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**CIVICUS Submission to the National Council of Provinces of South Africa on the
Protection of State Information Bill 2011
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CIVICUS: World Alliance for Citizen Participation is an international movement of civil society dedicated to strengthening freedom of association and citizen's participation across the globe. CIVICUS welcomes the invitation by the South African National Council of Provinces to provide inputs on the Protection of State Information Bill 2011 (hereafter the "bill").

We recognise that the present version of the bill has been amended to accommodate some public and civil society concerns. Nevertheless, we are of the opinion that the bill falls substantially short of the freedom of expression and information standards contained in the South African Constitution and the International Covenant on Civil and Political Rights (ICCPR) to which South Africa is a party.¹ The South African Constitution lays down that any limitation of fundamental freedoms must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".² The ICCPR also contains clear guidelines with regard to restrictions on the freedom of expression. These have been elaborated upon and outlined in detail by the UN Human Rights Committee, the expert body of jurists charged with interpreting and ensuring compliance with the provisions of the ICCPR.

We demonstrate below how key provisions of the bill are incompatible with the South African Constitution and the ICCPR to which South Africa is a party.

1. Draconian punishments and no public interest defence

Restrictive measures must conform to the principle of proportionality and should be appropriate to achieve their protective function. The UN Human Rights Committee mandates that the "principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities that apply that law".³

In contrast, the bill contains an exhaustive list of criminal offences and punishments for communicating, delivering, receiving or being in possession of classified information, and even for failing to report possession of classified information.⁴ The punishment varies for different offences but can extend up to 25 years imprisonment. The extreme nature of the punishments, coupled with the fact that there is no 'public interest defence' clause is likely to instil fear in the minds of whistleblowers and potentially inhibit legitimate uncovering of information to advance transparency and good governance. This would be a serious setback for democratic freedoms in South Africa.

¹ Article 16 Constitution of South Africa and Article 19 ICCPR

² Article 32 Constitution of South Africa, 1996

³ UN Human Rights Committee General Comment 27 para 14

⁴ Sections 36-49 Protection of State Information Bill, 2011

Moreover, omission of a public interest defence clause to provide legal cover to public spirited individuals, journalists or members of civil society exposing information in the larger interests of the people of South Africa goes against the constitutional ideal to “Lay the foundations for a democratic and open society in which the government is based on the will of the people and every citizen is equally protected by law”.⁵

Recommendations: (i) A ‘public interest’ defence clause in line with international best practice should be included in the bill.⁶ In chapter 11, a new section should be drafted to read: “Any action committed in the furtherance of public interest shall not be deemed as an offence under this Act.” (ii) The quantum of punishments for various offences contained in Sections 36-49 should be proportionally reduced to allay fears amongst potential whistleblowers.

2. Excessive ministerial discretion to expand the law’s ambit

Laws must be formulated with sufficient precision to prevent their misuse and enable public officials to regulate their conduct accordingly. The UN Human Rights Committee has mandated that “a law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution”.⁷

In addition to security services and constitutional oversight bodies who are empowered to classify, declassify and reclassify information, the bill allows the Minister of State Security to extend these powers to any government department on “good cause shown”.⁸ Notably, the term “good cause” is not defined and left open to ministerial discretion. In addition to being incompatible with well established legal principles requiring precision in drafting laws, this provision also stands in conflict with the bill’s preamble which expressly recognises the need to put the “protection of state information within a transparent and sustainable legal framework”.⁹

Recommendation: The discretionary power vested in the Minister of State Security to extend the application of the bill’s provision to any state body in Section 3 (2) (b) should be scrapped.

3. Excessively wide definition of national security

The UN Human Rights Committee has cautioned that extreme care should be taken in crafting official secrets laws to prevent them from being invoked to “suppress or withhold” information of legitimate public interest that does not harm national security. The Committee has also mandated that it is not “generally appropriate to include in the remit of such laws, such categories of information as those relating to the commercial sector, banking and scientific progress”.¹⁰

Notably, the bill contains an overbroad definition of ‘national security’ which can be invoked to withhold public access to a wide swathe of information. Included in the definition of national security, is the “exposure of economic, scientific or technological secrets vital to the Republic”.¹¹ This appears to be too wide a classification, which could lead to information being made unavailable that it would be in the public interest to know, such as the factors determining the adoption of a particular economic or commercial policy or information about the functioning of parastatal organisations or companies in which the government has a stake.

⁵ Preamble, Constitution of South Africa, 1996

⁶ For instance, Section 15 of Canada’s Security of Information Act, 1985 provides: “No person is guilty of an offence under Section 13 or 14 if the person establishes that he or she acted in the public interest.”

⁷ UN Human Rights Committee General Comment 34 para 27

⁸ Section 3 (2) (a) Protection of State Information Bill, 2011

⁹ Preamble, Protection of State Information Bill, 2011

¹⁰ UN Human Rights Committee General Comment 34 para 30

¹¹ Section 1 Protection of State Information Bill, 2011

Recommendation: The definition of ‘national security’ under Section 1 of the bill should be tightened to exclude “exposure of economic, scientific or technological secrets vital to the Republic” from its ambit.

4. Inadequate appeals procedure

To give effect to the right to access information, the UN Human Rights Committee urges the placing in the public domain of official information that it would be in public’s interest to know. States parties are thus obligated to “make every effort to ensure easy, prompt, effective and practical access to such information”.¹²

In contrast, the bill does not enable independent and timely review of cases where access to information is denied. Under the current provisions of the bill, an aggrieved person can, in the first instance, appeal to the Minister in charge of the department which has withheld the information.¹³ If the appeal is rejected by the Minister - who could have a direct interest in withholding the information - the bill provides just one remedy, of approach to the courts, which can be both expensive and time consuming.¹⁴ Tellingly, the bill omits to include an intermediate appeals process prior to approach to the courts, such as an independent tribunal or commission, which would be both cheaper and less time consuming than a court of law.

Recommendation: An independent quasi-judicial body should be empowered under the bill to hear appeals against denial of requests for information from the Minister.

CIVICUS urges the Parliament of South Africa to maintain South Africa’s position as a role model for democratic standards around the world and address the above-mentioned fundamental flaws with the Protection of State Information Bill 2011. Passing of the bill in its present form will do irreparable harm to the enjoyment of cherished constitutional freedoms besides breaching obligations owed to the people of South Africa under international law.

For more information, please contact:

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¹² UN Human Rights Committee General Comment 34 para 19

¹³ Section 31 Protection of State Information Bill, 2011

¹⁴ Section 32 Protection of State Information Bill, 2011