



Ad hoc committee on the General Intelligence Laws Amendment Bill (GILAB)
Parliament of the Republic of South Africa

18 December 2023

ATTENTION: Ms Alutho Sombex

SUBMISSIONS ON THE GENERAL INTELLIGENCE LAWS AMENDMENT BILL 2023

1. These submissions are made jointly by Freedom Under Law ('FUL') and the Ahmed Kathrada Foundation ('AKF') (collectively, the 'Parties') in response to Parliament's call for public comment on the General Intelligence Laws Amendment Bill 2023 (the 'Bill') Government Gazette No. 49717 of 14 November 2023.
2. FUL is a not-for-profit organisation, promoting democracy, the advancement of the rule of law and the principle of legality, which it understands to be foundational for a functional constitutional democracy.¹
3. AKF is a not-for-profit organisation focused on advancing the legacy of Ahmed Kathrada through its work that focuses on deepening non-racialism and democracy in South Africa.²

The Bill

4. The Bill purports to amend the powers and mandate of the South African intelligence services in accordance with the recommendations of the Judicial Commission of Inquiry into Allegations of State Capture (the 'Zondo Commission')³ and the 2018 High Level

¹ See: <https://www.freedomunderlaw.org/>

² See: <https://www.kathradafoundation.org/>

³ See: https://www.statecapture.org.za/site/files/announcements/667/OCR_version_-_State_Capture_Commission_Report_Part_V_Vol_I_-_SSA.pdf

Review Panel on State Security Agency (the 'Review Panel')⁴ together with the findings in *amaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v amaBhungane Centre for Investigative Journalism NPC and Others*.⁵

5. In particular, the Bill would amend three existing laws relating to intelligence structures: the National Strategic Intelligence Act, the Intelligence Services Act, and the Intelligence Oversight Act; and bifurcate the State Security Agency ('SSA') into the South African Intelligence Service (focused on foreign intelligence) and the South African Intelligence Agency (focused on domestic intelligence).
6. The Parties express a grave concern that the Bill poses a threat to South Africa's democracy as it permits the intrusion of state security agencies into our society in a way that undermines democracy, clears the way for continued over-reach by state agencies and lays the groundwork for a return to state capture.
7. More specifically, if the Bill is passed in its current form, the Parties are concerned that:
 - 7.1. The Bill will provide state security agencies with the power to do mandatory security vetting on 'any person or institution of National Interest in terms of section 4(2)(a)(i)'. Since the definition of 'person or institution of National Interest' is extremely broad, it potentially casts a wide net over almost all civic structures. Security vetting is extremely intrusive and FUL is skeptical of the state's need for this power.
 - 7.2. The Bill is imprecisely drafted and the ambit of extensive state powers, such as security vetting, is ambiguous and ill-defined. Security vetting is extremely intrusive and this power ought to be clearly delineated.
 - 7.3. The Bill will serve to enhance the security agencies' powers of mass surveillance through a National Communications Centre with little meaningful oversight and none of the requisite protections for privacy and freedom of expression.

⁴ See: https://www.gov.za/sites/default/files/gcis_document/201903/high-level-review-panel-state-security-agency.pdf

⁵ 2021 (3) SA 246 (CC).

- 7.4. The Bill fails to provide safeguards to prevent the abuse of secret funds (a key element of state capture at the state security agency). This opens the door to continued illegal expenditure and mismanagement.
 - 7.5. The Bill fails to ensure the independence of the Inspector-General of Intelligence, the watchdog of intelligence agencies. The era of state capture made clear the need to hold state security to account.
 - 7.6. The Bill widens the definitions of operative terms in a way that would allow for the unconstrained intrusion of state security agencies into every aspect of citizens' daily lives – far beyond the legitimate scope of state intelligence.
 - 7.7. The Bill gives state security agencies the power to vet individuals who wish to access national key points, such as the SABC. This is a dire threat to journalistic independence.
 - 7.8. The Bill fails to stipulate a reporting requirement in terms of which public organisations who have been the subject of a cyber-attack are required to disclose this fact to the public in accordance with international best practice.
 - 7.9. By including national 'opportunities' in the ambit of state security apparatus' objectives, the Bill impermissibly expands the SSA's mandate beyond the furtherance of public safety.
8. While the Parties' concerns are not limited to those outlined above, these are their key concerns. Each will be discussed in more detail below.

Expansion of the SSA's vetting powers

9. The Bill vastly expands the state security agencies' power to perform security vetting.
10. Pursuant to the Bill, section 2A of the National Strategic Intelligence Act is amended to read 'the relevant members of the National Security Intelligence Structure must conduct a vetting investigation in the prescribed manner to determine the security competence of a person if such a person', *inter alia*, 'if [sic] a person or institution of national security interest in terms of section 4(2)(a)(i) of the Act'.⁶

⁶ National Strategic Intelligence Act, 39 of 1994, Section 2A(1) ('NSI Act').

11. What was previously a discretionary power to conduct security vetting ('may conduct vetting') has now been made compulsory ('must conduct vetting').
12. The amendment also expands the categories of individuals who would be required to undergo such vetting to all persons who are 'persons or institutions of national security interest in terms of section 4(2)(a)(i) of the Act'.
13. Importantly, the definition of 'persons or institutions of national security interest' is exceedingly broad – the term is defined as 'any person or institution, identified by the Agency in the form and manner prescribed, that conducts himself/herself or itself or engages in activities that are inconsistent with the principles set out in section 198 of the Constitution including any person or institution that engages in activities that are defined as a threat to national security in terms of the Act' – meaning that almost any person or organisation could be drawn into the ambit of the state security apparatus. Indeed, the fact that the section is explicitly linked to the functions of the National Intelligence Co-ordinating Committee only serves to confuse matters.⁷ In its present form, section 2A(a)(iv) is vague and fails to delineate the ambit of its application. The wording of the section ought to be redrafted to ensure that the scope of the SSA's power to conduct security vetting is clear and unambiguous.
14. In addition, the Bill expands the scope of security vetting, defining it ('security competence test'), as the administration of a vetting investigation aimed at determining 'the security competence of a person or institution and if such person or institution is suitable to access classified information or critical infrastructure of the State or is viewed as vulnerable to blackmail, undue influence or manipulation or security compromise or is a person or institution of national security interest in terms of section 4(2)(a)(i) of the Act'.⁸
15. Absent prescribed criteria to assess whether a person is vulnerable to 'undue influence or manipulation', any person could be denied security clearance for almost any reason.
16. This raises serious concerns about freedom of association and the risk of surveillance of civil society organisations, especially given the way in which security vetting has been used to marginalise critics in the past – for example, a former SSA Director-General

⁷ Section 4(2)(a)(i) of the NSI Act provides that 'The functions of Nicoc shall be to co-ordinate the intelligence supplied by the members of the National Intelligence Structures to Nicoc and interpret such intelligence for use by the State and the Cabinet for the purposes of the detection and identification of any threat of potential threat to the national security of the Republic'.

⁸ Section 4(2)(a)(i) of the NSI Act simply delineates the functions of the National Intelligence Co-ordinating Committee (Nicoc). It is not abundantly clear why this qualification has been included.

revoked the security clearance of the Inspector-General of Intelligence during an investigation into his (the Director-General's) conduct.⁹

17. Furthermore, the increased scope of security vetting effectively permits the SSA to conduct extra-judicial investigations into persons and organisations in a manner that is contrary to the Financial Task Force's (FATF) Recommendation 8. Given that powers of investigation have already been conferred upon the Financial Intelligence Centre and the Hawks to combat terrorism finance and money laundering, conferring the self-same powers on the SSA is superfluous.
18. Given its expansive language and the manner in which similar powers have been used in the past, the Bill grants the government powers patently beyond the legitimate scope of state intelligence.

Expansion of the definitions of national security

19. The Bill expands the definition of 'national security' which would effectively expand the reach of the state security agencies into every aspect of public life. This is contrary to the recommendations of the Review Panel - and indeed best practice - that national security powers should be narrowly defined.
20. Currently, the National Strategic Intelligence Act defines 'national security' as 'the protection of the people of South Africa and the territorial integrity of the Republic against, among others, violent attacks, terrorism, sabotage and serious violence directed at overthrowing the constitutional order.'¹⁰
21. The extant definition explicitly excludes lawful political activity, advocacy, protest or dissent from activities that could ever threaten national security.¹¹
22. On the contrary, the Bill defines 'national security' as 'the capabilities, measures and activities of the State to pursue or advance any threat, potential threat, opportunity or potential opportunity, or the security of the Republic and its people, in or outside the Republic in accordance with section 198 of the Constitution.'¹²

⁹ See: <https://mg.co.za/article/2018-04-17-arthur-fraser-vs-inspector-general-of-intelligence-in-court-over-security-clearance/>

¹⁰ NSI Act, 39 of 1994, section 1.

¹¹ Ibid, section 1.

¹² General Intelligence Laws Amendment Bill, para (m).

23. By jettisoning the requirement that 'national security' is principally concerned with threats to the constitutional order, the new definition expands the concept to one which is vague and all encompassing, and which could potentially turn almost any matter into one of national security.
24. These changes significantly broaden the mandate and powers of the state security structures, providing them license to proactively seek 'opportunity or potential opportunity' to advance South Africa's national security interests.
25. Indeed, the suggestion that these concepts are embodied in section 198 of the Constitution is misleading. While section 198 refers to equality, peace and harmony, and the ability to seek a better life, the section provides no guidance as to the 'national values' allegedly at the heart of 'national security'.¹³
26. In addition, the Bill expands the following other key terms:
 - 26.1. 'domestic intelligence' now means 'intelligence on any internal threat or opportunity or potential opportunity or threat or potential threat to national security';
 - 26.2. 'foreign intelligence' now means 'intelligence on any external threat or potential threat and opportunity or potential opportunity to national security';
 - 26.3. 'intelligence gathering' now means 'the acquisition and processing of relevant and reliable information into intelligence products related to any domestic or foreign opportunity or potential opportunity or threat or potential threat to national security or threats to the advancement or protection of national security'; and
 - 26.4. 'national security intelligence' now means 'intelligence which relates to or may be relevant to the assessment of any opportunity or potential opportunity or threat or potential threat to the national security of the Republic in any field'.
27. These definitions go far beyond the legitimate scope of state intelligence and given the SSA's track record of meddling in politics and civic life, are extremely concerning.

¹³ Pierre de Vos 'New intelligence bill is anti-democratic, and a unique mix of malice and stupidity', available at <https://www.dailymaverick.co.za/article/2023-09-07-new-intelligence-bill-is-a-unique-mix-of-malice-and-stupidity/> (accessed on 06 November 2023).

Expansion of mass surveillance capabilities

28. The Bill attempts to establish in law the SSA's mass surveillance capabilities through the National Communications Centre (NCC).
29. The NCC previously operated as a mass surveillance facility, scanning millions of communication signals to identify people or groups to be targeted for further surveillance. Many individuals were caught in this surveillance dragnet without their knowledge or permission. Indeed, the NCC operated without transparency and without clear safeguards or regulations.
30. In *amaBhungane*,¹⁴ the Constitutional Court declared that the NCC's bulk surveillance operations in terms of the RICA act were unlawful. More specifically, the Court held that the RICA act only permitted 'targeted' surveillance (that is, the interception of a specific person's communications, under specific circumstances) rather than the mass interception of many people's communications (as the NCC had been doing).
31. While the Bill is an attempt to legalise the NCC's operations (following *amaBhungane*¹⁵), it does not provide for the requisite protections for privacy and freedom of expression, nor for meaningful oversight of the NCC. More specifically, the proposed nominal oversight by a judge appointed by the President (and advised by two 'interception experts') falls far short of the standards set by the Constitutional Court – including sufficient independence of judges authorising surveillance, and the right to post-surveillance notification of any person whose communications have been intercepted. Furthermore, the Bill does not adequately regulate the practical implementation of this surveillance – for example, amongst others, the Bill does not regulate the manner and duration for which the SSA is permitted to store intercepted communications).
32. Rather than an attempt to codify the standards set by the Constitutional Court, the Bill is nothing more than an attempt to reintroduce the SSA's powers of unaccountable mass surveillance.
33. In any event, these portions of the Bill are somewhat superfluous. The Department of Justice is currently drafting a separate Bill to amend RICA (in line with the Constitutional Court's judgment) by introducing new safeguards and transparency for surveillance

¹⁴ *amaBhungane* (supra)

¹⁵ *Ibid.*

operations. In this context, all the Bill achieves is the creation of a messy parallel process with none of the requisite safeguards.

Failure to deliver on oversight and accountability.

34. There is an urgent need for reforms to boost oversight and accountability in the SSA to prevent corruption and further abuses of power. Yet the Bill fails to deliver these reforms.
35. The Inspector-General is meant to be the watchdog of the state intelligence agencies. At present, the Inspector-General's decisions do not appear to be binding. Furthermore, the Intelligence Oversight Act does not provide for an acting or deputy Inspector-General – an oversight which has resulted in the institution sitting leaderless between appointments.
36. This has severely weakened the oversight role that the office of the Inspector-General could otherwise exercise in respect of the state security agencies.
37. The Bill ought to remedy these defects (for example, by empowering the IG to enforce their decision). As it stands, the Bill fails to do so and is a missed opportunity to bolster the power and institutional independence of the Inspector-General.
38. In addition, the Bill ought to provide for better external oversight of and safeguards for the SSA's expenditure and management of secret funds. (This lack of oversight and safeguards was a key dimension of state capture within the agency.)
39. At present, because the classification of documents by the SSA effectively prohibits the Auditor-General from conducting a full audit of the agency's accounts, the SSA has never received an unqualified audit. The Bill therefore ought to ensure that the Auditor-General has full access to all the SSA's internal financial documents for this purpose.
40. The era of state capture made clear the need to hold state security apparatus to account. The Bill, in its present form, does not do enough to address these serious concerns.

Conclusion

41. There is a genuine need for the reform of the state intelligence structures in South Africa, but the Bill raises serious concerns around freedom of association, mass surveillance, and oversight and accountability.

42. On the face of it, the Bill appears to represent an attempt to interfere with civil society and religious institutions to an extent that would threaten many South African's rights to free expression, to organise and assemble, to fully engage in civil and political life, and to religious and cultural practice. Civil society was and remains a key bulwark against state capture, and the Bill appears to be an attempt to exert control over these institutions.

43. In light of the considerations raised in this submission, and by other stakeholders, the Parties call on Parliament to ensure that the Bill is either withdrawn or redrafted to bring it fully in line with the Constitution and best practice.

ENDS