

JOINT SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF THE REPUBLIC OF SOUTH AFRICA

Submitted 28 November 2011



Association for Progressive Communications (APC)
Centre for Applied Legal Studies (CALs), University of
Witwatersrand

CIVICUS: World Alliance for Citizen Participation
Gender Links

Highway Africa Chair in Media and Information Society, Rhodes
University

IDASA: An African Democracy Institute
Open Democracy Advice Centre (ODAC)

Right 2 Know Campaign

Southern African NGO Network (SANGONeT)

Section27

Socio-Economic Rights Institute of South Africa (SERI)

A Introduction

1. This joint submission from APC,¹ CALS,² CIVICUS,³ Gender Links,⁴ Highway Africa Chair in Media and Information Society,⁵ IDASA,⁶ ODAC,⁷ Right 2 Know,⁸ SANGONet,⁹ Section27¹⁰ and SERI¹¹ focuses on: freedom of expression; the right to information; freedom from censorship; freedom of the press; the right to privacy; and the importance of affordable access to the internet. The submission is structured as follows:
 - Section B highlights concerns about universal, equitable and affordable internet access; internet penetration in South Africa; and online content diversity and language.
 - Section C highlights concerns about the right to privacy and the regulation of the interception of communications.
 - Section D highlights concerns about the freedom of expression and impending legislative restrictions.
 - Section E highlights concerns about access to information and

¹ The Association for Progressive Communications (APC) is an international network and non-profit organisation founded in 1990 that wants everyone to have access to a free and open internet to improve lives and create a more just world. www.apc.org

² The Centre for Applied Legal Studies is an independent organisation committed to promoting democracy, justice, equality and peace in South Africa and addressing and undoing our country's legacy of oppression and discrimination, through the realisation of human rights for all South Africans under a just constitutional and legal order. www.wits.ac.za/academic/clm/law/11159/cals.html

³ CIVICUS is World Alliance for Citizen Participation is an international movement with members in more than 100 countries worldwide. Established in 1993, CIVICUS nurtures the foundation, growth and protection of citizen action throughout the world, especially in areas where participatory democracy and citizen's freedom of association are threatened. www.civicus.org

⁴ Gender Links (GL) is an organisation that works in 15 SADC countries and is committed to a region in which women and men are able to participate equally in all aspects of public and private life in accordance with the provisions of the Southern African Development Community (SADC) Protocol on Gender and Development. www.genderlinks.org.za

⁵ Highway Africa is a centre of the School of Journalism and Media Studies at Rhodes university. It promotes the use of appropriate technologies by journalists and citizens. It hosts an annual conference, and engages in training, teaching, research, postgraduate supervision and advocacy to strengthen Africa's position in the global information society. www.ru.ac.za

⁶ Idasa is an independent public interest organisation committed to building sustainable democratic societies in collaboration with African and global partners. www.idasa.org

⁷ ODAC's mission is to promote open and transparent democracy; foster a culture of corporate and government accountability; and assist people in South Africa to be able to realize their human rights. ODAC seeks to achieve its mission through realising the right to know so that it makes a material, tangible difference to the lives of the poor, and thereby contributes to social and economic justice. www.opendemocracy.org.za

⁸ The Right2Know Campaign (R2K) is a nation-wide coalition of people and organisations. R2K believes a responsive and accountable democracy able to meet the basic needs of our people is built on transparency and the free flow of information. www.r2k.org.za

⁹ The Southern African NGO Network (SANGONeT) was founded in 1987. Over the past 24 years SANGONeT has developed into a dynamic civil society organisation with a history closely linked to the social and political changes experienced by South Africa during its transition to democracy. SANGONeT is still one of very few NGOs in Africa involved in the field of information communication technologies (ICTs) and continues to serve civil society with a wide range of ICT products and services. www.ngopulse.org

¹⁰ Section27 was established in May 2010 as a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights. www.section27.org.za

¹¹ SERI is a non-profit organisation providing professional, dedicated and expert socio-economic rights assistance to individuals, communities and social movements in South Africa. www.seri-sa.org

- protections for whistle-blowers.
 - Section F makes recommendations for follow up and implementation.
2. Particular attention is given to internet access as a facilitating right that affects all the other rights addressed in this submission. The UPR process should give consideration to the internet which has become integrally linked with human rights, particularly, but not exclusively, rights related to culture, information and expression.
 3. The official outcome documents of the United Nations World Summit of the Information Society (WSIS), affirms the importance of human rights in the information society.¹² The importance of promoting and protecting human rights and fundamental freedoms on the internet has also been confirmed by the Human Rights Committee, which notes that freedom of expression includes internet based expression.¹³ Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression also confirms that Member States' existing human rights obligations¹⁴ extend to taking steps (including national plans of action) to ensure access to the internet.¹⁵

B Universal, equitable and affordable internet access

4. South Africa has the obligation to “promote or to facilitate the enjoyment of the right to freedom of expression and the means necessary to enjoy this right, which includes the internet.”¹⁶
5. The key access issues in South Africa are: limited access (low internet penetration particularly outside main centres), prohibitively high costs, inadequate broadband infrastructure, limited content in local languages, and the absence of an integrated strategy for harnessing the potential of the internet for social, cultural, economic and political development.

B.1 Internet penetration and cost in South Africa

6. The number of internet users in South Africa has increased by 65 per cent since 2000 (from 2.4 million to 6.8 million). But overall internet penetration at 13.9 per cent is low – particularly given the potential of the internet to support the exercise of human rights such as freedom of

¹² The Geneva Declaration of Principles (December 2003) makes extensive reference to the Universal Declaration of Human Rights: <http://www.itu.int/wsis/docs/geneva/official/dop.html>

¹³ Human Rights Committee, General Comment 34, Freedoms of Opinion and Expression, (21 July 2011, CCPR/C/GC/34) para 12.

¹⁴ The matters on which they must report in the UPR: Human Rights Council, Institution-building of the United Nations Human Rights Council (18 July 2007, A/HRC/RES/5/1. Affirmed in Resolution A/HRC/RES/16/21).

¹⁵ Frank La Rue “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression” (26 April 2011, A/HRC/17/27).

¹⁶ Ibid, A/66/290, at para. 80

- opinion and the right to participate in the cultural life of the community.¹⁷
7. The uneven nature of the distribution of internet penetration is worrying. Only 31 per cent of South African internet users are women¹⁸ and 64 percent of all users are white South Africans (nine per cent of the country's total population).¹⁹ Rural internet penetration remains very low and distribution of internet users among provinces is extremely uneven. South Africa's two most urbanised provinces, Gauteng and the Western Cape, account for 73% of all internet users in the country.
 8. For many individuals, the economic barriers to gaining internet access are prohibitive (not only are costs of internet access high, devices such as computers and internet enabled phones are also expensive) and “for the vast majority of South Africans, the Internet remains only a concept – still unaffordable and mysterious”.²⁰
 9. The development of mobile access to the internet has helped connect those in rural areas. This is positive, but also creates new inequalities. As handsets become more sophisticated, new services (including public services) become available to those with a connection – excluding those without the internet connection, and the right type of phone. Currently the cheapest mobile internet data option costs R 50 rands per month for 100 Mb, which is simply too expensive for sustained access.^{21 22}
 10. A deep pent-up demand for Internet use in South Africa, held back by lack of affordable connectivity and lack of affordable access devices clearly indicates that the Internet has become a vital tool in the lives of ordinary people. Despite this, projections suggest that Internet penetration will remain below 25% until at least 2015.
 11. If fixed broadband access does not reach rural areas soon, the differences in accessibility to the internet will just increase the digital divide (including the gender digital divide) within South Africa, and between South Africa and the rest of the world.
 12. We commend the Department of Art and Culture for their efforts to support free internet access in public libraries. Free public internet access must feature in Government's plans to ensure that ALL people, no matter what their personal economic circumstances, can access the internet. However, this initiative should achieve greater focus, and feature in interdepartmental national development planning. Public access can also be used to reach groups that are specifically marginalised, e.g. unemployed women in rural areas.

B.2 Policy and regulation weakness

13. South Africa has a broadband policy with the laudable the goal of

¹⁷ Internet World Stats, <http://www.internetworldstats.com/stats1.htm>

¹⁸ Research ICT Africa, <http://www.researchictafrica.net/countries.php?cid=19>.

¹⁹ Statistics South Africa, <http://www.statssa.gov.za/publications/P0302/P03022011.pdf>

²⁰ Internet Society South Africa, <http://www.isoc.org.za/?p=198>.

²¹ Russell Southwood, Policy and regulatory issues in the mobile internet, (APC, May 2011), <http://www.apc.org/en/node/12433>, fetched November 15 2011.

²² <http://www.8ta.com/plans/prepaid-data/>, APC comparison between current available mobile operators in South Africa.

achieving universal access to broadband services by 2019. However, the policy target of 15 percent household penetration is far too low and the definition of broadband²³ (256kbit download speed) is problematic. This speed does not satisfy current demands, and will definitely not be enough in 2019.

14. A primary weakness of the policy is that it does not present an integrated vision of how internet infrastructure can support development and reduce inequality, including gender inequality. The recent National Development Plan for 2030 is a good example of a more comprehensive approach to ICT policy, but we have yet to see if a “national e-strategy”²⁴ will become reality and include updated targets for internet and broadband penetration.
15. In general the failed process of managed liberalisation of the telecommunication market has led to limited competition, high prices and slow development of services, which mostly affects poor marginalised groups.^{25 26}

B.3 Content diversity and language

16. Language is a barrier to full internet access for many South Africans. South Africa has eleven official languages, yet content is available predominantly in English and Afrikaans. Limited content in local languages reduces the overall value of the internet as a tool for protecting and strengthening local culture and knowledge
17. The establishment of the Media Development and Diversity Agency and the adoption of the Media Development and Diversity Act in 2002 was positive step The Agency has stated that:²⁷

“Access to information and a choice of media for all, is a fundamental right of citizens, especially the poor. All South Africans should have equal access to a diverse choice of media (public, commercial and community). All citizens should have access to media in all languages, accordingly support of indigenous languages in print, TV and internet-based media should be consolidated.”
18. However, the Agency has failed to adequately include internet content in its actions.

B.4 Human rights and multi-stakeholder participation in internet governance, policy and regulation

19. It is important that South Africa observes its obligation to promote and protect human rights in all internet policy and regulation. This can be done more effectively in close partnership with civil society and all other relevant stakeholders, as defined in the Tunis Agenda: “Internet governance is the development and application by governments, the

²³ Department of Communications, Broadband Policy for South Africa, no. 33377.

²⁴ National Planning Commission, National Development Plan for 2030, p. 172.

²⁵ Alison Gillwald, SA Fails test of network society, Mybroadband, <http://mybroadband.co.za/news/telecoms/35902-sa-fails-test-of-network-society.html>

²⁶ National Planning Commission, National Development Plan for 2030, p. 172-175.

²⁷ <http://www.mdda.org.za> “Strategic and Business Plan 2009-2012 03 June 2009” at page 30.

private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the internet”.²⁸

20. We commend the government for convening a multi-stakeholder national Internet Governance Forum during 2011, but this is not enough. There is a need for a standing multi-stakeholder forum where government can openly engage with civil society, business and others on all internet related policy and regulation.

C Right to privacy and regulating the interception of communications

21. According to the Mail and Guardian newspaper dated 14/10/2011, rogue police and intelligence officials are intercepting people’s communications illegally. The Regulation of Interception of Communications Act (RICA) makes it illegal for anyone to intercept communications without permission of a retired judge,²⁹ designated for this purpose by the Minister of State Security. The paper’s report is deeply worrying, as it suggests routine violations of the right to privacy of citizens.
22. Once again in the run up to the ruling party’s next elective conference in 2012, there are signs of the cycle of abuse emerging once again, in spite of the fact that the intelligence services claim to have tightened internal controls. Apart from the Mail and Guardian’s allegations, which the SAPS have vigorously denied, various political leaders have also alleged that they are spied on.³⁰
23. The problem dates back to 1999, when the NIA’s mandate was broadened to inappropriate proportions, which was due to an overbroad definition of national security.³¹ The broad definition has enabled an expansive mandate of the state security agencies, which has effectively mandated them to become state watchdogs of society, making it more likely that intelligence resources will be used for improper reasons, namely to spy on perceived political opponents, civil society, activists, or journalists.³²
24. The oversight body for intelligence services, the Inspector General of Intelligence, is not sufficiently independent from the executive, lacks resources and does not release its reports publicly.³³
25. RICA does not cover ‘foreign signals intelligence’, which means that

²⁸ WSIS. Tunis Agenda for the Information Society. Para. 34. <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>.

²⁹ Regulation of Interception of Communications Act no. 70 of 2002.

³⁰ Rostron, B. ‘ANC resorts to the biggest apartheid boggy’, *Business Day*, 24/11/2011,

³¹ Nathan, L., Matthews, J. and Ginwala, F. Intelligence in a constitutional democracy – final report to the Minister of Intelligence Services, the Hon. Mr. Ronnie Kasrils MP, September 2008.

³² Spies snoop on greens, *City Press*, <http://www.citypress.co.za/SouthAfrica/News/Spies-snoop-on-greens-20111112>

³³ Nathan, L., Matthews, J. and Ginwala, F. Intelligence in a constitutional democracy – final report to the Minister of Intelligence Services, the Hon. Mr. Ronnie Kasrils MP, September 2008.

communications between South Africans and foreigners can be intercepted without following the procedure outlined in RICA, leaving this aspect of communications interception wide open to abuse. Furthermore, there has been no parliamentary or public debate about the most appropriate mandate for these services.³⁴

26. South Africa is meant to have a state-of-the-art oversight system for the intelligence community. Yet in reality, there are too few safeguards to prevent factions of the ruling party that seek to gain or retain power from using the intelligence services to further their political objectives. Disappointingly, the Commission's recommendations to improve accountability have not been implemented yet.
27. The crime intelligence mandate is also overly broad. The National Strategic Intelligence Act requires Crime Intelligence to provide strategic intelligence on national security matters, which lends itself to political intelligence gathering that moves far beyond the SAPS' crime prevention mandate.³⁵

C.1 The Regulation of Interception of Communications Act (RICA)

28. RICA provides sets out the legal grounds on which interception orders may be issued.³⁶ In deciding whether or not to grant the interception order, the designated judge must be satisfied, for example that there are reasonable grounds to believe that a serious offence has been or is being or will probably committed, that the gathering of information regarding actual or potential threats to public health and safety and national security or actual threats to other compelling national economic interests is necessary, and in a number of other instances.
29. RICA contains safeguards, such as restricting the scope of the Act to a defined set of serious offences. The interception centres that carry out these orders report to the Minister of State Security and Parliament's Joint Standing Committee on Intelligence, which offers an additional level of oversight. The designated judge also provides the Committee with an annual report, which becomes publicly available when the Committee's report is released. Furthermore, intelligence activities are certified as being constitutionally and legally compliant by the Inspector general of Intelligence, who reports directly to Parliament. However, there are indications that these safeguards are insufficient.

C.2 The tapping of Mzilikazi wa Afrika's phone

30. Recently, the Sunday Times newspaper revealed that one of their journalists, Mzilikazi wa Afrika, had his phone calls intercepted by the elite crime fighting unit, the Hawks.³⁷
31. The phone tap was confirmed by the Inspector-general of Intelligence, Faith Radebe, who stated in her report to the paper that the Crime

³⁴ Nathan, L., Matthews, J. and Ginwala, F. Intelligence in a constitutional democracy – final report to the Minister of Intelligence Services, the Hon. Mr. Ronnie Kasrils MP, September 2008.

³⁵ National Strategic Intelligence Act, Act 94-39, 1004.

³⁶ Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002.

³⁷ Pather, S. 'Hawks tapped our reporter's phone'. Sunday Times. 2/11/2011.

Intelligence Division of the police served the Hawks with an interception direction for his phone calls. The direction was approved by the designated judge, which meant that the phone tap was lawful.

32. Wa Afrika himself made the news last year when he was arrested in a dramatic raid on the paper's offices for being in possession of a fax of a letter supposedly written by Mpumalanga Premier David Mabuza, announcing his resignation. He was accused of fraud and defeating the ends of justice for being in possession of the fax. The fax turned out to be false, and Sunday Times never published the story. The state prosecutor subsequently declined to press charges against him, saying that wa Afrika had no case to answer.
33. By that stage, wa Afrika had made a name for himself for his reports on corruption in Mpumalanga, as well as a scandal involving an unlawful approval of a multimillion-rand lease agreements for police headquarters in Pretoria and Durban. Given the flimsiness of the case against the journalist, it is impossible not to arrive at the conclusion that police with a vested interest in shielding Mpumalanga province's leadership, concocted a case to intimidate wa Afrika as a journalist. It can also be surmised that the designated judge simply accepted the police's reasons for the need for an interception order, in spite of the fact that they were baseless, which shows the fact that even the legal process outlined in RICA is capable of being abused.

C.3. Monitoring the interception of communications

34. South Africa's reports on interception orders are threadbare. Between 2006 and 2008, the designated judge's report merely contained statistics on the number of interception orders granted. To his credit, the latest designated judge issued a more detailed report for 2009/2010, but it still falls far short of the reporting obligations needed for effective public oversight. For instance, insufficient information is provided to understand why there has been a huge 120 per cent increase in the number of interception directions granted by the designated judge between 2009 and 2010. In fact, statistics for these years point to a steady growth in the number of interception orders.³⁸
35. No provision for ensuring that a person whose communications are intercepted is informed about the order exists in South Africa's law, which means that the judge's decisions cannot be taken on review by the affected party as she or he simply does not know of the interception direction.

D Freedom of Expression – Impending Restrictions

36. Freedom of expression is an enabling right and a cornerstone of democracy. The Constitution of South Africa provides for freedom of expression including freedom of the press and the media in general.

³⁸

Reports to the National Assembly of the Joint Standing Committee on Intelligence, 2008-2010

37. However, four proposed new laws are likely to contradict the constitution and curtail freedom of expression.

D.1 The Protection of State Information Bill (POSIB)

38. While the POSIB is primarily limited to state security services, it also empowers the Minister of State Security to extend all classification provisions to “any organ of state or part thereof” which could throw a blanket of secrecy over a potentially unlimited scope of government documents and activities.³⁹
39. If passed, the POSIB may greatly affect whistle blowers and journalists reporting on documents considered classified who could face up to 25 years in jail.
40. Access to information facilitates free expression and promotes good governance. The POSIB, if enacted, hinders freedom of the press, freedom of expression and the right of the people to access government information.
41. The POSIB would erode people’s rights to scrutinize and hold government organs accountable. Civil society organizations, community groups and journalists wishing to play watchdog in the country to guarantee transparency and accountability will be criminalized for receiving or possessing any classified information.

D.2 The Statutory Media Appeals Tribunal

42. The ruling political party in South Africa passed a resolution in Polokwane December 2007, to investigate a Media Appeals Tribunal. This resolution was reaffirmed at the ruling party’s national general council in Durban in September 2010.
43. Although intended to transform media and improve journalism standards in the country, the tribunal will effectively mean political control of the media. The Tribunal’s primary intention of addressing what the government referred as “continuous shabby journalism, declining of journalism standards, inaccurate, unfair and irresponsible reporting, the inadequate powers of the press ombudsman to deter and discourage this practice, continuous non-compliance and non-adherence to the existing Press Code and a lack of accountability from the media”⁴⁰ is likely to create self-censorship in the media as the muscle of the state moves in to silence dissenting voices.
44. At present the country has a self-regulatory system – consisting of the press code, the Ombudsman and the Press Appeals Panel, all of which work well to serve the peer reviewed media.

D.3 The Public Service Broadcasting Bill (PSBB) and the Independent Communications Authority of SA (ICASA) Amendment Bill

45. The PSBB 2009 was another restrictive Bill under debate, but was

³⁹ Section 3.2.b Protection of State Information Bill (B6-2010)

⁴⁰ Contained in the Parliament invitation to stakeholders for “Indaba on Diversity and Transformation of Print Media” in September 2011, by head of the newly formed Press Freedom Commission (PFC)

withdrawn by the former Minister of Communications, Mr. Roy Padayachie, in favour of a comprehensive overhaul of broadcasting legislation.

46. PSBB would have narrowed the social mandate of community and public broadcasters to serve the developmental goals of the Republic and extends the powers of the Minister of Communications over the SABC and municipal officials over community radio.
47. Diversified print media is essential in facilitating freedom of expression and reaching out to ordinary citizens. Currently there is a concentration of ownership in the print media and the public broadcaster has been captured by the ruling political party. This is a limitation on freedom of expression by preventing a diverse media that facilitates access to information and freedom of expression.
48. Women are grossly underrepresented in media ownership as well as in decision making structures of media houses; women remain underrepresented on boards of directors (38 percent), top management (25 percent) and senior management (35 percent).⁴¹
49. The few existing community and small commercial media projects face sustainability challenges. The government has failed to provide sufficient funding to SABC and the Media Development and Diversity Agency (MDDA). The problem has been compounded by the existing tax, trade and competition policy that further restrict media diversity.
50. The Independent Communications Authority of SA (ICASA) Amendment Bill 2010 was proposed mainly to strengthen the capacity of the regulator. However, the Bill gives the Minister of Communications powers to determine the functions of individual ICASA councillors and to conduct performance appraisals of councillors. This will greatly affect the independence of the regulatory body and jeopardise the independence of broadcasting in the country by providing room for interference from both political and commercial interests. Smaller radio stations and community radio may be influenced to restrict diversified views of citizens especially those critical of government policies or big companies.

D.4 Gender and freedom of expression

51. The differential impact of freedom of expression on women and men cannot be understated. Whereas freedom of expression has been understood to mean the absence of political censorship, there are many other ways in which citizens may be denied the right to be heard, such as when women's voices may be excluded from the media.⁴²
52. Some of the examples of gender issues in freedom of expression debates include the plight of widows; whether or not pornography fuels gender violence; rape as a weapon of war; and whether the internet has had positive or negative effects in the struggle for women's rights.⁴³

⁴¹ Gender Links, 2009, "Glass Ceilings South Africa: Women and Men in Southern African Media, Gender Links, Johannesburg.

⁴² Gender Links, 2006, Gender Review of Media Development Organisations

⁴³ Gender Links, 2006, Gender Review of Media Development Organisations

E Access to Information and the Protection of Whistle-blowers

E.1 The Promotion of Access to Information Act (PAIA)

53. At the time of its adoption in 2001 the PAIA was lauded as a gold standard Right to Information (RTI) law. Today there is great anxiety about the state of compliance with and implementation of the law. Concerns are based on what can be described as “the 7 Deadly Failures in Implementation”, namely:

E.1.1 Poor designation of deputy information officers

54. Designation of deputy information officers is still haphazard and “not structured.” A number of Deputy Information Officers who received requests for information from the Index researchers claimed that they were not aware that they were Deputy Information Officers. In 2011, information requests are still being handled by unqualified officers.

E.1.2 Failure to compile PAIA manuals

55. Public bodies are obliged to publish a manual⁴⁴ to provide, amongst other things, contact details, records held and how to access these records. But not all public and other institutions, the South African Human Rights Commission (SAHRC), or the Government Printers and have the necessary resources to either compile, publish or process the manuals of over 800 public institutions and over a million others organisations.

E.1.3 Lack of an alternative dispute resolution mechanism

56. In the absence of the necessary rules, applicants for public information are restricted in their right of appeal to the same body that has refused access, followed by appeal to the High Court. This is an extremely expensive and lengthy process, out of the reach of the vast majority of South Africans. In practice the vast majority of South Africans do not have access to a dispute resolution mechanism.

E.1.4 Failure to respond to requests for information

57. One of the greatest obstacles is that of “mute refusals,” namely, requests for information that do not receive any response during the appropriate time frame. This non-compliance appears to be due to a lack of adequate training and lack of guidance on how to handle requests under the Act. However, the lack of a rapid, inexpensive, authoritative and effective dispute resolution mechanism has compounded this and prevented the development of decisions

⁴⁴ Section 14 of PAIA. In other jurisdictions manuals are referred to as publication schemes. Manual is a document that contains background information of the institution, the records it holds, the contact details for information officials as well as description of the process of submitting a request.

interpreting the Act.

E.1.5 Failure to provide access to disadvantaged requestors

58. Information officers are required to assist individuals who are unable to make written requests by translating an oral request to the prescribed form, and providing a copy to the requestor. However ODAC's study found that 70% of oral requests could not be submitted, while a further 10% were given oral refusals. In particular, blind and illiterate requestors experienced severe obstacles in making requests.⁴⁵

E.2 The State of Implementation: Whistleblowing in South Africa

E.2.1 Inadequate access to justice

59. Only courts have jurisdiction to hear disputes, rather an independent agency such as an ombudsman. Courts and litigation are prohibitively expensive and in practice this means justice is inaccessible to whistle-blowers living in poverty or on low incomes.

E.2.2 Limitation of protection against an "occupational detriment"

60. The PDA protects against "occupational detriment". This limitation does not provide sufficient reassurance against possible reprisals and is one of the primary causes of silence. For example, Van Vuuren observes that "Despite good whistle-blower provisions (South Africa is one of only seven countries with legislation protecting whistle-blowers) as many as 27% [of respondents who did not report bribery in the ISS study] said they are afraid of reprisals."⁴⁶
61. This fundamental lack of protections is a key impediment to fostering a culture of disclosure and needs to be urgently addressed. On a national scale, almost half the population do not have confidence in the law. The Markinor study commissioned by ODAC found that 43.1% of the respondents felt that the law does not adequately or effectively protect whistle-blowers.⁴⁷

E.2.3 Failure to protect whistle-blower confidentiality

62. Confidentiality must be distinguished from anonymity. An anonymous disclosure is one "*sent in a brown envelope or a message left on an answering machine, with little or no possibility of identifying or contacting the whistle-blower or verifying the information. By contrast, a confidential disclosure is where the recipient knows the identity of the person, but agrees not to disclose it if and when the information is used.*"⁴⁸ The New Zealand review described confidentiality as "perhaps the most significant protection"⁴⁹.
63. But the PDA also fails to protect confidentiality or have adequate civil

⁴⁵ Open Democracy Advice Centre "The state of whistle-blowing and access to information in South Africa" (2005) at page 4.

⁴⁶ Ibid Page 15

⁴⁷ Paula Martin "The Status of Whistle-Blowing in South Africa" (2010)

⁴⁸ Calland R and Dehn G, 2004: page 8

⁴⁹ In Banisar D, 2006: page 29

and criminal liability protections.⁵⁰

E.2.4. Remedies for whistle-blowers are insufficient

64. The remedies available to a whistle-blower in terms of the PDA in the case of his or her right to protection against occupational detriment being infringed are unduly limited by the narrow boundaries of the Labour Relations Act which is incorporated by reference.
65. A claim for damages in terms of the PDA is limited to the equivalent of 12 months' salary for an occupational detriment that amounts to an unfair labour practice and 24 months for an unfair dismissal. Yet the damage suffered by whistle-blowers is often severe and warrants more substantial damages. The limits also perpetuate class lines and are especially problematic in the case of lower paid workers (who are already vulnerable and less likely to whistle blow⁵¹).

F Recommendations to South Africa

We recommend that the Government of South Africa:

F.1 Universal, equitable and affordable internet access

66. Acknowledge the critical importance of universal access to the internet as a facilitator of civil and political and economic, social and cultural human rights.
67. Develop an integrated national strategy for how access to information and communications can strengthen development and human rights, linked to the National Development Plan.
68. Update the Broadband Policy with regard to internet penetration and speed targets and consult with civil society and private sector on policy implementation.
69. Ensure public internet access, in spaces that are safe and accessible for all, including women, the aged, children and people with disabilities, is included in any policy concerning communication, social development or education.
70. Encourage ICASA to regulate the South African internet market in a manner that would promote affordable broadband access and as outlined in the government's National Development Plan released in November 2011.
71. Strengthen the efforts of the Media Development and Diversity Agency in facilitating the development of local language internet content.

F.2 Internet governance, human rights and multi-stakeholder participation

⁵⁰ SALRC, 2008: page 2

⁵¹ Greyling A, 2008

72. Affirm its commitment to promoting and protecting human rights and multi-stakeholder participation in all internet related governance, policy and regulatory activities at national and global levels.
73. Concretise this through establishing a national multi-stakeholder internet steering group in partnership with groups from civil society, business, academia and the internet technical community.⁵²

F.2. *The right to privacy and regulation of interception of communications*

74. Amend the Intelligence Services Oversight Act so that information provided in the annual report on the interception orders includes information on the number of interception orders, the major offences for which orders were granted, a summary of different types of interception orders, the average costs per order, the types of surveillance used, and information about the number of arrests and convictions resulting from intercepts.
75. Review the RICA to protect the rights of the people under surveillance and amend the Act to:
 - (a) provide that within 90 days of an interception order granted in terms of RICA terminating, the person whose communications were intercepted is informed about the order, unless there are compelling grounds not to do so;
 - (b) require that a person must be informed about applications for interception directions against them which are unsuccessful;
 - (c) ensure the grounds for issuing of interception directions reflect the highest possible threshold in accordance with international human rights law and best practice;
 - (d) define “national security” narrowly and in accordance with international human rights standards;
 - (e) require the applicant to undertake to minimise the interception of communication that is not immediately relevant to the task at hand;
 - (f) recognise the right of journalists to protect their sources of information, either in the form of express provisions in the Act or in the form of a protocol that law enforcement or intelligence officials are required to adhere to in investigating journalists;
 - (g) extend the Act to cover foreign intelligence signals.
76. Implement the recommendations of the 2008 report entitled ‘Intelligence in a constitutional democracy – final report to the Minister of Intelligence Services, the Hon. Mr. Ronnie Kasrils MP, and hold a public debate on the mandate of the intelligence agencies.’
77. Establish an independent commission of inquiry into the allegations of illegal phone tapping as a matter of urgency.
78. Ensure that State officials found guilty of illegal monitoring and

⁵² A model for such a group is the Brazilian internet steering group CGI.br.

surveillance are dismissed and prosecuted according to law.

F.3 Freedom of expression

79. Defer the passage of POIB until all concerns raised by civil society are addressed and reviewed its draconian provisions to ensure the principle of openness and maximum disclosure of information is upheld and that limitations on freedom of expression comply with international human rights standards.
80. Stop the establishment of Media Appeals Tribunal and allow self-regulation of the media as a move to consolidate the freedom of press.
81. Redraft the ICASA Amendment and the Public Service Broadcasting Bill to ensure the Minister of Communications and municipalities do not exercise undue control over community and public broadcasting.
82. Stop the process of enacting fragmented media and broadcasting laws and instead embark on a harmonious and comprehensive media policy in full consultation with civil society and interested stakeholders.
83. Ensure that State-owned media lead by example through women's voices being well represented in media content and in media decision making structures. This should and ultimately achieve the 50% representation of women's voices in the media in line with the media provisions of the SADC Protocol on Gender and Development.⁵³

F.4 Access to Information and the Protection of Whistle-blowers

84. Appoint information officers and deputy information officers with clear job descriptions and proper training;
85. Ensure institution under the PAIA are informed about their responsibilities and provide access to their records and manuals;
86. Make the necessary resources available to the Government Printer and SAHRC for publication and processing of manuals for all public institutions;
87. Create easily accessible dispute resolutions mechanisms such as Ombudsman, Tribunals or Information Commissioners in matters involving public and corporate governance, human rights and socio-economic justice in order to bring dispute resolution within easier reach of the ordinary citizen.
88. Introduce more stringent punitive measures for those refusing to implement rules and regulations under PAIA.
89. Monitor, prosecute and take punitive measures against employers who fail to heed PDA judgments;
90. Broaden the scope of the PDA to include possible damages awards outside of the labour relations realm; protection against civil and criminal liability arising out of the disclosure as well as protection for the family members and other associated with the whistle-blower that can be subject to victimisation;

⁵³ http://www.sadc.int/index.php/download_file/34/165/

91. Introduce a qualified confidentiality protection in the PDA.