CORRUPTION WATCH

Submission to the NCOP ad hoc Committee on the

Protection of State Information Bill [B6 – 2010]

27th March 2012

1. **We would like to thank the Committee for inviting us to make a submission at these hearings. The invitation was somewhat unexpected. Between the day on which we launched Corruption Watch on the 26th January – a mere eight weeks ago – and the deadline for written submissions some three weeks later, we did not have the opportunity to give the Protection of State Information Bill the detailed consideration that a written submission required. We wrote to the Committee explaining this and in response were invited to make this oral submission.**

2. **So unlike the other service organisations and individual experts who will be making submissions before this Committee over the next three days we are not veterans of the protracted process of discussion that has accompanied the passage of this Bill. We conclude then that we are invited here because the members of the Committee share our concern with the grave dangers posed by increasing levels of corruption, and that they, like us, are anxious to ensure that the legislative process in which they are participating does not result in an outcome which will in any way impede the fight against corruption.**

3. **This is, we are certain, an apprehension that is shared by leading members of the Executive. Deputy President Motlanthe is on record describing corruption as "..after racism, the most serious malady staring humanity in the face today." At our launch the Minister of Justice, Mr. Jeff Radebe, described corruption as "a serious challenge facing our democratic transformation." Members of the Executive have been at pains to emphasise that the purpose of the contemplated legislation is not to conceal the information necessary to expose and so combat corruption. We are aware – and we are pleased to note – that there is a provision in the Bill that criminalises the classification of information for the purpose of hiding corruption.**

4. **However, this latter provision notwithstanding, it remains our firm view that this Bill, if passed in its present form, will indeed seriously impede the fight against corruption. For that reason we are equally certain that you will not pass this Bill without significant amendment.**

5. **So we are going to make our submissions from the perspective of a non-governmental organisation, that is engaged in fighting corruption. This is a perspective that has to be treated with due seriousness. We have seen the 'ranking' that leading members of the Executive have given to fighting corruption. We will show that this concern reflects the values enshrined in our Constitution. Indeed it our contention, that the fight against corruption cannot**

be separated from the imperative to guard our national security. We will further contend that corruption represents a greater threat to South Africa's public interest than do the threats to national security from which the Bill seeks to protect us. This contention echoes the sentiments in the Preamble of the African Union Convention on Preventing and Combating Corruption, and other international conventions, to which South Africa is a signatory. Of course, corruption within the security apparatus not only stymies efforts to combat corruption across the board, but it constitutes a direct attack on our national security.

6. **We want equally to emphasise our NGO status. Corruption cannot be combated without the powers, resources and remedies available to the criminal justice system. However, corruption, particularly on the scale of South African corruption, certainly cannot be conquered through law enforcement alone. Corruption is a social problem where stealing from the public as opposed to an individual or a company is too often viewed as a victimless crime. However this is the opposite of the truth: corruption generates massive social problems, in particular a significant diversion of resources from the public, and especially that part of the public dependent on public provision. It has also led to a concerning erosion of trust between the public, on the one hand, and elected representatives and public servants, on the other. Even when government and the legislature proposes measures that are clearly for the public good, it is treated with suspicion. 'What is in it for them?' is the first question that almost invariably comes to mind. Until the public speaks out, until it tells its elected leaders and its public servants how commonly it experiences corruption and who its victims are, these crimes against the public will not be treated with sufficient seriousness, and the perpetrators will not be treated like the common criminals they are. So a public that both informs and is informed is central to our mission and is central to harnessing the public in the fight against corruption. That is the task that we have set ourselves and why we are here today.**

7. **I want to be clear from the outset: firstly, we take no comfort from assurances that it is not the intention of either the executive or the legislature that this Bill should impede the fight against corruption. The Bill has to be assessed objectively, on its terms. If it fails this test, that is, if, on an objective assessment, it is found that there are provisions in the Bill that are capable of impeding the flow of information that is the principal weapon in the fight against corruption, then the offending provisions must go. The increasing incidences of serious corruption, in particular at the second and third tiers of government, is ample evidence that there are sufficient individuals who are the custodians of large public resources, who will be only too willing to take advantage of any legislative provision – whatever its intentions – that enhances their efforts to loot public resources, not least by preventing those who have knowledge of their criminal conduct from reporting them. 'Zero tolerance' means that nothing can be left to chance, and this must expressly include closing any loopholes in our legislative framework that provide even the slightest opportunity to commit and get away with acts of corruption.**

8. **Secondly, we do not deny the necessity for secrecy in the handling of information that represents a threat – from both external and internal sources – to the**

national security of the Republic. We understand a threat to national security to mean a threat to the territorial integrity of the Republic, to its constitutional order and to the safety and security of all who live in it. Our national security is under no imminent or even foreseeable threat from armed movements, internal or external. The clear and present dangers already confronting us come from poverty and inequality, unemployment and corruption. These factors are already clearly the root cause of significant social unrest, if not yet insurrection. There can be no gainsaying that corruption is eating away at the innards of our most important institutions and is a direct contributor to increasing inequality and to persistently high levels of poverty. Nor can it be denied that corruption is rife in the very heart of the institutions responsible for defending our national security.

9. **The police - the very home guard that must deal with a threat to our national security, the institution that is meant to secure the safety of those who live in South Africa – is a hotbed of corruption. During the week that we celebrated Human Rights Day (21 March 2012) we received a complaint from an informant alleging, in one important regional policing division, nepotism in appointments, appointments made without advertisement, the falsification of statistics, the abuse of police resources for private gain, the awarding by the officer in charge of supply chain management of contracts worth millions to a close family member. Our informant alleges that this conduct has been reported to the Internal Complaints Directorate – who confirmed the allegations – and to the National Commissioner. But nothing has been done about it. At the other end of the policing spectrum we have received hundreds of reports from all corners of the country of venal traffic police, police who, even when asked to, do not bother to write out tickets, because it takes too much time away from bribing other, more pliable offenders.**

10. **And what can we do about corruption in the police and other parts of the security apparatus? We can do a number of things but principally we are providing a platform for the public to openly report their experiences, the better to encourage others to report their experiences; we are providing platforms to enable the public to express their opinions, the better to encourage others to give theirs; we are providing a platform that enables the public to speak to those in authority. This way those in our law enforcement authorities who are corrupt know that the public are on to them and despise them; and those who are honest know that the public support them; and the elected representatives who are charged with exercising oversight of the police know that the public is watching, it is judging and that it will act.**

11. **There is every likelihood that information pertaining to corruption in the police and other parts of the security apparatus – we have also received reports alleging corruption in the SANDF – will fall foul of the legislation contemplated here despite the fact that combating corruption in these organs will undoubtedly strengthen rather than compromise our national security. We will, in the immediate future, be releasing a report on the Johannesburg Metropolitan Police Department. We have a real and reasonable apprehension that this report would not see the light of day had the legislation contemplated in the Bill already been in place.**

12. Of course corruption is flourishing in other key areas of public delivery. Small municipalities, the healthcare system and education have been the subject of many of the reports that we have received. There can be little doubt that poor delivery from these systems is at the root of increasing social tension. You will ask what this has to do with the Bill.

13. Information is the key ingredient in fighting corruption, all corruption. Even the best, least corrupt police force in the world – and that would not begin to describe our own law enforcement authorities – could not confront even a small proportion of corruption. They can go for the very big fish who reap the really large rewards from these multiple acts of corruption or those who, for a number of reasons, choose not to see. To do that they need information, it can be clandestine information, but it also needs people who are willing to speak up and bear witness, sometimes in an open court.

14. But to get at these multiple acts of corruption, there can be no doubt that sunlight is the best disinfectant. We need, public witnesses, publicly told stories, stories that isolate the venal public servant and the corrupt business person, that make them look over their shoulders all the time, that make the corrupt elected representative or just the elected representative that has not stood up to corruption, worry about his or her prospects for re-election. And for this to happen we need a public that is free to inform and be informed. And this, we insist, must be a strong consideration that informs judgement about what is acceptable and not acceptable about the Protection of State Information Bill.

15. Our apprehension – and we shall elaborate this below - is that as a result of this Bill, and of the inflexible and punitive approach that it adopts towards an important class of state information, protection of state information rather than access to state information will be perceived as the default position of the South African information regime. And that this, in turn, will compromise efforts to combat corruption on a broad front, extending well beyond the security establishment at which it is principally directed.

16. We are going to make very few focused points. We have read the submissions of, amongst others, the Legal Resources Centre and the Open Democracy Advice Centre. We strongly endorse the views of the LRC on the constitutionality of the intended legislation, as we do ODAC arguments regarding the impact that the Bill, if passed, would have on whistle blowing and its essential incompatibility with the constitutionally mandated Promotion of Access to Information Act and the Protected Disclosures Act.

17. We want to focus on the relationship of the provisions and policy underlying the Bill to our constitutional values; on the relationship of the Bill to the Promotion of Access to Information Bill; and on the relationship of the Bill to whistle-blowing. We do not make weighty legal pronouncements, nor, for the most part, do we draft alternative formulations. We are happy to defer to others better placed than us to do this. Our comment is at the level of values, and at the level of the practical impact that this Bill, if enacted will have on the free flow of information necessary to combat corruption.

Our foundational values and the Bill

18. The avowed purpose of this Bill is the defence of national security. National security is characteristically thought to be compromised by conduct that threatens the territoriality integrity of the Republic, its constitutional order, and the safety and security of those who live in it. This, essentially negative definition of national security, constitutes, but for the unfortunate addition of the '*exposure of economic, scientific or technological secrets vital to the Republic',* the boundaries of the much wordier definition provided for in Section 1 of the Bill. Axiomatically then, only information that threatens South Africa's territorial integrity, its constitutional order and the safety and security of its citizens should ever be subject to the sort of restrictions contemplated by this Bill.

19. However our Constitution provides a significantly wider and positive cast to the meaning of 'national security'. Section 198(a) of the Constitution provides that

'*National Security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life'*

20. Our Constitution thus effectively provides that national security is undermined by conduct that promotes inequality, disharmony and fear. Corruption clearly promotes inequality, it is palpably at the root of growing disharmony and it thrives in an environment where those who live in South Africa are fearful of the consequences of reporting and otherwise combating corruption. It follows that legislation that causes the public to fear reporting corruption is at odds with our constitutional values. If we have learnt nothing else in our short experience, we have learnt that South Africans not only fear – and with good reason – reporting corruption, but that this fear will be exacerbated if this Bill is passed into law. By nullifying the essence and spirit of the Protected Disclosures Act, this bill will certainly not foster "a culture which will facilitate the disclosure of information…relating to criminal and other irregular conduct…." Instead, the Protection of Information Bill could criminalise the act of whistle-blowing and add to the pervasive atmosphere of fear we know surrounds the reporting of corrupt individuals and activities. This also counters the definition of freedom of expression set out in the Johannesburg Principals: Freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds.

21. Indeed the positive cast that the Constitution gives to the meaning of national security must, by virtue of its provenance, trump the negative cast given by the Bill. That is, should there be a conflict between supressing information that, on the one hand, may undermine national security as defined in the Bill and that, on the other hand, may (through dissemination of the same information) promote efforts to combat inequality, disharmony and fear – the Constitution's definition of national security – the latter considerations would trump the former.

22. We should re-emphasise that there is no immediate or foreseeable threat to national security as defined in the Bill. There is, on the other hand, a clear and

present danger arising from the greater inequality and disharmony that is, in no small part, attributable to escalating levels of corruption costing, by some estimations, over R25 billion annually.

23. The defenders of the Bill will respond to this argument by insisting that the Bill only seeks to restrict information that threatens national security as defined in the Bill; that it will not restrict information that will promote the Constitution's vision of national security and this includes information that will better enable the combating of corruption. In that case we would recommend the legislature embrace our ideas to rename the Bill the 'Protection of State Information that Pertains to National Security Bill', specifically exempt any information that could lead to criminal prosecution of the corrupt from its definition of classified information and initiate a major information and education campaign to accompany new legislation. This public service campaign would seek to encourage members of the public to report information pertaining to corruption, that will advise them where to report this information and that will assure them that the provisions of the legislation will not be used against anyone who reports corruption. We believe it is the duty and principal function of legislatures to expand people's rights, not take them away.

<u>The Bill and the Promotion of Access to Information Act</u>

24. The Promotion of Access to Information Act (PAIA) is a statute that is constitutionally mandated to give expression to the Constitution's guarantee of 'the right of access to any information held by the state; and any information held by another person and that is required for the exercise or protection of any rights.' It is thus a critical elaboration of our Bill of Rights and extreme care should be taken to ensure that it is not weakened by parallel legislative measures that also seek to legislate conditions of access to state information. We believe that this Bill weakens PAIA and respectfully suggest that in this regard the Committee gives close attention to the submission of the Open Democracy Advice Centre.

25. The state, at all levels, is not wont to give easy access to information. This is borne out by our limited experience. We have, for example, attempted to gain access to the Manase Report dealing with allegations of corruption and mismanagement in eThekwini. This has been refused on the grounds that the persons cited in the report must be accorded the right to be heard, despite the fact that all of these persons will inevitably have been heard in the process of compiling the report, and that, should these persons be indicted, the court will naturally accord them the right to be heard again. This restrictive attitude to the release of information – even information that has no bearing on the standard definition of national security and, the denial of which certainly restricts information pertinent to combating corruption – should speak volumes to those who believe that the legislation currently contemplated will not be used or abused to further restrict access to information. We have now commenced an application in terms of PAIA for access to the Manase Report.

26. This will undoubtedly prove to be a long and costly road, as will our PAIA application for access to the SIU's investigation of corruption in the Gauteng

healthcare system, another hotbed of corruption. By all accounts of which we are aware, PAIA has not proved particularly friendly to those persons or institutions wishing to gain access to information, particularly where the latter do not have access to the resources necessary to support lengthy litigation. And even where the claimant is able to litigate and triumph, the information eventually released is significantly devalued by the sheer length of time required to exhaust the processes of court.

27. However PAIA is what we have. We should be thinking of strengthening it and in particular easing the path and lowering the cost of utilising its provisions. We should certainly, as already stated, be guarding against any parallel legislative action that weakens PAIA. The introduction of a new highly restrictive access to information regime, one that is focused not only on restricting information and punishing both those responsible for its dissemination and those who to whom it is disseminated, is bound to damage the existing regime which, based on PAIA, is rooted in the premise – enshrined in our Constitution – that the South African public should be entitled to information in the hands of their state. We agree with the Carter Center – "Information belongs to the people; governments simply hold information in their name."

28. There are a wide range of exemptions in PAIA. If the provisions of PAIA are permitting access to information that is threatening our national security – that is, we repeat, threatening the territorial integrity of the Republic, its constitutional order and the safety and security of the public – then the 'first best' response is surely to revisit and strengthen the exemptions in PAIA. It is not to set up an alternative regime that, with respect to an important class of information, is premised on an approach that is directly contradictory to the statute that expressly gives expression to the provisions and entire tenor of our Constitution. We should add that we are unaware of any instance in which the condition for access under the provisions of PAIA has permitted the release of information that has jeopardised national security, however defined.

29. By the same token, if, as we are inclined to suspect, the Bill is partly born out of frustration on the part of our security agencies at the state's inability to keep its legitimate secrets out of the public eye, then, again, surely the 'first best' measure is to strengthen the governance of information pertinent to national security, rather than introducing legislation that compromises our constitutionally mandated approach to access to information.

<u>The Bill and whistleblowers</u>

30. The report of Transparency International, 'Daily Lives and Corruption: Public Opinion in Southern Africa' has been extensively cited for its evidence of increasing corruption in the six countries, including South Africa, that are surveyed. Public comment has highlighted the finding that the police service is the most corrupt institution identified by respondents across the board, a finding of direct pertinence to the Bill before us.

31. However, we believe another important aspect of the survey result may have been overlooked. 76% of people surveyed believe that ordinary people can make

a difference in the fight against corruption. In South Africa itself, 80% of those surveyed expressed confidence in the ability of ordinary people to contribute to combating corruption. However when the survey respondents were asked if they would report an incident of corruption, only 60% of South African's responded affirmatively against a regional average of 77%. The willingness of South Africans to report an incident of corruption is lowest of all the countries surveyed.

32. What do we make of this data? Are South Africans insufficiently concerned with corruption to bother reporting it? No, because this is flatly contradicted by other data in the report. Are South Africans sceptical of the ability of ordinary people to make a difference? No, because this too is not borne out by the data referred to above. A likely conclusion is that South Africans are fearful of the consequences of reporting incidents of corruption and do not trust the institutions of state tasked with combating corruption. Regrettably this conclusion is borne out by our short lived experience.

33. While we have received many reports of corruption, many of those reporting have declined to identify themselves. On our social media platforms and on many encounters with the public both on radio call-in programmes and through our stakeholder outreach programme, many members of the public have openly articulated their fear of reporting corruption. This response is particularly strong from small towns where the risk of exposure to powerful and vengeful local political bosses and corrupt business leaders is particularly high.

34. The ineluctable – albeit extremely distressing - conclusion is that many people living in South Africa are afraid of their government, in particular, as already suggested, local government in areas out of media focus and the public eye. Their fear is of victimisation in their workplaces, fear of being placed on an unofficial supplier blacklist, fear of being selectively denied access to public goods and services like housing, and fear for their lives. City Press and other news media have provided us with regular horror stories about Moss Phakoe and others who have given their lives for a corruption-free South Africa. Their fear, in other words, is of 'unofficial sanction' for reporting corruption.

35. However, the Bill, and its possible passage into law, has added another dimension to their fear: a fear of formal and harshly punitive sanction at the hands of the state. We are not imagining this: scores of people communicating with us have asked how we expect to continue to function when the Bill is passed into law. Scores of people have asked us how we can responsibly ask them to reveal their knowledge of corruption when this may bring the wrath of the state down on them in the form of the sanctions contained in the Bill.

36. The inevitable response by supporters of the Bill is that these people are misled, even that their conclusions have been distorted and their fears exaggerated by the robust campaign against this Bill. However, what is undoubtedly clear is that this perception is rife and is likely to intensify once the Bill is passed. This, in the face of already weak whistle-blower protection, will be a severe blow to combating corruption, so severe as to lend credence to the view that supressing information is one of the implicit intentions of the Bill.

37. We have no doubt that if the Bill is passed, NGOs like ourselves will begin strategizing how to continue our work in the new context. Surrounded by clever and sympathetic lawyers and a robust and vigilant media – their own work seriously threatened by this Bill – we may find the shortcomings in the legislation, beginning, no doubt, with a constitutional challenge. These naturally all add risk and cost to the business of fighting corruption but we may find ways of prevailing just as we did in the face of hostile national security based legislation of previous eras.

38. However this will be cold comfort to those living throughout South Africa, particularly in rural and other marginalised areas who do not have access to publicity and legal support in their struggles against corruption. It is not difficult to envisage a corrupt manager of a small rural town or a corrupt business person in that setting, waving a copy of the newly minted Protection of Information Act at those who would expose them and warning them of the possibility of the long prison sentence that they will get as thanks for their efforts. This does not have to be true; it simply has to be believed, and without the legal and other backing to advise them to the contrary, prudence will invariably triumph over valour. If that happens it will be the most downtrodden South Africans, those most severely disadvantaged by corruption, that will be denied voice. The Legislature will hesitate to impose this price on South Africa, and on those South Africans in particular.

In sum, we strongly endorse the views of the LRC on the constitutionality of the intended legislation, as we do ODAC arguments regarding the impact that the Bill, if passed, would have on whistle blowing and its essential incompatibility with the constitutionally mandated Promotion of Access to Information Act and the Protected Disclosures Act.

We would also encourage Parliament to

- **rename the Bill the 'Protection of State Information that Pertains to National Security Bill';**
- **specifically *exempt* any information that could lead to criminal prosecution of the corrupt from its definition of classified information;**
- **support a public service campaign to encourage members of the public to report information pertaining to corruption, advise them where to report this information and assure them that the provisions of the legislation will not be used against anyone who reports corruption.**

Alternatively

- **strengthen the Promotion of Access to Information Act in particular by ensuring government deparments are more responsive to requests for information and lowering the cost of seeking information;**
- **expand exemptions in PAIA to include information threatening our national security rather than introduce parallel legislation in the form of the POIB; and**
- **strengthen the governance of information pertinent to national security rather than introducing legislation that compromises our constitutionally mandated approach to access to information.**