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GENERAL INTELLIGENCE LAWS AMENDMENT BILL

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Introduction

The South African History Archive (SAHA) thanks the Ad Hoc Committee for the opportunity to comment on the General Intelligence Laws Amendment Bill (the Bill) currently being considered by the committee. The Bill substantively amends three key laws governing the intelligence services; the National Strategic Intelligence Act 1994, the Intelligence Services Act 2002 and the Intelligence Services Oversight Act 1994. Consequential amendments are also made to a number of further laws.

SAHA is an independent human rights archive committed to documenting, supporting and promoting greater awareness of past and contemporary struggles for justice through archival practices and outreach, and the utilisation of access to information laws. SAHA aims to:

- recapture lost and neglected histories;
- record aspects of South African democracy in the making;
- bring history out of the archives and into schools, universities and communities in new and innovative ways;
- extend the boundaries of freedom of information in South Africa; and
- raise awareness, both nationally and internationally, of the role of archives and documentation in promoting and defending human rights.

With its considerable expertise, established reputation and distinctive commitment to transparency and good governance SAHA is well positioned to comment on aspects of the Bill that will affect the achievement of those goals in South Africa.

Transparency

Section 32(1) of the Constitution provides, relevantly, that 'everyone has the right of access to any information held by the State'. In 2000 the Promotion of Access to Information Act (PAIA) was enacted to give effect to that right.

The preamble to PAIA recognises the culture of secrecy that prevailed under apartheid and the need to overcome that culture in order to achieve democracy. It states, relevantly, that 'the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations'. Accordingly, PAIA seeks to overcome that historical environment by 'foster[ing] a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information'. PAIA therefore recognises that the right to information is central to the achievement and maintenance of democracy through promoting transparency and accountability.

SAHA acknowledges that the right to information is not absolute. In accordance with section 36(1) of the Constitution, the right to information may be limited to the extent that limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...'. To that end, section 41 of PAIA sets out the circumstances in which the right to information may be restricted in order to protect the defence, security and international relations of the state.

However, the intelligence services of South Africa currently operate in an environment of secrecy well beyond that which is permitted by the protection afforded under PAIA. In the 2008 report 'Intelligence in a Constitutional Democracy' (often referred to as the Matthews Report) the Ministerial Review Commission on Intelligence (the Commission) commented that 'the secrecy surrounding the intelligence organisations is not consistent with the Constitution. So much critical information about these bodies is confidential that they appear to be exempt from the constitutional imperatives of transparency and access to information'¹.

The Commission made a number of key recommendations that it considered would 'enhance openness in the interests of democracy without undermining security or compromising intelligence operations'². Those recommendations included:

- subjecting the National Intelligence Priorities approved annually by Cabinet to parliamentary consultation and debate;
- promulgating all ministerial regulations on intelligence in the Government Gazette, including those that are currently secret;
- making the following records of the intelligence services publicly available:
 - executive policy on intelligence operations;
 - annual reports;
 - annual budgets;
 - financial reports; and
 - audit reports;
- lifting the exemption currently afforded to the intelligence services in respect of creating a manual on the functions of, and index of records held by, those bodies under section 14 of PAIA.

SAHA supports those recommendations of the Commission and below assesses the extent to which the Bill implements those recommendations.

National Intelligence Priorities

Section 4(2)(f) of the National Intelligence Act provides that National Intelligence Co-ordinating Committee must make recommendations to the Cabinet on intelligence priorities. According to the Commission "the Cabinet's priorities provide executive direction for the intelligence organisations' focus, priorities and allocation of resources in the forthcoming year"³.

The public should be aware of the national security priorities of the country and be able to engage with and assess those priorities. Without access to the priorities, it is not possible for the public to hold the intelligence services accountable for their actions.

The Commission noted that "security would not be undermined [by parliamentary and public consultation and debate on the priorities] since the priorities do not include the names of individuals and organisations. Instead, the document refers to categories such as 'organised crime' and 'nuclear proliferation'⁴.

¹ Ministerial Review Commission on Intelligence, 'Intelligence in a Constitutional Democracy: Final Report to the Minister for Intelligence Services, the Honourable Mr Ronnie Kasrils, MP', 10 September 2008, page 263

² Ibid., page 22

³ Ibid., page 266

⁴ Ibid., page 267

It is therefore unfortunate that the opportunity to amend the provision to allow for proper parliamentary and citizen oversight of the actions of the intelligence agency has not been taken in this Bill. Instead, the Bill maintains the status quo. SAHA calls on the Committee to adopt the recommendations of the Commission and insert a requirement in the Bill that the priorities of the State Security Agency are subject to parliamentary and public consultation and debate.

Regulations

Currently regulations made under the National Intelligence Act and Intelligence Services Oversight Act need not be published. Likewise, some categories of regulations made under the Intelligence Services Act are also exempt from publication. The regulations deal with matters of substantive importance, essential to enable public scrutiny of the intelligence services. Accordingly access thereto directly impacts on the public's capacity to hold the security services accountable. For example, the Intelligence Services Act allows secret regulations to be made about procedures to be followed in the event of a disciplinary investigation or allegations of poor performance against members of the agency and the code of conduct with which members of the agency must comply. These matters directly reflect on the manner in which the agency holds its members accountable. Given the extensive powers exercised by those members that directly impact on and limit the privacy rights of citizens, it is essential that the public is aware of the manner in which those members are held accountable for their actions and should therefore be publicly available.

Furthermore, the provisions in those Acts affording secrecy to regulations are unconstitutional. Section 101(3) of the Constitution provides that 'proclamations, regulations and other instruments of subordinate legislation must be accessible to the public'.

The unconstitutional nature of these provisions has not been corrected by this Bill. In fact, alarmingly, the Bill expands the categories of regulations that may be made, and kept secret. Amendments to the National Intelligence Act will now allow for secret regulations to be developed about the conduct of intrusive operations and the manner and form in which Nicoc may gather intelligence products.

The Bill must be changed to amend the unconstitutional provisions of the National Intelligence Act, Intelligence Services Oversight Act and the Intelligence Services Act by requiring that all regulations made under those Acts are published in the Government Gazette.

Reports, budgets and policies

Annual report

SAHA welcomes the amendment to include a new section 10(5) in the Intelligence Services Act, which requires the State Security Agency to prepare an annual report on their activities which must be tabled in parliament and, except for classified information, must be made publicly accessible.

However, SAHA is concerned about the interaction of this clause with the proposed criteria for classification of information under the Protection of State Information Bill (POSI Bill). SAHA's concerns with the potential for a large number of organs of state to classify information, the vague nature of the test for classification and the flawed process for classifying information were raised in its submission on the POSI Bill, a copy of which is attached for reference. Of particular concern to SAHA is the broad definition of national security, which forms the central tenet for the classification of information, and therefore the basis on which information may be withheld from the public.

The definition currently contained in the POSI Bill is unnecessarily broad and would allow the classification of information unrelated to national security:

- the definition is inclusive, rather than exhaustive. It would therefore be possible for an organ of state to classify information they claimed would cause harm to national security that is not currently envisaged by the POSI Bill. As broad categories of the type of information that may affect national security are provided in the POSI Bill, it is unnecessary and unreasonable for further opportunity for organs of state to identify information they consider relates to national security to be identified;

- clause (b)(iv) of the definition of national security provides for protection against ‘exposure of a state security matter with the intention of undermining the constitutional order of the Republic’. A ‘state security matter’ is also a non-exhaustive definition and includes any matter which has been classified under the Bill and is dealt with by the State Security Agency, or which relates to the functions of the agency or to the relationship existing between any person and the agency. This definition goes well beyond what could properly be considered to be a matter related to national security. For example, information about the relationship between any person and the State Security Agency would include all contracts between the agency and third parties. This would include cleaning contracts, contracts for the provision of drivers to officials and similar. Information about such contracts could not properly fall within any reasonable interpretation of national security. Furthermore, any matter that could fall within the definition of a state security matter and properly be considered to relate to national security is already encompassed within other clauses contained in the definition of national security; and
- clause (b)(v) of the definition of national security provides for protection against ‘exposure of economic, scientific or technological secrets vital to the Republic’. The inclusion of economic secrets in this provision renders the clause so broad as to extend the definition of national security well beyond what could fall within a reasonable interpretation of what constitutes national security. For example, various mineral extraction operations may be vital to South Africa in terms of economic impact, such as maintaining a reasonable gross domestic product, managing the value of the rand and combating unemployment. However, none of these economic consequences are sufficiently related to national security to justify the inclusion of such matters in this Bill. The word ‘economic’ should therefore be removed from the clause.

Accordingly, while the requirement that annual reports on the activities of the State Security Agency are made publicly available is welcomed, the broad nature of the classified information that will be exempt from such disclosure means that the provision will fail to achieve the level of transparency in the Agency’s activities that was envisaged by the Commission on making the recommendation and, more importantly, that is required by the Constitution and PAIA.

Budget and financial reports

In accordance with the Intelligence Services Oversight Act budgets and annual financial reports of the intelligence services must be reviewed by the Joint Standing Committee on Intelligence (JSCI). However, there is no obligation for those documents to be provided to parliament. In its report the Commission noted that the current practice is that the budgets and reports of the intelligence services are not provided to parliament:

“The budgets and annual financial reports of the intelligence services are reviewed by the JSCI, which reports to Parliament, but the documents themselves are confidential and are not presented to Parliament. As a result, according to the National Treasury, the intelligence services are not directly accountable to Parliament for their budgets and spending.

This arrangement deviates from the Constitution, which states that national, provincial and municipal budgets and budgetary processes must promote transparency and accountability. The arrangement is also inconsistent with the public finance management principle that transparency leads over time to better delivery and better decision-making on allocation of funds.”

All governments have a limited budget with which to deliver a broad range of services to its citizens. It is a fundamental tenant of democracy that the public should be able to scrutinise the manner in which the government spends that limited budget. It is unsatisfactory for government to allow the budget for its intelligence services to be cloaked in secrecy.

Allowing public access to the budgets and financial reports of the agency would not threaten the defence or security of the state. Indeed, in its report the Commission stated “we have read a number of the budgets and strategic plans presented to the JSCI by NIA and SASS and do not believe that disclosure of these documents would in any way prejudice intelligence operations or the security of the country”⁵. It is therefore unjustifiable for the intelligence services to be exempt from proactively providing such information to parliament and the public. Indeed if such information were requested under PAIA, a denial of that information could lead to a legal challenge, which, based on comments of the Commission, would be likely to be successful.

Audit reports

Section 188(3) of the Constitution states that the Auditor-General must submit audit reports to any legislature that has a direct interest in an audit of a national or provincial state department or administration and that all reports must be made public.

The Intelligence Services Oversight Act provides that such reports must be submitted to the JSCI who must then report to the parliament. There is no direct obligation for the audited reports to be provided to parliament or made publicly available. In its report the Commission notes that the reports provided to the JSCI are classified as ‘confidential’ or ‘secret’ and as such are not made available to the public. The current practices of the intelligence services and the JSCI in this regard are therefore unconstitutional.

The Auditor-General and the Commission both expressed the view that there is no justifiable basis for failing to disclose previous audit reports of NIA and SASS to the public, particularly as the Minister may request that any sensitive information that may prejudice national security be withheld from a public report. The Bill should therefore amend section 3 of the Intelligence Services Act to expressly provide that the Auditor-General’s report must be made publicly available.

PAIA manual

Section 14 of PAIA provides that all public bodies must prepare a manual on the functions of, and index of records held by, that body. Section 14(5) allows the Minister of Justice to ‘exempt any public body or category of public bodies’ from the obligation to create a manual. The intelligence services applied for and received such an exemption.

The type of information that must be included in a manual is generic in nature and would not require the disclosure of any information that may prejudice national security. It includes information such as the contact details of the body, a description of the subjects on which the body holds records and the categories of records held on each subject and a description of any arrangement for a person to make representations or otherwise participate in or influence the formulation of policy or the exercise of powers or performance of duties by the body.

It is unnecessary for the intelligence services to be exempt from providing such generic information that would help promote openness and transparency in their activities and while no direct amendment is required to the Bill in this regard, SAHA takes this opportunity to recommend that the exemption be lifted and the services required to produce the manuals.

Privacy

SAHA notes with grave concern the potential impact of the Bill on the privacy of ordinary South Africans.

The Bill inserts new section 2(2)(b)(iv) into the National Intelligence Act. That provision states that it will be a function of the State Security Agency ‘to collect and analyse foreign signals intelligence in a manner prescribed under section 37(1)(sC) of the Intelligence Services Act 2002 (Act No.65 of 2002), in accordance with the intelligence priorities of the Republic’.

⁵ Ibid., page 223

A new definition of 'foreign signals intelligence' is inserted into the legislation, providing that:
"foreign signals intelligence means intelligence derived from the interception of electromagnetic, acoustic and other signals, including the equipment that produces such signals, and includes any communication that emanates from outside the borders of the Republic, or passes through or ends in the Republic".

The reality of modern communications is that many communications that will occur between people situate within South Africa will be transmitted through servers hosted outside South Africa, particularly given the cost implications of domestic hosting. For example, many South African websites and email host servers are in the United States. Therefore, technically, any communication that emanates from such servers will do so from outside the borders of South Africa and therefore fall within the definition of 'foreign signals intelligence'. The provision may therefore be used to monitor both domestic and foreign communication.

Of even greater concern is that the manner in which that information will be collected and analysed is left undefined by the Bill. The Bill simply inserts a provision into the Intelligence Services Act (section 31(1)(sC)) which allows the Minister to make regulations on 'the collection and analysis of foreign signals intelligence'. There is no requirement for public consultation in respect of such regulations, the Minister need only consult with the JSCI. Furthermore, while it is arguable that such regulations would not be made 'with reference to members' and therefore would be required to be published, the position is not clear and it may be open to the Minister to argue he is not required to publish the regulations.

The interception of communication is an enormous restriction on the fundamental right to privacy. Any restriction must therefore be strictly defined and contained in substantive law. Indeed the Commission recommended the imposition of a list of grounds that must be present before such intrusive operations could be undertaken, including that such measures should be limited to situations where there are reasonable grounds to believe that the target has committed or is about to commit an unlawful act and that such measures should require prior authorisation from a judge.

Furthermore, there is no requirement that the regulations created subject such intelligence gathering to the provisions of the Regulation of Interception of Communications and Provision of Communication Related Information Act 2002. It is therefore potentially open to the Minister to allow the random and targeted gathering of information from both domestic and foreign sources without justification or judicial oversight. Additionally, there are no requirements regarding the maintenance or disposal of records gathered through such monitoring. There is no obligation to dispose of records that prove to be irrelevant to the purpose of the intelligence gathering and therefore the State Security Agency could potentially hold personal information about individuals that were not connected with issues of national security and were gathered without justification indefinitely.

This provision must be reviewed to ensure that the circumstances in which such intelligence gathering can occur are strictly defined and justifiable and that the disposal of non-pertinent information is appropriately regulated.

Conclusion

This Bill presented an excellent opportunity to review the governance and practices of the intelligence services in accordance with the report of the Commission to ensure transparency and accountability in the functions of the services. Unfortunately, this Bill fails to do so and in some instances further perpetuates the exclusion of the services from public scrutiny. Importantly, the Bill fails to address the unconstitutionality of the legislation currently governing the intelligence services and the practices of those services which unjustifiably limit the fundamental right of access to information.

Furthermore, the Bill creates potential for the unwarranted restriction of individuals' right to privacy without judicial oversight.

The Bill must be reviewed to ensure that the intelligence services are accountable to parliament and to the public at large.

Should you require further written or oral submissions on these issues SAHA would be happy to assist. Please contact Tammy O'Connor on the details below.

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