

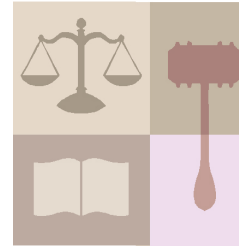
JASA

Justice Alliance of South Africa

"Standing up for Justice in the public square"

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Submission of JASA

to

The Ad-Hoc Committee on Intelligence (National Assembly)

PROTECTION OF INFORMATION BILL 2008

Written Submission

presented by

JJ Smyth, QC

Director of Justice Alliance of South Africa

(Please note that Mr Smyth would like to make an oral submission also)

Written Submission

General

JASA accepts the need for a comprehensive Bill of this nature given the complexities of modern government and the importance of protecting information which may be used to the detriment of the nation if placed in the public domain.

This submission is confined to one matter: **the need for a provision in the Bill establishing an appeal procedure** that will ensure that classification is not misused by Ministers and other 'heads of organs of State'.

The suspicion of corruption in respect of the 'arms deal' which has hung over the nation and government for too long makes it imperative that a tribunal be set up to which complaints can be made *in camera* when a suspicion arises that **section 22** of the Bill - which lays down the guiding principles for classification - is being contravened.

The executive must not be judge in its own cause. **Sections 31 to 37** provide for just that. In every case, as the Bill stands, it is the executive which makes a judgement about the integrity of its own decision.

Section 34 of the Constitution reads:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

In the circumstances of this Bill, this clause in the Constitution envisages an independent tribunal which would sit *in camera* to decide whether the head of organ of state had acted fairly and impartially in accordance with the principles of section 22 of the Bill. We submit that without such a clause the Bill may be open to a charge of unconstitutionality.

Suggested New Clause in the Bill

(1) The Minister for Intelligence Services shall within 60 days of this Act coming into force appoint a Judge of the Supreme Court of Appeal and two assessors not employed by the State to preside over a Tribunal to hear appeals *in camera* in respect of any complaint alleging that section 22 of this Act has not been properly complied with in respect of a classification order.

(2) The Minister shall provide by regulations for the media, non governmental organisations and individual persons to approach the Tribunal and be heard within 30 days from the date of filing of any complaint.

(3) If any party is dissatisfied with the decision of the Tribunal, that party may approach the Constitutional Court in accordance with its rules for seeking leave to appeal. The decision of the Constitutional Court shall be final.

(4) The Tribunal's decision shall be announced in open court, but the Tribunal may order that its reasons for the decision be classified in accordance with the Act if it is of the view that the interests of the State might be prejudiced if they were published. This provision shall also apply to any appeal heard by the Constitutional Court.

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