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The Right2Know Campaign Submission on the Defence Amendment Bill NCOP Select Committee on Security and Justice

16 November 2018

“Governments should be supported by transparent defence institutions that are accountable to ordinary people and whose primary purpose is the protection of all citizens”[2]

Introduction: concerns around transparency, accountability and rule of law in Defence

The Right2Know Campaign welcomes the opportunity to make a submission on the Defence Amendment Bill, 2017, and thanks the Committee for creating a reasonable timeframe for public comment.

The Constitution envisages that the Defence sector plays a crucial role ensuring the security and stability of the country, whilst adhering to protection of and respect for human rights. However, it is common cause that this role is being eroded by criminality and corruption within the sector, coupled by a lack of transparency and public accountability.

A 2017 report by the Defence Ombud remarked on rampant criminal activities in the South African Defence Force military bases, illustrated by the 9 South African Infantry Battalion incident.[3]

It is regrettable to note a number of public instances where Defence structures have exhibited a shocking disregard for the rule of law. Most recently, in the Marievale evictions case, in 2018 the Gauteng High Court found that personnel of the South African National Defence Force (SANDF) had conducted illegal evictions, in the absence of a court order, of people living on public land.

A range of troubling facts were brought before the court, of SANDF personnel conducting armed raids of people's homes, committing assault, damaging their property. Significantly, the SANDF, Minister and Commanding Officer at Marievale base now face a contempt of court application after ignoring the orders handed down by the court. Of additional significance to this Bill, SANDF personnel barred officers of the court from accessing the land, thereby preventing the sheriff of the court from serving court orders and court summons while the illegal evictions continued.[4]

It is also regrettable to note numerous examples an unjustifiable culture of secrecy within the defence sector which is not guided by legitimate security prerogatives, but by a resistance to oversight and accountability. In a notable example, following the infamous 2013 Gupta family landing at the Waterkloof military airbase, investigative journalism centre amaBhungane was forced into a four year battle to access information from the Department of Defence on private landings at the base.

In its papers filed before the court, the department of defence claimed that the information could not be provided due to its "top secret" classification and putative harm to international relations. Days before the matter could be heard in open court, and four years after the information was requested, the Minister of Defence conceded the information should be made public, and disclosed the information in 2017.

No harm has come to the republic as a result of this disclosure, and it would seem only justification for this secrecy was to shield itself from investigative journalism on a matter of wide public interest.

These examples are but a few in which secrecy or unnecessary force have eroded public confidence and trust in the Defence Force. The consequences of the erosion has serious implications on the ability of the Defence Force to play its legitimate role, and pose significant challenges for rule of law, openness and accountability in South Africa.

It is common cause that transparency is the best cure for corruption – and indeed to build or rebuild public confidence. Transparency, where the law protects and promotes public interest journalism, whistleblowers and civilian oversight functions, should be encouraged and upheld through all legislation.

Doing so fosters public accountability and creates a bulwark against the arbitrary use of power, acts of impunity and abuse of resources.

Right2Know therefore makes this submissions to ensure that the amended defence legislation includes provisions for transparency and public accountability – cornerstones of our constitutional democratic order.

In doing so, we focus on those aspects of the Bill which unduly limit access to information,

freedom of expression and discourage acts of whistleblowing. These include clauses 15 and 16 (proposed new section 83A and 104). We provide proposals to assist the Committee in ensuring the Bill meets constitutional muster.

I. Prohibition of access to military property or areas – a return to Apartheid-era defence secrecy.

The overview of the Bill explains that the ‘new’ clause 15 prohibitions are a re-introduction of the apartheid-era 1957 Defence Act provisions, removed from the current Defence Act of 2002. The provisions are reproduced below for ease of reference:

83A. (1) The Minister may prescribe measures to regulate access to any military camp, barracks, dockyard, installation, premises, areas or property, or to any airbase or any land or area of water which is used either temporarily or permanently by the Defence Force or which is under the control of the Defence Force, including a building, premises or area or any part thereof which is also being used or is occupied by, or is the property of any other person.

(2) Any person who fails to comply with any prohibition, restriction or condition prescribed under subsection (1) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years.

Clause 15 (1) provides for extremely broad prohibition on access to military property and or large areas around such property, with excessive, indiscriminate penalties.

The wide reaching provisions do not to distinguish between *intentional* and *unlawful* access, and accidental, harmless or even access made with the purpose of exposing criminality, corruption or imminent danger. The Minister is granted a high degree of discretion in drafting the regulations, with no legal guidance or parliamentary oversight.

This chilling effect of this is concerning.

The effect of the prohibition may mean grievous human rights abuses will be not be observable, humanitarian aid possibly stopped or limited, and critical accountability media reporting would be silenced.

It has become an accepted principle of legality that provisions which include severe criminal sanction must distinguish between categories of the offence -- examples of this include the the Critical Infrastructure Protection Bill, and even the Protection of State Information Bill, which have or are passing through this Committee, meaning members would be alive to these principles.

The importance of this cannot be overstated.

The Bill’s criminal sanctions may, for example, see community members being prosecuted for

unintentional and harmless access to military property or areas.

This is applicable in the Marievale eviction case. Had this prohibition been in force, residents posing no substantial threat to the state would have been liable for hefty fines and up to 15 years in jail.

Crucial media reporting and solidarity activism by many, including our R2K campaign[5], may too have been prevented – or those participating facing threats of being fined and jailed.

The use of the SANDF in joint operations with the police may also see such prohibitions imposed over communities where these often questionable operations are taking place.

Clause 15 (3) extends the prohibitions to include:

“any land or premises on or in which armaments are developed, manufactured, serviced, repaired or maintained, must be regarded as land or premises used by, or under the control of, the Defence Force.”

This prohibition likely includes state owned arms company Denel, which has as its primary purpose *‘designing, developing, manufacturing and supporting defence material.’* [6]

Denel has found itself highly exposed to state capture, and serious allegations of corruption have emerged in recent years.

A blanket prohibition with chilling criminal sanctions as envisaged by this clause is frankly unsuitable given the vulnerability of this SOE.

Greater public oversight and accountability is urgently required.

In the aftermath of the September fatal explosion at the Denel factory in Macassar, just outside Cape Town, where 9 workers tragically lost their lives, current Minister of Public Enterprises , Pravin Gordhan stated that the factory is listed as a National Key Point[7].

A level of restricted access therefore already applies through National Key Points Act of 1980 – which is being amended as the Critical Infrastructure Protection Bill - presently before this Committee to bring it in line with our constitutional principles, while s104 of the existing Defence Act already sets out offences for endangerment of security in Defence-related infrastructure, and protection of information. Even the Trespass Act of 1956 serves the purpose sought by this amendment Bill, without creating such undue infringement on constitutional rights.

Proposals

Right2Know is deeply concerned that almost 25 years into our constitutional democracy, the defence sector, which should be moving towards being a more transparent institution, is moving backwards to re-introduce apartheid era clauses.

Our strong recommendation is that this entire section should be scrapped.

However, in the event that the Committee chooses to retain these provisions, we urge members to make amendments to ameliorate the worst aspects of this clause, including:

- a) The regulations drafted by the Minister should be subject to a full and transparent public participation process through Parliament. This may also have the added benefit of avoiding legal challenges to the regulations, as has been the case for the department in the 2007 *SANDU v Minister of Defence and Another*.
- b) As a further safeguard to protect legitimate public interest media reporting and whistleblowing, we recommend that access to military property or areas with the purpose of exposing criminality, corruption or imminent public danger should not be subject to criminal sanction.
- c) The criminal sanctions in the clause should be subject to an adequate harm test, and the sanction should be differentiated according to the type of offence committed.
- d) The penalty clause at 15(2) would be strengthened by the inclusion of *intentional* and *unlawful* proviso, thereby excluding harmless or unintentional access.
- e) Clause 15(3) should be removed in its entirety as adequate protections for such sites are provided for through the more robust Critical Infrastructure Protection Bill (to replace the old National Key Point Act, 1980)

II. Penalty and Offences Clauses – An unconstitutional limitation on the free flow of information

Section 104 of the Defence Act of 2002 contains the main penalty and offences provisions.

Clause 16 of the Defence Amendment Bill makes limited proposals only in respect of criminal enforcement for the unlawful possession or wearing of military uniforms and other distinctive marks.

The section has other worrying criminal sanctions which have been overlooked by the Defence Amendment Bill.

Right2Know believes these demand the urgent attention of Parliament, and therefore brings it to the attention of the Committee:

- a) There are sweeping criminal penalties of up to 5 years for the disclosure and publication in the media of all classified information in terms of the Act.
- b) Section 19(a) ramps up the penalty for accessing, possession, reproduction and disclosure of classified information from “*classified facilities, installations or instruments*” including “*digital data*” up to 25 years in prison.
- c) The constitutional right to protest and strike are unduly criminalised, despite our apex court ruling that the defence department is not exempt from adhering to constitutional

principles freedom of expression in the 1999 in the case of *South African National Defence Union v Minister of Defence and Another*.

- d) The Act provides no explicit protection for whistleblowers -- either under the Protected Disclosures Act, the Prevention and Combating of Corrupt Activities Act or even a general public interest defence for whistleblowing which is vital for our democracy. The Defence Act falls short of even the contentious Protection of State Information Bill in this regard.

The problematic sections are reproduced here for ease of reference :

(4) Any person who obstructs, damages, removes, destroys or commits any other act on or against any property used for protecting or safeguarding the Republic, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 25 years.

...

(7) Subject to the Promotion of Access to Information Act, 2000 (Act 2 of 2000), any person who, without authority, discloses or publishes any information, or is responsible for such disclosure or publication, whether by print, the electronic media, verbally or by gesture, where such information has been classified in terms of this Act, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.

(8) Any person who, without authority, gains access to the computer systems or computer data bases of the Department, or who, without authority, changes, alters, corrupts, copies or withdraws data from any such systems or databases, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 25 years.

....

(14) Any member of the Defence Force or of any auxiliary service who participates in any strike or secondary strike action, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.

.....

(19) (a) A person is guilty of an offence if he or she, without proper authority-

(i) enters, overflies or otherwise collects or gains access to classified information from specific classified facilities, installations or instruments of the Department;

(ii) is in possession of, makes copies of, sketches, photographs, makes printouts of, electronically or in any other manner records or obtains digital data from classified facilities, installations or instruments of the Department;

or (iii) hands over or discloses to any person or loses or obtains from any member or employee of the Department, copies, sketches, photographs, print-outs, electronic or non electronic recordings of the digital data referred to in subparagraph (ii). (b) Any person convicted of an offence contemplated in paragraph (a) is liable to a fine or imprisonment for a period not exceeding 25 years.

Proposals

At the core of Right2Knows concern with the provisions in this section is the complete absence of adequate safeguards against the potential abuse, and misuse of power enabled by the broad and harsh penalties.

Such safeguards are vital for journalists, activists, whistleblowers and workers within the

defence services who may want to act in the public good, and exercise their constitutional rights.

The absence of such provisions make the Defence Act of 2002 out of step with other legislation governing security cluster, and related court judgements.

For example, the contentious passage of the Protection of State Information Bill (POSIB), which remains unsigned, provides important guidelines for how penalties should and shouldn't be provided for in classification of information by legislators.

The final version of POSIB adopted by Parliament, further included important protections for whistleblowers within the defence force, journalists and other members of the public compelled to make public interest disclosures.

In regard to the right to strike, the 1999 judgement in the *South African National Defence Union v Minister of Defence and Another* the Constitutional Court declared invalid the prohibition on defence force members from taking part in public protests because it infringed on their right to freedom of expression.

These are but a few examples.

It would be prudent and in the public interest for this Committee use this opportune moment to introduce minor additional amendments to remedy some of the more serious defects of s104, which may infringe on the constitutionality of the Act.

Conclusion:

South Africa has a long and troubled history of defence sector secrecy, which has allowed for corruption to flourish at the expense of the public good.

Important reforms to the Defence Act have been made since our democratic transition in 1994.

The current amendment Bill before the Committee is another opportunity for Parliament to play its important oversight role in creating laws for defence sector which serve the public. We trust our submission and its proposals will be useful to the Committee in this regard.

Should the Committee elect to hold public hearings on the Bill, we will avail ourselves to discuss our submission further.

#ENDS

[1] The submission by Right2Know has been done in collaboration with the amaBhungane Centre for Investigative Journalism, as

part of amaBhungane's advocacy mandate, which is to secure information rights for investigative journalists and in the wide public interest.

[2] Transparency International "Defence Corruption"

<<http://ti-defence.org/defence-corruption/>>

[3] Parliamentary Monitoring Group Report (2017) "Defence Ombud status report; Military Bases state of security; Military Base Heist report, 03 November 2017"

< <https://pmg.org.za/committee-meeting/25402/>>

[4] *Rex and Others v Minister of Defence and Military Veterans and Others* (22663/2018)

Rumana Akoob, "Allegations of intimidation and torture as Marievale residents are evicted from army base", Daily Vox, 01 December 2018 <<http://www.thedailyvox.co.za/allegations-of-intimidation-and-torture-as-marievale-residents-are-evicted-from-army-base-rumana-akoob/>>

[5] Masechaba Sefularo (2018) "Right2Know protests over Marievale Community's from Military Base" EyeWitness News (EWN) 01 January 2018

<<https://ewn.co.za/2018/01/29/right2know-protests-over-marievale-community-s-eviction-from-military-base>>

[6] South African Defence Review 2015

<<http://www.dod.mil.za/documents/defencereview/defence%20review%202015.pdf>>

[7] Jenni Evans (2018) "Prayers, black armbands as munitions plant workers mourn colleagues" News24, 07 September 2018

<<https://www.news24.com/SouthAfrica/News/prayers-black-armbands-as-munitions-plant-workers-mourn-colleagues-20180907>>