her sources of information, the journalist must assert and show that he or she received the relevant information in confidence, that the guarantee was necessary to assure that the relationship with the source was sustained and that the relationship would be substantially harmed by the disclosure (see Wigmore H, 8 *Wigmore on Evidence; Legislation infringing freedom of expression: a call for amendment*, Victoria Bronstein, 5 April 2000).

What the state must show to rebut this is the following:

- (a) That the identity of the informant is relevant evidence;
- (b) That the evidence is highly probative to certain key issues;
- (c) That no alternative sources of information are available or that any available sources have been exhausted without such information being obtained; and
- (d) That the balancing of public interests is required in the interests of the administration of justice in all the circumstances.

The first three criteria are well-recognised minimum requirements in American, Commonwealth and Canadian jurisprudence. The fourth factor permits flexibility for the

courts in individual cases to assess the weight of the public interests being guarded (see Victoria Bronstein's paper).

Further because we have a Bill of Rights, the courts, when exercising their discretion, are now obliged to consider arguments against disclosure set out in the jurisprudence and cases described above, namely *Goodwin*, *Brazenburg*, *Nyarota* and *Cornelissen*, and to also consider international instruments and resolutions on the protection on sources.

Regarding the view of Cameron J in the *Holomisa* case, in November 2002, in a speech to the Webber Wentzel Bowens 2002 Legal Journalists of the year Awards, Wim Trengrove S C (a constitutional law expert) stated:

“I would suggest, however, that this view no longer holds true under our Constitution, which not only recognises the special role of the media but protects its freedom to perform that role. It does so in Section 16(1)...I emphasize three features of the way in which this section protects freedom of expression.

“The first is that it vests the right to freedom of expression in ‘everyone’. The second is that the freedom of expression that it protects is not limited to the right to speak freely. It also includes the freedom to receive information and ideas from others and to convey information and ideas to them. The third is that this right, vested in everyone, includes the right to “freedom of the press and other media”.

“In other words, the Constitution recognises and protects the freedom of the media by vesting a right in all of us to demand that it be free. The media's freedom is protected not because it is a superior class but because its freedom is in the interests of all of us. The protection of the freedom of the media to act as the ‘eyes and ears of society’ requires that journalists be given greater access to information on public affairs and greater protection of their reports than they now enjoy.

“The Constitutional Court has said, for instance: ‘It could actually be contended with much force that the public interest in the open marketplace of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way’. This role of the media also deserves special protection. The Constitutional Court recently endorsed the statement by his lordship Mr Justice Joffe in the *Sunday Times* case that ‘it is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators’.

“The protection of this role of the media requires that its sources be protected. It must, moreover be borne in mind that the freedom of the media is not limited to the publication or broadcast of information and ideas that we regard as responsible, tasteful and inoffensive. It includes the freedom to publish information and ideas that offend, shock and disturb” (abridged version).

Further considerations include the following:

- (a) In relevant circumstances, a journalist can rely on the defence that disclosure of an informant’s source may tend to incriminate him. In *Parbhoo and Others v Gerts NO and Another* 1997 (4) SA 1095 (CC), the Constitutional Court confirmed the right not to be compelled to give self-incriminating evidence as entrenched in s35 of the Constitution;
- (b) Those who for good reason disclose corruption or other iniquity are fully protected against discovery (in other words discovery of documents, including videos, films etc as part of the legal proceedings which might reveal the source of information) – the iniquity rule (see Burns, Communications Law, p297).

Possible campaign for alternative remedies or legislation

As suggested above, there are little prospects of success to a constitutional challenge of the actual provisions of section 205. This is not to say that section 205 is the most elegantly drafted example of legislation providing the qualified privilege to journalists I have suggested is the case below. A law of evidence amendment act similar in substance to section 201 of the CPA providing attorney-client privilege and similar in substance to section 3 the Law of Evidence Amendment Act of 1998, dealing with an open-ended list of suggested exceptions to the exclusion of hearsay evidence may be called for.

There is also nothing stopping journalists as an organised social or labour force from lobbying to enact separate legislation to provide an express privilege against handing over of material. Indeed some commentators have expressed doubts about whether being compelled to confirm the authenticity of documents such as photographs already published is of the same negative moment as compelling the disclosure of a source. I agree that it would be far more serious had Benny Gool been subpoenaed to reveal who had told him that the march would take place at what time on Rashied Staggie's home as opposed to his being asked to confirm that published photographs were taken by him.

Nevertheless, the perception that the press had sided with the State would linger in either case, causing exactly the same breakdown in the freedom of expression complained of above. If legislative amendments are going to be called for, this aspect must be covered in the same breath as the disclosure of sources.

Demands for legislative amendment would not be a ludicrous or unreasonable demand in the context of South Africa. For example, labour/employment law in South is primarily legislative and extremely protective. These legislative gains came about through mass shopfloor organisation, protest action and collective bargaining. Their formula, through organisations like Nedlac, could be examined for guidance.

Possible legislative enactments could be based on the Mozambican and Swedish Press Law. The European Court of Appeals has endorsed such an approach.

It is suggested that, even if there is no legislative amendment, negotiations could include expanding on the Record of Understanding to include these provisions. It will not be law but will be of significant persuasive value in a s205 hearing. This could be the compromise between the state and the media.

However, in law, less is sometimes more. As matters stand at the moment a Judge considering whether to invoke the section 189 to compel a journalist to testify has to interpret the term “just cause” in line with the spirit and purport of the Constitution. And is this not where the battle lies, over the spirit and purport of the Constitution?

There are those who take a very narrow view which will have administrative convenience, party political advantage and law and order as just enough cause to force disclosure. There are others for whom the longer-term entrenching of a transparent, accountable and fully informed democracy, *inter alia*, through a free and uninhibited press is far more important than an individual conviction here or there of a gangster or vigilante.

Working simply with wide notions of “just cause” in section 189 of the CPA (which, as the law presently stands, covers even non-journalists) and “open and democratic society” in section 36 of the Constitution might give a lawyer far more argumentative scope than a narrow list of pre-ordained exemptions.

While this battle can be fought with charm and erudition by counsel in the courts as cases may come up, it really has to be won in the profession and academy but also in the wider public terrain. Although outside the area of expertise for which I was engaged, I have the sense that a campaign against the improper use of section 205 should not be confined to the legal realm.

The campaign should, in essence, generate support for the ideas that lie behind privileging freedom of expression over notions of administration of justice or the so-called “national interest”. This may involve making use of legal arguments and examples for time to time. But there is no ducking the politics of the binary opposition that is set up by the powers-that-be between various freedoms (such as expression and assembly) and law and order. The role of any campaign will be to foster the realisation that those who seek to enhance the freedom of expression do so on behalf of the public at large.

In discussions with a few senior journalists, I am advised that a parting of ways between editors and journalists in campaigns on behalf of a radical vision of freedom of expression may be called for. While many editors have stood by their journalists quite adequately, there are indications, I am advised, that the sense among some editors about what kind of information should remain confidential is shrinking in inverse proportion to their sense of what is all in the “national interest” is becoming vague and enlarged. In other words, editors are increasingly viewed as part of the political establishment.

An idea that is being floated is the drafting, debating, circulation and finally, signing of a public pledge by all journalists and progressive media workers committing themselves, amongst other things and notwithstanding the state of the law, to maintaining the confidentiality of sources even in the face of imprisonment. Such a pro-active, hard-hitting and unambiguous public campaign by journalists would stipulate why confidentiality is important thus popularising the fairly sophisticated arguments that lay behind, say, the Benny Gool refusal.

Moreover, if well supported by journalists, the State may get the sense that it will be met with resolve and unity should it try a Frank Kahn subpoena again. While such a campaign may well not provoke legislative change, the sense of power this generates and the intellectual battle it takes to those who wish to use section 205 will stand the profession in good stead.

BENITA WHITCHER

JANUARY 2003

ADDENDUM:

SEPARATE OPINION ON SECTION 205 OF THE CRIMINAL PROCEDURE ACT
BY: - HEINRICH BOHMKE

The approach to the trouble that section 205 of the Criminal Procedure Act causes for journalists exercising their own (and society's) freedom of expression I wish to take is a practical one. I have read Benita Whitcher's opinion in which she has set out and analysed the legal position quite comprehensively. I have seen the opinions of other legal scholars and counsel on the subject too. That work having been done and a consensus, it seems, emerging as to the likely approach of the Courts in deciding whether to compel disclosure of confidential news sources in the future, I thought the FXI may benefit from a different discussion now. This one is centred on plotting the best advocacy course to protect and enhance the right to freedom of expression.

To summarise the legal consensus briefly, it seems to be commonly acknowledged on the one hand that: -

1. To compel a journalist to reveal his or her confidential sources of information creates a situation in which the free flow of information and freedom of expression is inhibited not only from the journalist so compelled but within the profession generally;
2. To compel a journalist to testify against participants in events that she was covering similarly inhibits the free flow of information and has the additional effect of placing the safety of journalists at risk;

3. It is in the public interest that there is as much free a flow of information as possible and that journalists are able to operate freely, especially in controversial, momentous areas like politics and crime where many informants speak only on condition of anonymity and where some journalists are tolerated only on condition that they are not potential witnesses;

On the other hand it is also acknowledged that: -

4. The democratic state has a perfectly legitimate interest in administering justice. The withholding of any information relevant and desirable in the trying of matters or obtaining a conviction is not ideal;
5. Certain pieces of information, including the identity of a confidential source, may be of such significance and needed to avert danger of such magnitude that the “national interest” demands it be disclosed notwithstanding the negative effects described in paragraphs 1 – 3 above;
6. Individuals, particularly those accused of crimes, have a very personal and pressing interest in placing before the Court any information, including the identity of a source, which may directly or indirectly exonerate them;

As for the emerging legal position then, it seems safe to say that: -

7. There is no absolute privilege afforded to communications between informant and journalist such as may be said to apply between attorney and client. Almost no jurisdiction in the world provides such a privilege to journalists;
8. In South Africa a journalist may thus be compelled to reveal her sources on pain of imprisonment although no such sentence has been handed down since the adoption of the Constitution;

9. Nevertheless, there is emerging from case law, and an interpretation of the Constitution and the term “just cause” in section 189 of the CPA, a suggestion that communications between source and reporter may enjoy a partial or qualified privilege under South African law. This is principally because of the reception of the tenet in paragraph 1 above;

Absolute Privilege versus Expanding “Just Cause” – a campaign

I was initially of the view that those campaigning for the freedom of expression from a radical perspective could only obtain a radical outcome where there was to be the provision, through legislation, of an absolute privilege. It seemed to me that if one defined journalist and delineated journalistic activity with sufficient accuracy, one might make a case, on behalf of freedom of expression for a privilege akin to that of lawyers. Surely, the reason behind attorney-client privilege was no less pressing than the social and political ills to be prevented and rights to be advanced by journalist-source privilege: trust, the promotion of a free-flow of information and, the right of access to society’s institutions.

Even if such a campaign were lost, it could at least be fought in such a way as to signal just how seriously some people (the FXI, some journalists and academics) took the freedom of expression.

But then I had regard to other factors. One of these was the good chance a campaign for absolute privilege would not only be lost but simply be seen to be proffering contrary and imprudent solutions. Looking at certain Canadian cases, such a campaign seemed to be fighting on the wrong front. Canadian jurisprudence is cited so often in South Africa because the structure of their constitution is so similar to ours. The freedoms provided in their Bill of Rights are subject to a limitation clause similar to our own section 36. All the serious legal opinion that has been provided over the years seems to suggest that section 205 orders will probably be found to be a limitation of the right to freedom of expression. Thus the very structure of our Constitution will nudge these legal questions

into a section 36 enquiry. Is such a limitation “justifiable in an open and democratic society based of freedom and equality”? If this is the way the Court’s are likely to go, perhaps it is better to start a campaign, which expands (or rather closes in this case) the notion of justifiability. Or in other words, it is the task of the FXI to campaign, educate and advocate the primacy of principles 1 – 3 over reasons 4-6.

Internal to the CPA, justifiability also plays a role. “Just cause” is taken to excuse non-compliance with an order to disclose a source and must, in this case, be expanded.

The Campaign

The SANEF agreement.

Editors cannot be trusted to be the custodians of journalist’s right to withhold the identity of sources or not to be compelled to provide other evidence. Presently, an agreement exists that purports to restrain the state in making use of section 205 but these restraints are purely procedural. Research needs to be conducted into what journalists actually want and need in the way of privilege. From this research, a separate body representing journalists needs to be convened which may act as the sponsor of a revised agreement that provides substantive restraint on the use of section 205. The main journalist unions will probably come on board as long as they don’t have to pay the bills for the initiative.

A test case may also be sponsored which, in essence formalises what legal scholars and counsel expect the post-constitution position to be. This initiative is dependant on a suitable case arising.

H Bohmke

Chennells Albertyn and Tanner

February 2002

12. POWERS AND IMMUNITIES OF PARLIAMENT BILL, 2001

Freedom of Speech – Chapter 1

The bill is consistent with the Constitution in this respect. Moreover the Supreme Court of Appeals (“SCA”) and the Constitution have settled this issue and the SCA has in its judgement entrenched the protection of freedom of speech in the National Assembly and the National Council of the Provinces and their associated committees.

The Constitution and case law

Section 58(1)(a) of the Constitution provides that cabinet members and members of the National Assembly have freedom of speech in the assembly and in its committees, subject to its rules and orders.

In terms of section 58(1)(b) the said members are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything they have said in, produced before or submitted to the assembly or any of its committees; or anything revealed as a result of anything that they have said in, produced before or submitted to the assembly or any of its committees.

In *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA), Mrs De Lille, a Member of Parliament was charged for contravening section 10 (3) of the Powers and Privileges of Parliament Act 91 of 1963. She was charged with abusing her privilege of freedom of speech by making serious allegations during a debate and wilfully disobeying a National Assembly resolution to the effect that members should not impute improper conduct to others except by way of a separate substantive motion. She was punitively suspended by an ad hoc committee. De Lille challenged the charge and suspension in the High Court.

In terms of section 10 (1) of the 1963 Act Parliament has the power to punish its members for contempt.

In terms of section 10 (3) thereof, contempt of parliament includes insulting a member on account of his/her conduct in parliament (as opposed to criticism), publishing any false or scandalous libel on any member touching his conduct as a member, and unduly influencing a witness in regard to evidence to be given by him/her before Parliament or a committee of Parliament.

The penalty for contempt under the 1963 Act includes a reprimand, fine or imprisonment by Parliament, or a court if prosecuted therein.

The High Court found that the freedom of speech conferred by section 58 (1) is an absolute freedom in the sense that it is subject only to the rules and orders of the assembly. The Court also found that this freedom of speech is not subject to the limitation clause (section 36 of the Constitution) and Mrs De Lille's suspension was unconstitutional and in violation of section 16 of the Constitution, which guarantees freedom of speech.

The Supreme Court of Appeal confirmed the High Court's findings and further confirmed that there was no constitutional authority for the Assembly to punish a member of the Assembly for making a speech, by means of an order suspending the member from the proceedings of the Assembly.

Although the Bill makes provision for the freedom of speech for members of the National Assembly and the National Council of Provinces, the freedom is limited to the proceedings of the Assembly and the Councils.

However Section 117 of the Constitution affords freedom of speech to members of provincial legislatures and to the provinces' permanent delegates to the National Council of Provinces.

Section 161 of the Constitution provides that provincial legislation may provide for privileges and immunities of municipal councils and their members.

Accordingly the Constitution ensures that members of legislative bodies and their committees enjoy freedom of speech.

Witnesses – Chapter 5

An area of the Bill that requires scrutiny is the section, which permits parliament or any committee to issue a summons to any person to appear before it to give evidence and/or produce any document in his/her possession. The person may be questioned and the document examined by parliament or the relevant committee.

The summonsed person (“examinee”) is afforded the following protection:

Section 24 - the law relating to privilege, as applicable to a witness summoned to give evidence or produce a document before a High Court, applies.

Section 25 – the examinee commits an offence only if he/she fails, without sufficient cause, to appear and/or to answer fully and satisfactorily any questions lawfully put to him/her and/or fails to produce the relevant document.

It is unlikely that this part of the provisions can be constitutionally challenged. Many democracies have similar provisions. For example in the United States persons can be summoned to appear before Congressional committees investigating particular issues.

Further, in terms of *Berntein v Bester* (1996) 2 SA 751 (CC), it could be argued by the state that there is nothing in the said provisions of the Bill which compel the presiding officer of the hearing to infringe any fundamental right. A form of ‘reading down’ or section 39(2) interpretation of the provisions is possible and could be utilised by the examinee and the presiding officer to avoid infringement of any fundamental right, namely privacy or freedom of expression or privilege and so on. Section 23 and 25 arguably permits an invasion of these rights but does not compel such an invasion. A door is introduced by s25 which states that it is only an offence if the examinee fails to

answer “without sufficient cause any question lawfully put to him/her” or fails “without sufficient cause’ to produce any document requested. A question which would unconstitutionally infringe the examinee’s right to privacy, freedom of expression, journalistic privilege and/or the right to remain silent and not to be a compellable witness against oneself (*S v Zuma and others* 1995 (4) BCLR 401 (CC)) and so on will not be ‘lawfully put’ and the examinee will thereby have ‘sufficient cause’ to refuse to answer such a question.

Insofar as the presiding officer of the hearing did infringe upon the examinee’s rights and/or did not read down the provisions and/or made an improper decision regarding the examinees conduct or failure to respond, the proper remedy in terms of *Bernstein* is to seek a review of the presiding officer’s decision or conduct.

The meaning of **reading down** – section 39(2) of the Constitution places a general duty on every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting or implementing any legislation – in other words, implement the legislation in a way that is favourable to the rights of the examinee.

A question regarding the arbiter and the objectivity of such a person was raised by the FXI, namely who is the arbiter in the hearings and who decides whether the examinee has sufficient cause and/or whether a question has been lawfully put?

In terms of the Bill the arbiter will obviously be the person presiding at the parliamentary or committee hearing (section 23). Accordingly it will be a Member of Parliament and/or parliamentary committee. This obviously raises questions of the potential political bias of the presiding officer.

In terms of *Bernstein v Bester* it would appear that the only remedy against this allegation, if it arises during the proceedings, is the review remedy.

The problem with the review remedy is that a review offers only limited grounds of challenge and the onus is on the applicant (the examinee) to establish that the presiding officer's conduct is reviewable.

Further, unlike in *Bernstein*, the presiding officer in a parliamentary hearing can hardly be perceived as an independent and impartial arbiter. Accordingly the section in this sense is inconsistent with the examinee's constitutional right to a fair hearing.

I therefore suggest that an amendment be sought which would remove from the presiding officer the power to determine whether an examinee has failed to answer questions lawfully put to him/her and/or failed, without sufficient cause to answer questions or produce the relevant document.

If an examinee refuses to answer or produce in the proceedings, the matter should be referred by the relevant presiding officer to the High Court for a hearing along the lines of s205 of the Criminal Procedure Act. In this way an independent and impartial forum will adjudicate upon the question of the conduct of the examinee.

A further amendment that can be sought is that there should be an express provision which provides for the examinee to be permitted legal representation during the hearing or for a legal representative to be present (to advise the examinee) during the hearing.

Offences relating to unauthorised publishing – chapter 6

Section 29(1) (a) of the Bill states that no person may publish any document if the publication of that document is prohibited by or in terms of the standing rules.

A person who contravenes the above commits an offence and is liable to a fine or to imprisonment for a period not exceeding three years (s29 (2)).

Section 32(1)(a) of the Constitution provides that everyone has the right of access to any information held by the state. Thus a general right to know is provided.

The Promotion of Access to Information Act 2 of 2000 (“the PAI Act”) gives effect to this right to information. The Act makes provision *inter alia* for the manner of access to records held by the state, it lays down certain grounds for refusal of access and makes provision for complaints to the Public Protector. One of the objectives of the Act is to promote transparency and accountability by all organ of the state.

Certain information is subject to mandatory and discretionary non-disclosure. For example where the defence, security, international relations and economic welfare of the Republic could be prejudiced; privacy and commercial interests of third parties, protection of records of the SARS, the safety of individuals and the protection of property, protection of police dockets in certain instances, privileged records in legal proceedings and so on (section 40, 41).

Section 46 of Act provides for disclosure in the public interest where disclosure of the record would reveal evidence of a substantial contravention of or failure to comply with the law or an imminent and serious public safety or environment risk and where the public interest in the disclosure clearly outweighs the harm which could result from the disclosure in question.

In terms of section 41, if the state refuses disclosure, it must give reasons and inform the requester that he/she may lodge an appeal or an application with a court against the refusal.

The state will have to comply with the provisions of the PAI Act and section 41 in particular to justify withholding information and/or to justify a prohibition on publishing in terms of s29 of the Bill.

The right to access to information is related to the right to gather and receive and impart information (that is publish information).

Accordingly section 29 of the Bill is not unconstitutional because it must be read with the Promotion of Access to Information Act which provides for disclosure and a process to compel the same.

If the publishing of a document is prohibited in terms of section 29(1)(a) of the Bill, a person can challenge the prohibition in terms of the Promotion of Access to Information Act.

Offences relating to Parliament – Chapter 3, section 12

The term “any disturbance” may be problematic. It does not sufficiently define the unlawful conduct targeted by the section. It is broad enough to include lawful ‘noises’, like lawful demonstrations.

This section however has to be read together with the Regulation of Gatherings Act, which regulates and permits such in the vicinity of the buildings of parliament. So if the demonstration is lawful in terms of this Act, it cannot constitute a disturbance in terms of section 12 of the Bill.

Accordingly the section may be defensible and not unconstitutional.

BENITA WHITCHER

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13. PROTECTION OF INFORMATION ACT 84 OF 1984

The most comprehensive secrecy law in our legislation is the Protection of Information Act. It repealed and replaced the Official Secrets Act of 1956.

The Act regulates the prohibition of disclosure of protected information and espionage activities. The general effect of the Act is to punish the unauthorised disclosure and use of virtually the whole range of official government information.

We deal herein with the anti-disclosure provision, namely section 4 and section 13 which makes provision for criminal trials to take place behind closed doors.

Section 4 basically places a blanket ban on the disclosure, retention or other use of secret information. The provisions are too long to reproduce herein. However for our purposes it is sufficient to say that the categories of protected/secret information are boundless. It not only includes information about secret codes, passwords, military establishments and installations and information relating to the real security of the Republic but also include:

- (a) Documents and items “used, kept, made or obtained” in any prohibited place.
Prohibited places can include factories and docks and any area the State President declares a prohibited place;
- (b) Information entrusted to the accused in confidence by a government official;
- (c) Information obtained by the accused in the course of his job with the government;
- (d) Information the accused knows or reasonably should know should be kept secret by reason of the security of the state or other interests of the Republic.

If the information falls into any of the categories defined in the Act, it is protected and it will be an offence to:

- (a) Disclose it to any other person other than a person to whom the accused is authorised to disclose it or to whom it may be lawfully disclosed or to whom, in

the interests of the Republic, it is his duty to disclose it. The offence may be committed by an official who discloses what he is not permitted to reveal or by a private person who passes on secret information.

- (b) Publish it in a manner or for a purpose prejudicial to the ‘security or other interests of the Republic;
- (c) Retain the information without right or contrary to duty or not to comply with lawful directions for its return or disposal.

Section 4(2) also provides for the punishment of those who unlawfully receive protected information.

The penalties for offences under the Act are severe, ranging from imprisonment for 10 years or a fine of R10 000.00 or both.

Section 13 provides that any court may, if it appears to be necessary for the considerations of the security or other interests of the Republic, direct that any trial or preparatory examination in respect of an offence under this Act, shall take place behind closed doors or that the general public or any section thereof, shall not be present thereat.

Analysis

The Act has in its totality been criticised severely by both lawyers and academics because of its broad area of application and the vagueness of certain phrases.

As the relevant information is protected, its precise application cannot be determined with certainty. It can therefore be anticipated that members of the media may obtain prohibited information without knowing its true character.

The width and vagueness of the provisions is clear when one has regard to the phrases: “security of the state or other interests of the Republic”. If the accused should have realised that *any* interest of the Republic requires that the information be kept secret, the

information is protected and may not be disclosed. The Act does not provide any criterion by which prejudice to the interests of the Republic is to be judged or determined. It is extremely difficult for any journalist to determine whether information he has obtained is covered by the provision.

In the Act the words “security” and “interests” are disjunctively linked with the result that the prosecution need show only an injury to the interests of the State. Since the word “security” is used separately, the word “interests” lacks the connotation of national security and could therefore refer to any interests of the State whether military, economic or otherwise.

The task of a journalist in determining whether the information which he has obtained and wishes to retain or publish falls within the ambit of the Act is made even more difficult by section 10 which presumes against him or her that the purpose of his/her possession or publication of the information was a purpose prejudicial to the security or other interests of the State, leaving the journalist with the onus of proving that this was not his/her purpose.

Essentially, the subjective motivation of the accused, a fundamental criminal law principle, is irrelevant. In *S v Du Plessis* 1981 3 SA 382 (A), a decision of three judges in the Appellate Division (now the Supreme Court of Appeals), it was held that it would be of no use to the accused reporter to argue that, although his immediate purpose might have been prejudicial to the security or other interests of the Republic, his ultimate purpose was not prejudicial, or was even beneficial, to the Republic (Bell, Dewar & Hall, *Kelsey Stuart's Newspaerman's Guide to the Law*).

Although the Act requires that the accused must be proved to have known, either actually or constructively, that secrecy was required in terms of the security or other interests of the Republic, the requirement does not apply to all categories of protected information. For example it is inapplicable to “security” information. Further the term “other interests”

is so wide and vague that virtually anything could be found to be “undisclosable” because harmful to such interests (A S Mathews, *Freedom State Security and the Rule of Law*).

A further criticism made by commentators on the Act has been that the Act contains blanket restrictions on disclosure, which take no account of the principles of openness and accountability.

Section 13 prima facie breaches an accused’s right to a public trial. And since a public trial includes access by the media to court proceedings, freedom of the press is also relevant.

Is there a need to repeal or amend the Act?

It is arguable that there is no need to repeal or amend the Act because it may impliedly have been repealed or amended by the Promotion of Access to Information Act, 2000 and the Protected Disclosures Act, 2000.

The two Acts however are of no use in situations however where a journalist, for instance, obtains or comes across information outside of the bureaucratic procedures of the Promotion of Access to Information Act. Further the Act makes provision for information to be kept secret/classified secret.

The Disclosures Act does not make provision, or clear provision, for disclosure to a journalist.

Further it is arguable that under the new Constitution the provisions of the Act could be given a narrower and more liberal interpretation. For example, it may be possible for the Courts under the new Constitution to interpret liberally the authority granted by the Act to reveal where there is a duty to disclose “in the interests of the Republic”. In other words the accused may escape liability by showing that, although disclosure was unauthorised, the revelation thereof (say of corruption or maladministration) was in the

interests of the Republic. The counter argument could be that the person can only make disclosure in terms of the Disclosure Act, and as stated, there is no clear provision for disclosure to the media in the Disclosure Act.

It is also arguable that the phrase “security and other interests of the Republic” will be construed very narrowly under the New Constitution to mean proper security interests, and thereby permit more disclosure.

In the case of *S v Du Plessis*, with regard to the question of whether the purpose was “prejudicial to the security or interests of the Republic”, the Court found that this should be objectively considered, having regard to the relevant facts and circumstances.

It may also be argued that section 13 is not inconsistent with the Constitution because it is a justifiable limitation since even international law and the European Court of Human Rights (UHR) recognises *in camera* trials in certain circumstances, including that of “national security”, “public order” and the “interests of justice”. The Courts, when interpreting section 13 and exercising its powers therein, will have regard to the Constitution and thereby interpret the phrase “necessary for considerations of the security of the state or other interests” to require real security constraints.

However, because of the problems with the Promotion of Access to Information Act and the Protected Disclosures Act and because more certainty and accountability should be required in legislation regarding government secrets and information, a new Act should be enacted which is clearer, more specific and which takes into account principles of accountability.

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