State secrecy bill returns, worse than ever. *Sunday Times* (South Africa), 11 July 2010. Written by Dario Milo.

The Protection of Information Bill, introduced in parliament in 2008 by former minister for intelligence Ronnie Kasrils but never passed, is back with a vengeance. And the latest draft does nothing to allay the fears expressed two years ago by the media and others that the bill will result in censorship of political expression, dramatically undermine the activities of investigative journalists, and criminalise the publication of information on matters of public interest where such information has been classified by the state. In fact, the revised bill exacerbates these problems.

A law that regulates the classification of state secrets is necessary in a democracy, and the drafters of the bill must be commended for striving to achieve a far more transparent and open regime for the classification of information than is provided by existing apartheid-era laws. But these good intentions do not percolate down to the operative provisions of the bill.

The first fundamental problem with the bill is the use of overbroad definitions of "national interest", "security", "national security", and "state security". The definitions provide the trigger for the classification of state information and the resulting criminal offences. Yet the definitions are so broad as to justify the classification of any information whatsoever. For instance, "national interest" is defined to include "the pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations" and "all matters relating to the advancement of the public good".

Even the ministerial review commission on intelligence in 2008 found the breadth of this definition problematic, stating that it would be "inevitable that there will be significant inconsistencies between the classifications made by different officials".

The second problem with the bill is that it permits the classification of commercial information held by the state and even such information not held by the state. This is a startling provision which has the unsavoury result that, for instance, a company's commercial information may be classified by the state in circumstances where existing areas of law give more than adequate protection to such commercial information. The tentacles of the bill ought not to reach into the boardrooms of companies.

Thirdly, the bill authorises classification of information as "top secret", "secret" and "confidential" on the basis of speculative or hypothetical harm to the "national interest". Allowing such a low threshold for classification goes against clear developments in other areas of freedom of expression law, and is not in tune with international developments. The inevitable result of overbroad definitions and low thresholds for classification is that state information - the type of information which ought as a matter of right to be made available to the public - will be censored on pain of criminal offence.

And when one turns to the criminal offences in the bill, the media should be gravely concerned. Take the example of a leaked classified document which reveals corruption, gross incompetence or clear hypocrisy on the part of a public official. It would take a brave editor to risk publishing this information in the face of the various criminal offences in the bill. These include the offences of disclosing classified information and failing to report its possession, which both carry minimum jail sentences of three years and maximums of five years; and the offences of accessing classified information and disclosing a state security matter prejudicial to the security or interests of the state, which both carry jail sentences of a minimum of five and a maximum of 10 years.

These difficulties would be resolved if a public interest defence were to be included in the bill. Such a defence was accepted in principle by Kasrils, yet it has not found its way into the new bill. And it is imperative for media freedom that such a defence be included. As the US Supreme Court ruled in the famous Pentagon

papers case, in which it permitted the Washington Post and the New York Times to publish extracts from a classified report into the US's involvement in the Vietnam war: "Secrecy in government is fundamentally anti-democratic ... Open debate and discussion of public issues is vital to our national health."

The fifth problem is the absence of a public domain defence. It makes no sense for a journalist to be punished when he or she has simply repeated information already in the public domain.

Finally, the bill seeks to turn the open justice principle on its head. It provides that when classified documents come before a court, the rule is that the documents may not be made public, unless the court is satisfied that full or partial disclosure is justified. This puts the cart before the horse. In the application by Independent Newspapers for access to classified documents in the court case brought by Billy Masetlha, the former director-general of the National Intelligence Agency, against former president Thabo Mbeki, the court stated that the "default position is one of openness". It is for the state to justify secrecy, rather than for the public to argue for openness when documents are put before a court.

A parliamentary committee will hear submissions on the bill in the next few weeks. It is hoped that the concerns raised by the media and others will this time be taken on board. The vibrancy of our democracy depends on greater openness and accountability, not secrecy and censorship.