

Speech by Minister of State Security Siyabonga Cwele in presenting Protection of State Information Bill to the National Council of Provinces.

Chairperson of the National Council of Provinces (NCOP) Hon. MJ Mahlangu

Honourable members of the NCOP

Ladies and gentlemen

Comrades and friends.

Our Constitution, Our Foundation And Future.

Thank you for giving us the time to work with you in processing what has become the most talked about piece of security legislation both here and abroad. We are grateful to the members of the Ad-Hoc Committee who widely consulted the public in all our provinces and devoted sufficient time to improve the bill.

At the outset, we would want to underscore that we respect and recognise the democratic freedoms underpinning our Constitution. These are hard won freedoms that must always remain close to our hearts and at the centre of our conscience.

The goal of this government continues to be to serve the Constitution and the people of this country. The White Paper on Intelligence clearly states that our focus and priority is to improve the quality of life of our people, the practice of democracy and the promotion of an internal and international climate of peace and stability.

The key objective of any government is to ensure national security as the bedrock for attaining peace, stability, development and progress for a nation.

The Protection of State Information Bill (B6B-2010) seeks to advance the public interest by protecting certain classified information held by the state that if it became known to adversaries, would prejudice state programmes and hinder its ability to perform its duties. Secondly, it introduces the protection of valuable information held by organs of state against unlawful alteration, destruction or loss in order to prevent hardship experienced by our people who may as a result be denied services they are entitled to.

The bill is repealing the Protection of Information Act of 1982. This apartheid legislation is defining national security in a narrow manner yet since 1994 we adopted a broader definition which goes beyond protection of the state to include protection of the people. Our bill seeks to incorporate the rights and responsibilities imposed by our constitution. This process is also guided by the International Covenant on Civil and Political Rights which provides under article 19(2) as follows;

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print”

In article 12(3) it further provides:

“Freedom of Expression may... be subject to certain restriction, but these shall only be such as provided by law and is necessary

- a) For respect of the rights or reputation of others. And
- b) For the protection of National Security or of public order, or public health or morals.”

It needs to be emphasised that the rights in our Constitution, as is the case in the Covenant, are not absolute as they are subject to Section 36, which limits these right. No such limitation exists on the provisions of the Chapter 11 pertaining to National Security and the Security Services and their oversight structures.

To those who fear that the Bill may be abused, we say: the only thing to fear is fear itself. We say: Soldier on and know that “the price of freedom is eternal vigilance” hence we have developed a Bill which in clause 10(1) and (2), amongst others, provides that “ the decision to classify information must be solely based as set out in this act; (2) (a) Classification of state information is justifiable when it is necessary to protect the national security (b) Classification of state information may not under any circumstances be used to conceal ... corruption, unlawful act or omission, incompetence, inefficiency or administrative error...”.

There are, inter alia, checks and balances to prevent any abuse of power in the classification system. These include oversight by an independent Classification Review Panel, by the Minister of the relevant department, by the judiciary, the Inspector General of Intelligence, the Joint Standing Committee on Intelligence and Parliament.

International Competition: Espionage

The global competitive nature of the world today and the scramble for scarce resources manifest in foreign states employing interventions that counter or compete with our national interests. To this end, the bill criminalises foreign spies who steal our secrets to improve their competitive edge in order to advance their interests and at expense of our own development.

Introducing a declassification system

Further, the Bill limits secrecy and develops a more open society by introducing a transparent system of declassification where there are stringent criteria and timeframes for classification, reclassification and declassification. This is something that our people haven't been told about by those opposing the Bill. They have also not been told that this Bill is, in fact, more progressive than any other Act anywhere else in the world that governs the protection of classified information.

The accomplishment of this Bill is that it manages to create an environment of openness, accountability and responsiveness, and it does this without compromising National Security – all of these being prerequisites for a stable democratic society.

Public Defence Provisions

There has been a lot of focus by the opponents of the Bill on the absence of the public interest defence clause. In the National Assembly process, and the subsequent work in the NCOP, the public interest override was introduced in clause 19. Furthermore, the inclusion and amendments made in clause 43 which provides exemptions on disclosure and possession of classified information goes a long way in addressing that concern. Clause 43 explicitly protects whistle blowers and those who expose corruption. What is strange Chairperson is; despite the African National Congress (ANC) being accommodative to views of the public and having spared no effort to accommodate all political parties as a consensus building mechanism, some opposition parties opted for 'cheap politics of walkouts' because they have ran out of all logical arguments and sought to continuously move the goal post.

The Bill provides a public interest override. This is a simple mechanism that allows a person to apply to the head of an organ of state to access and declassify information, and if this is denied, a person can appeal to the relevant Minister or can apply to the court.

It is our position that with such a mechanism there is no need for a public interest defence clause as there is no need to commit an offence when all you need to do is apply to the relevant authorities to access and declassify the information. The authorities by law would have to comply with Clause 10 of the Bill which states that classification cannot be used to conceal an unlawful act or omission, incompetence, inefficiency or administrative error and cannot be used to limit scrutiny or prevent embarrassment.

The problem with the public defence clause is the associated risk where any member of the public can decide what is in the public interest, when the head of organ or courts for instance may be in a better position to objectively weigh up the issues. Remember the objective of the Bill is to protect national security and the secret information we have to advance our national interests – it is not to protect the criminals who steal state resources from being prosecuted.

Chairperson, let me assure you again that this bill does not permit the abuse of power. Further, let me assure you that this government would not support a Bill that undermines our Constitution, and which does not strike a balance between secrecy and transparency.

No conflict with PAIA

There is concern in some submissions that the Bill is unconstitutional as it is in conflict with the Promotion of Access to Information Act (PAIA), an Act which gives expression to the constitutional right to access of information and hence with the Constitution. It is our view that this is not the case. The protection of classified information to protect national security is mandated by the Constitution.

The Constitutional Court in the matter of *Independent Newspapers v Minister for Intelligence Services* 2008 has also upheld that confidentiality of state information on the basis of national security is not unconstitutional and it held that the protection of classified information to protect national security is mandated by the Constitution and is necessary to protect the rights contained in the Bill of Rights.

It is important to note that the Protection of State Information Bill and the PAIA do not present opposing legislation. There are two different pieces of legislation with two different objectives in that PAIA is an Act to promote access to information whereas this Bill seeks to protect certain state information.

Another main issue raised is what is perceived as the broadness of the definition of national security. There is a view that the word “includes” in the definition is problematic, in that it renders the definition overbroad. There is no universal or single definition of the concept of national security. International law shows an inclusive approach to the definition. This is mainly due to the fact that the courts will interpret national security according to what are the relevant circumstances at a particular time facing a country. Hence, any inclusion in the definition of national security would be defined by the context by the courts - therefore the word “includes” cannot be read to mean that every instance can be included under national security.

If one looks at best practice in other countries, the term national security is not specifically defined. In the UK and under European law they have kept it broad in order to retain flexibility and ensure that the use of the term can adapt to changing circumstances. The Canadians too do not have a clear definition of national security and avoids limiting the definition by defining threats to their security. In the US, they define national security broadly to include contributors to national Security such as demographics, natural resources, the environment, economic growth, globalisation, the quality of governance, (national and international) technological developments, refugee crisis, peace keeping, humanitarian emergencies and global health.

Our Constitution also broadly defines national security and any legislation defining the concept further would need to be sufficiently broad to provide for all threats including new emerging threats. This recognises that threats are not static and are dynamic. However, it is important to note that as a further measure to counter any fears of this broadness, the definition in the Bill adopted by the National Assembly expressly excludes activities or freedoms provided for in the constitution, namely lawful political activity, advocacy, protest or dissent.

Honourable Chairperson,

In closing I would like to reiterate and remind the nation that we have brought this bill before you for only four reasons, being:

to repeal the old apartheid act 84 of 1982

to introduce clearly regulated system of classification, declassification and reclassification system in government.

criminalise espionage and information peddling.

to introduce the protection of valuable state information against unlawful alteration, loss and destruction.

It is my privilege and honour to present this- the Protection of State Information Bill (B6B-2010) to the NCOP.