NELSON MANDELA CENTRE OF MEMORY

STATEMENT ON THE PROTECTION OF STATE INFORMATION BILL

21 November 2011

BACKGROUND

1. The National Assembly is scheduled to vote on Tuesday 22 November 2011 on the Protection of State Information Bill. If passed, the Bill will then be considered by the National Council of Provinces in terms of the procedures in section 75 of the Constitution. It is hoped that the NCOP process will offer a further opportunity to propose amendments to the Bill.

2. With this opportunity in mind, the Nelson Mandela Centre of Memory, working with the Wits Law School, has prepared a position paper that argues for four such amendments to parts of the Bill. The proposals are motivated by the concern that some aspects of the Bill are unconstitutional.The problematic parts of the Bill can, however, easily be amended to cure the problem without compromising the fundamental principles of the Bill.

3. In brief, the four proposals are the following:

    3.1. **Harmonisation with the PAIA and the limitation of the right of access to information**. Changes to the Bill, introduced by the Parliamentary committee in the very last stages of its deliberations, have removed sections of the Bill that provided that a request for classified information was to be dealt with in terms of the Promotion of Access to Information Act (the PAIA). These provisions are crucial to the Bill's constitutionality. In the view of the NMCM they must be restored or the Bill will directly be in conflict with the constitutional right and with the PAIA.

3.2. **Changes to the offences provisions should focus on the harm caused by disclosure of classified information.** In the view of the critics of the Bill, the penalty provisions will have a chilling effect on whistleblowing and investigative journalism. They have argued for the inclusion in the Bill of a "public-interest defence" that will allow a whistleblower or journalist who discloses or publishes classified information to argue that the disclosure was justified in the public interest, for instance because it revealed evidence of significant incompetence or criminality on the part of government officials.

In the view of the NMCM, there is another way of achieving the broad purpose of a public interest defence without undermining the fundamental purpose of the Bill. This can be done by reformulating the wording of the offences to focus on the harm caused by the mishandling or disclosure of classified information rather than, as is currently the case, the mere fact that information is classified.

3.3. **The public-interest override must be reformulated.** Though the Bill does not currently have a public-interest defence, it does have a public-interest *override*. This is an essential provision of the Bill. However, its effectiveness is limited by the unreasonably high content threshold that it imposes. As it stands, only information evidencing a substantial contravention of the law or an imminent and serious public safety risk can be considered for declassification in the public interest. The section, deriving from the PAIA, must be reformulated to provide simply that a record may not be classified if the public interest in the disclosure of the record clearly outweighs any harm to national security that may result from its disclosure.

3.4. **The provisions for automatic declassification of old-order classified information are unnecessarily narrow.** The 2008 version of the Bill contained progressive provisions for dealing with archives and automatic declassification, particularly old-order classified records, by a process of

automatic declassification. These provisions have been considerably diluted in later drafts of the Bill. The 2008 provisions were simple to apply, progressive and pose no danger to the fundamental interests underlying the Protection of State Information Bill. The NMCM has accordingly recommended that the archival and automatic declassification dimensions of the 2008 version of the Bill be reinstated.