Southern African Catholic Bishops' Conference
PARLIAMENTARY LIAISON OFFICE

Submission to the Parliamentary Ad-hoc Committee on Protection of Information Legislation, National Assembly

on the

PROTECTION OF INFORMATION BILL (B6 – 2010)

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Introduction

1. The Southern African Catholic Bishops' Conference welcomes the opportunity to make a second submission on this important piece of legislation. Our first submission, made when this Bill was discussed by the Ad-hoc Committee on Intelligence in 2008 (B28 – 2008), highlighted a number of concerns. We are pleased to note that two of those concerns appear to have been met in the new version of the Bill.

Firstly, the 'Intrinsic Value Approach' to determining which State information should be protected (clause 8 in the 2008 Bill), has been removed. It was a vague and confusing provision with little clear purpose.

Secondly, there is now a useful definition of 'national security' in the definitions clause. This was missing in the earlier version of the Bill, with the result that it was open to State officials to make 'national security' mean almost anything in order to justify classification of information.

2. Despite these improvements, we are still concerned about certain of the Bill's provisions and principles. Any measure which impacts negatively on a constitutional right - in this case, access to information - must be approached with caution. It must be clear that the measure is sufficiently necessary to justify the inroads which it proposes.

3. We accept that circumstances do arise from time to time in which access to state information needs to be limited in order to protect important interests and to ward off genuine threats to the nation's security.

4. We are less convinced however, that the need to protect South Africa's so-called national interests justifies the extent to which the Bill seeks to protect state information. Of particular concern is the Bill's tendency to lean towards excessive secrecy. It is important to remember that excessive secrecy actually harms security, and that the flow of information is necessary to promote security, confidence and trust between the State and the citizenry. A piece of legislation such as the current one requires the legislature to strike a balance between the competing interests of openness and access to information on the one hand, and

safeguarding the genuine national interest and security on the other. It is the failure of the Bill to strike such a balance that we take issue with, and we are concerned that certain provisions in the Bill will hamper, rather than promote, transparency and accountability in governance.

General Principles of State Information

5. We concur with the principles set out in clause 6, which 'inform its implementation and interpretation'. However, while these principles are sound, some of the provisions of the Bill (listed hereunder), derogate from this sound basis and in some instances render these principles practically meaningless.

National Interest

6. ***(1) An over-broad definition***: The definition of 'national interest' given in clause 11 further confirms our contention that this Bill leans towards promoting excessive secrecy. The definition is also too broad and all-encompassing. To define national interest as including 'all matters relating to the advancement of the public good' (11(1)(a) renders the definition practically useless. The purpose of a definition is surely to assist those affected by the law to understand what it covers and what it excludes. This definition fails to provide that guidance, and this vagueness is not cured by the further description in 11(1)(b), which is equally wide-ranging and open-ended. In our view, clause 11(1) ought to be removed; clauses 11(2) and (3) are far more certain and capable of clear interpretation, and give an adequate sense of what is meant by 'national interest'.

(2) Ideological bias: Apart from the over-broad nature of this definition, the notion of national interest is also tied to certain contestable and ideologically-loaded values such as economic growth, free trade and a stable monetary system. There are various ideological positions and schools of thought that hold that free trade, for example, is not always in a country's national interest, especially where developing countries are concerned. Likewise, while most people would regard economic growth and a stable monetary system as good things, it must also be admitted that these are not sacrosanct. There may, for example, be legitimate economic arguments in favour of foregoing a stable monetary system if that is

what is needed for some other important goal. This illustrates the fact that what this definition seeks to protect is not in fact the true 'national interest' but rather the prevailing state interest.

(3) Over-classification: There is a grave danger that this over-broad definition will lead to state information being classified too readily, denying the public access to state information and thereby considerably reducing the space available for public participation. It goes without saying that this runs counter to a democratic dispensation and the Constitution's emphasis on access to information. We therefore strongly recommend that this definition be reworked, narrowed down and relieved of any ideological bias.

Authority to Classify Information

7. Clause 16 (2) provides that the head of an organ of state may delegate authority to classify to subordinate staff members; and clause 16 (3) provides that classification as 'secret or top-secret' may only be done by designated staff. However, there is no clarity on who may be 'designated'; sub-clause (4), which speaks of a 'sufficiently senior level', is too vague to be of assistance. The danger remains that relatively junior staff could be given the authority to classify information and thus frustrate the constitutional right of access to information.

In the previous version of the Bill it was provided that 'Original classifiers must provide a written justification for each initial classification decision' (clause 21(5) in B28 – 2008 version.) This was a useful provision, as it meant that classification decisions had to be properly considered and justified. There would also be a 'paper-trail' enabling proper evaluation of the classification decision. Now that this requirement has been removed, it will be far more difficult for officials to be held accountable for their decisions to restrict access to information. We accordingly urge that this provision be re-inserted into clause 16.

Principles of Classification

8. By and large the principles of classification are sound and reasonable. We would particularly like to affirm our support for the position set out in clause 17(1)(b), which prohibits the illicit use of classification; and for the important principles contained in sub-clauses (c), (d) and (e).

However, we re-iterate our concern regarding the first principle, that *"secrecy exists to protect the national interest"* (clause 17(1)(a)). Secrecy must be seen not as an ordinary, everyday means to protect the national interest, but as something extraordinary and unusual. We recommend that this sub-clause be deleted and that sub-clause 17(1)(c) be extended to read: 'the classification of information is an exceptional measure. It may be employed only when it is clearly required in order to protect the national interest and must be conducted strictly in accordance with sections 11 and 15'.

Method of Classifying Information

9. Section 14 (2) of the Bill provides that items, files, integral file blocks, file series or categories of state information may be determined as classified. All individual items of information that fall within a classified file, integral file block, file series or category are then 'considered to be classified'. This provides for a form of block classification that serves no purpose other than administrative convenience or expediency. Items that do not in themselves require classification will end up being classified because of the mere fact that they fall within a certain file or file series. It is safe to predict that administrators will increasingly tend to classify such 'blocks' of information, rather than go to the trouble of identifying and isolating the information that actually requires classification. Classification must always be seen as a drastic and extraordinary step, and the relevant authority must apply its mind to every individual piece of information before deciding to classify it. In our submission classification *en bloc* should not be allowed, and clause 14(2) should be deleted.

Appeal Procedure

10. We have problems with the appeal procedure provided for in clause 25. An appeal to the Minister of the organ of state involved does not guarantee an objective consideration, since invariably the Minister will be an interested party. We recommend that provision be made for an appeal to an independent and impartial review board. Such a board, which could be staffed by persons of proven integrity and probity, would engender a greater feeling of confidence among the public, and would at the same time tend to minimise abuses of the classification system by state officials.

The Agency

11. Clause 30 provides for an active role to be given to 'the Agency' in monitoring, inspecting, providing advice and support, and making recommendations concerning information protection policies. We suggest that it is inappropriate for this agency, which is in effect the state security apparatus, to be charged with these tasks. The structures and personnel of this apparatus are, by their very nature, devoted to the securing and withholding of information, rather than to its free flow and availability. If this legislation aims, as the preamble claims, to 'promote the free flow of information within an open and democratic society', then in our view the functions of monitoring and inspection should be carried out by an impartial and independent body (such as the review board mentioned in para 12 above), and not by a state entity whose institutional culture is one of secrecy. Where the technical expertise of the agency is required, it could easily be called upon to assist by such an independent body.

Conclusion

12. It is acknowledged that the State has a legitimate concern to safeguard certain information in order to protect the interests, including the security, of the nation. From time to time items of information will have to be kept secret. Our concern is not with these points of principle, but with the manner in which this Bill seeks to make practical provision for the protection of information. There is always a danger that State officials and institutions will lose sight of the fact that they hold information on behalf of the people they serve, and never for its own sake or for narrow ideological or political ends. We believe that the Bill should be amended along the lines we have suggested above in order to promote the important constitutional right of access to information, and that this can be done without compromising the limited, legitimate security needs of the State.

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