ADVOCACY PROJECT

Comments on proposed legislation

Monitoring and commenting on proposed legislation forms part of the Foundation's *Advocacy Project*. The FMF's Directors attempt to commence the process at the earlier or "Green Paper" stage and to follow the progress of the prospective legislation through to the Portfolio Committee hearings in Parliament. In many cases, members alert the FMF to potentially harmful legislation and provide such specialised and technical information as may be required to propose free market alternatives to government proposals. The directors are most grateful to all those who have provided assistance.

We provide a synopsis of written and oral evidence that was led before Portfolio Committees of Parliament on two Bills that were dealt with after the August 2001 Council Meeting. The summaries are provided to give the Council and members an indication of the nature of the comments made on proposed legislation. The comments are in every case based on fundamental principles bearing in mind the requirements of a free society in which property rights, freedom of exchange, the rule of law and civil liberties are respected. In particular, the FMF remains constantly alert to proposed legislative contraventions of the RSA Constitution.

Some tendencies in proposed legislation over the past few years give rise for concern and these tendencies will be obvious from the evidence given on the under mentioned Bills as well as in previous evidence submitted on behalf of the Foundation. They include:

- Transferring law-making to government departments and agencies by granting wide discretionary powers to officials to make decisions on important issues and to write regulations that do not merely deal with procedural and administrative matters but change the substance of the law.
- Proposing legislation that seeks to ignore or circumvent the Constitution including vitally important aspects such as property rights, administrative justice, and the separation of powers.
- Following similar authoritarian trends to those that were prevalent during the apartheid era.
- Failing to ensure that the rule of law is fully respected.
- Attempting to create quasi-courts under the control of officials that would deny the accused their rightful access to the courts.
- Attempting to transfer to officials the power to exercise functions that should remain under the sole jurisdiction of the High Courts.
- Failing to appreciate the deleterious economic consequences of proposed legislation.

Comment on the Interception and Monitoring Bill

On 31 August 2001, Temba Nolutshungu and Leon Louw gave evidence before the Parliamentary Portfolio Committee on Justice on the Interception and Monitoring Bill, 2001. The main points in the evidence given on behalf of the Foundation were:

The urgent need to combat crime more effectively –

- The desire for crime to be combated more effectively was fully supported.
- The temptation to resort to authoritarian measures in addressing the challenge of combating crime should be avoided.
- Crime is easier to combat in authoritarian and despotic societies where human rights are disregarded.
- The adoption of democratic values, the rule of law, due process and the Bill of Rights protects ordinary citizens but also criminals from harsh anti-crime measures and injustice.
- It was therefore no surprise that transition from apartheid coincided with increased crime.
- Under such circumstances improved and expanded, properly funded law enforcement institutions are necessary and these must function under the constraints imposed by the constitution and the rule of law.

– The Bill regrettably reflected a failure to comprehend the demands and challenges of law enforcement under democracy.

Concept of the Bill –

– The most disturbing aspect of the proposed legislation was that it built on and strengthened a type of legislation adopted by the apartheid government to monitor the activities of opponents of apartheid.
– Although the focus was ostensibly on criminal activities, such legislation was previously used predominantly for monitoring political and philosophical opponents of the government.
– A real danger existed that the proposed legislation could be used for the same purpose and such activities have no place is a free society.
– The FMF had some experience of being under surveillance because of its opposition to apartheid.
– Although non-violence had always been a cornerstone of the FMF's philosophical support for individual liberty and economic freedom, this made no difference to the apartheid security services.
– There was consequently a danger that the proposed legislation could pose a similar threat in the hands of misguided officials providing false information in order to obtain "directions" for the interception of communications.
– The proposed legislation had such potentially far-reaching consequences and was so vulnerable to misuse that it should be subjected to the most thorough scrutiny and analysis.
– Elimination of crime is intended to increase the liberty of the people, not reduce it.
– There must be absolute certainty that the legislation will be used only against people for whom compelling evidence is presented to a sitting judge that the suspects are serious criminals, and that the legislation poses no threat to innocent people.
– The worst potential scenarios would be:
  • The use of a direction for interception for personal or business purposes by someone with influence, against victimised civilians.
  • The interception of communications for criminal purposes
  • The interception of communications of political opponents of an incumbent government.
  • The interception of communications by a member of the governing party opposed to a clique within the party.
– Such scenarios would unfortunately be possible if the Bill were to be adopted in its existing form.
– The proposed legislation failed to carefully circumscribe the powers of interception, and in its present form, was a danger to the liberty of the ordinary, peaceful and law-abiding people of South Africa.

Specific aspects of the Bill –

1. **The definition of a "judge" to hear applications**

– The definition of "judge" in Section 1 was in conflict with the requirements of section 165 of the Constitution that describes "Judicial Authority" and vests that authority in the courts.
– A retired or discharged judge who was "designated by the Cabinet member responsible for the administration of justice to perform the functions of a judge" for purposes of the Act (as proposed in the Bill) would become a member of the executive branch of government and could not therefore be seen as a member of an independent judiciary.
– The designation of "judge" for the purposes of the legislation should therefore mean an incumbent "judge of the High Court" otherwise this proposed measure would contravene the spirit and letter of sections 165 (1), (2), (3), and (4) of the Constitution.
– The proposal to designate retired judges to carry out the functions of a "judge" for purposes of the proposed legislation was also contrary to the important principle of separation of powers between the executive and the judiciary which is a cornerstone of the constitution.

- The requirement that law enforcement agencies have to convince senior members of an independent judiciary that they have sufficient grounds for taking abnormal actions should not be compromised under any circumstances.
- A judge as defined would be no judge at all.
- This provision ignored the profound and fundamental logic of requiring the executive to get special dispensation from the judiciary.
- Hijacking a judge into the executive did not overcome the essential need to minimise the potential for the abuse and misuse of power, especially abnormal, controversial and exceptional powers of the kind contemplated in the Bill.

2. **The definition of a serious offence**

- Item (g) under the definition of "serious offence" is described as "any offence threatening the security or other compelling national interests of the Republic".
- The words "compelling national interest" are impossible to define or interpret and require a detailed and comprehensive listing of the precise circumstances and description of what constitutes a serious offence under this heading.
- If such a listing is not supplied the words "compelling national interest" can be construed to mean anything that a government official says they mean.
- One of the most fundamental recognised principles of a democracy is that law should be maximally certain and minimally discretionary.
- Parliament cannot and should not divest itself of the responsibility to decide and say what it has in mind.
- Parliament may not delegate vague powers to the executive.
- Legislators must therefore decide which crimes are "serious offences" and say so unambiguously in the Act.

- *3.* ***Application for direction***

- The proposed activity that the Bill seeks to authorise is of a grave nature and in contravention of section 14 (d) of the Constitution.
- The intention to grant the power to make application for a direction to monitor communications to junior officials, subject only to their having "obtained the approval in advance" of some more senior official, was unacceptable.
- If there were to be so many applications that senior officials would not be in a position to personally deal with all of them, members of Parliament should have serious reservations about the real purpose of the bill.
- South Africa has a history of senior officials claiming that they were totally unaware of the "dirty tricks" being carried out by their subordinates.
- If Parliament intended approving this legislation it should insist that the applications for "directions" should be submitted only by high level officials and should circumscribe very carefully the purposes for which they may be granted.

- *4.* ***Prohibition on certain telecommunication services***

- Law enforcement and policing – protection of innocent civilians – is the most legitimate and important responsibility of government in a free society.
- The cost of this activity should be regarded as a first call on government financial and other resources, funded fully out of general revenue.
- It is not legitimate to impose a substantial cost and administrative burden arbitrarily on a single industry or members of an industry or on its consumers.
- The proposal that the cost be borne by telecommunication service providers amounted to an abrogation by the state of its responsibility to provide and fund security and law enforcement services.

– As with the cost of all policing this cost should be dispersed amongst taxpayers in general and not imposed on the providers of communications and they should not be expected to adapt their services at their own cost so that the government can intercept communications.
– Such a requirement is possibly unconstitutional as contravening Section 77 (1) of the constitution.

- *5.* ***Directives regarding applications***

– Section 12 (1) of the Bill contained the only recognition given to the High Courts in the entire Bill, stipulating that "the respective Judges-President of the High Courts may jointly issue directives in which the manner and procedure of applications (for directions) are uniformly regulated".
– The Bill then immediately removes that relevance by allowing the government-appointed retired or discharged judge, to whom an application for a direction to monitor and intercept communications had been submitted; to dispense with the procedure determined by the Judges-President.
– The section further stipulates that if the government-appointed "judge" "considers any case to be sufficiently urgent, the procedure contemplated in subsection (1) may be dispensed with" and the matter dealt with in such a manner and subject to such conditions as he or she deems fit, including, in an appropriate case, the hearing of an oral application and the granting of an oral direction.
– This is followed by section 12 (2) (b) which seeks to partially regularise the disturbing informality of section 12 (2) (a):
An oral direction referred to in paragraph (a) must be confirmed in writing within 48 hours.
– Paragraph (c) of section 12 (2) then appears to contradict or negate the preceding paragraph in that it provides that:
An oral direction may only be confirmed in writing as contemplated in paragraph (b) pursuant to a written application for such confirmation.
– How should the contents of section 12 be interpreted? There are various disturbing features that make the section unclear and uncertain.

The Submission urged the government to reconsider the perceived desirability of the proposed law. However, if the government is determined to proceed with this measure we urge it to do so in ways that constitute a minimum departure from democratic principles and values and principles of sound law.

Result
The Portfolio Committee is still considering this Bill.

Comment on the Financial Advisory and Intermediary Services (FAIS) Bill
The Foundation has paid particular attention to the Financial Advisory and Intermediary Services Bill and its precursors, as the adoption of the proposed legislation is likely to have highly negative economic consequences. Its probable harmful consequence for the poorest members of society and emerging insurance salespeople and brokers is particularly worrying. The bill has been drafted and re-drafted and the FMF has commented on every version commencing with a written comment in October 1999. On 3 October 2001, Temba Nolutshungu and Leon Louw presented the latest submission to the Parliamentary Portfolio on Finance. Some of the points made in the submission were:

– Regulatory excesses that constitute an intolerable burden on the economy are eroding the sterling work being done at the macro-economic level by Finance Minister Trevor Manuel and his team.
– The cost benefit analysis conducted on the Bill (which had possibly been carried out as a result of an earlier FMF criticism) appeared to contain several flaws, listed in the submission. [As far as the FMF can ascertain this is the first South African cost benefit analysis conducted in respect of proposed legislation – something we have repeatedly recommended in the past.]

- South Africa should not attempt to emulate the regulatory regimes of highly developed economies – the cost burden of first world regulation on developing economies is too great.
- Experience in the United Kingdom and Australia showed that similar legislation in those countries had decimated their financial services sectors and deprived lower income people of advice and service from financial agents without producing any tangible benefits for intended beneficiaries.
- The Bill failed to specify what problems it was intended to solve, its provisions were vague, and it failed to set out objective compliance criteria for aspiring financial service providers.
- The Bill would detract from the legislative responsibility and accountability of Parliament as entrenched in the Constitution since it would put power into non-Parliamentary hands to determine the substance and extent of the legislation after it has been promulgated.
- If the intention was to protect people from fraud, that problem would be better addressed by proper enforcement of the criminal law.
- Consumers would be lulled into a false sense of safety.
- The excessive regulation would destroy the innovation that leads to improved products.
- The unbridled power granted to the registrar in the section dealing with "undesirable practices" was undesirable in law.
- The bill would in all likelihood have the most severely detrimental effect on black South Africans, acting as a barrier to their entry into the financial services field.
- The "Policy Holder Protection Rules" issued in respect of the Long Term and Short Term Insurance Acts appeared to have the same objectives as the FAIS bill – the bill therefore appeared to be superfluous whilst the cost of implementation was estimated by an insurance executive at R120,000,000 per annum – without taking into account the compliance costs which insurance companies would have to pass on to policyholders.
- Certain key provisions of the Bill were unconstitutional –
    - a clause seeking to empower the registrar to prohibit publication of a document he or she considers to be "contrary to the public interest".
    - a clause seeking to empower the registrar to impose conditions on a licence granted to a service provider.
    - a clause empowering the registrar to prohibit a business practice on the basis that he or she considers the practice to be "undesirable".
    - a definition that sought to give the registrar the power to declare a product to be a "financial product".
    - a provision that sought to oblige a responding party to have a complaint determined by the Ombud and deny a respondent the right to have a dispute resolved by the application of law before a court or other independent forum.

Result

The proposed legislation has not been adopted and the Financial Services Board has been requested to resolve the constitutional issues. The Parliamentary Committee had not been informed of the existence of the cost benefit analysis and requested more information on this issue, including answers to the questions raised during the hearing.