the sandf
Department
Defence
REPUBLIC OF SOUTH AFRICA

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The Hon Mr S.G. Mthimunye
Chairperson of the Select Committee on Security and Justice

DEPARTMENT OF DEFENCE RESPONSE TO COMMENTS OF THE RIGHT2KNOW CAMPAIGN ON THE DEFENCE AMENDMENT BILL, 2017

1. Background. The Defence Amendment Bill, 2017 (DAB) is in the final stages of parliamentary approval. The National Council of Provinces (NCOP) select Committee on Security and Justice has recently published the DAB for public comments. The Right2Know Campaign (Right2toKnow) has submitted written comments to the NCOP, which were referred to the Department for written comments.

2. We have scrutinized the submission of the Right2Know Campaign (Right2toKnow) in connection with the Defence Amendment Bill, 2017, and wish to respond as set out hereunder.

3. It must be stated from the outset the tone used by the Right2toKnow in their submission is disconcerting. The South African National Defence Force (SANDF) is accused of having a shocking disregard for the rule of law in the past, and it is furthermore alleged that there is a culture of secrecy within the defence sector which is not guided by legitimate security prerogatives, but by a resistance to oversight and accountability. The objections of Right2toKnow against the Bill all relate back to those accusations.

4. The recent events at the Marievale military base of the SANDF are raised in particular in order to advance an argument that clause 15 of the Bill will ultimately be used for ulterior purposes. The Marievale events are still *sub judice* and we therefore have to refrain from any comment on the statements made by Right2toKnow in respect of that matter. However, we wish to point out that on judgment and an order dated 30 November 2018, the High Court found that the SANDF was not in contempt of court in respect of the court's original order, and the court furthermore amended its original order with the perceived aim of enabling the SANDF to deal with the practicalities of the matter. The position of the SANDF is furthermore that the Marievale occurrence emphasizes the need for clause 15 as the trespassing in that matter could have been prevented by proper access measures.

5. We do not deem it necessary to respond to all the allegations, accusations and insinuations made by Right2toKnow and is also of the view that Parliament is not the forum to debate the correctness of their views. We will therefore only concentrate on the merits of clause 15 from the viewpoint of the SANDF, while we will also comment briefly on the views expressed in respect of section 104 of the Defence Act, 2002.

6. Clause 15. Access to military property or areas is a serious and complicated matter that demands a diverse approach. At stake is not only the safety and security of military members, civilian employees and military equipment, but also the security of the country and the safety of visitors. It may seem to be a simple matter to regulate access to administrative offices on the one hand, but on the other hand regulating military areas where military training and exercises take place is far more complex.

7. Even in the case of military living quarters access has to be controlled. Military members living there understand that the occupation of official quarters are regulated by regulations under section 82(1)(*d*) of the Defence Act, 2002, that are in place for their own protection and wellbeing, and that their living quarters cannot be equated to houses and apartments in civilian suburbs where the inhabitants are subject to less restrictions. On the other hand, access to military living quarters by civilians or unauthorized persons must also be regulated as the SANDF is in the final event the responsible authority to be held liable for any misfortune suffered by visitors or trespassers in such military areas.

8. The only practical manner to deal with all these diverse scenarios is to make regulations that can provide for the various requirements with fitting sanctions for each scenario. Right2know is probably not aware of all the processes, but the State Law Advisers must scrutinize all draft regulations, including SANDF regulations, to ensure that they are not only valid, practical, reasonable and unambiguous but also comply with the Constitution and are not in conflict with any other law. The SANDF is therefore not in a position to slip in underhand measures.

9. The purpose of clause 15 (proposed new section 83A) is merely to confer powers on the Minister to regulate the matter. Concerns raised by Right2know regarding such matters as *intentional*, *unlawful*, accidental or harmless access, and access made with the purpose of exposing criminality, corruption or imminent danger can all be addressed in the regulations. Criminal sanctions can be varied in accordance with the severity of the matter. However, the wording of the proposed new section 83A(2) may be problematic, and consideration should be given to replacing it with a provision similar to section 82(3) of the Defence Act, 2002. The effect of the change will then be that the Minister may prescribe various penalties that fit specific offences. Such a provision can then read as follows:

"(2) Any regulation made under subsection (1) may provide that a contravention of or failure to comply with that regulation is an offence and that any person found guilty of the offence is liable to a fine or to imprisonment for a specified period that may not exceed 15 years for any specific offence."

10. It is trite that National Key Points Act, 1980, does not apply to military areas. It is also envisaged that the Critical Infrastructure Protection Bill will not regulate military areas. While it is true that access to premises of Denel or other service providers in the armaments industry will probably be regulated under the envisaged Critical Infrastructure Protection Act, the practical situation is that there often is a sharing of premises or a required SANDF presence on such premises. Should the proposed new section 83A(3) be omitted, the SANDF will not be able to regulate access to such areas.

11. Section 104 of the Defence Act. We noted the concerns of Right2toKnow in respect of section 104 of the Defence Act, 2002.

12. As we understand the position, the NCOP Select Committee on Security and Justice is not in a position to deal with section 104 as the section is not addressed in the Defence Amendment Bill, 2017 (DAB). In order to deal with section 104, the Select Committee must first obtain the permission of the full house of the NCOP. Furthermore, due to the fact that the DAB is a section 75 Bill, the NCOP may only make recommendations that must subsequently obtain the approval of the National Assembly.

13. We submit that dealing with section 104 in the above manner will unnecessarily delay the passing of the Bill, while the SANDF is in urgent need of the commencement of the amendments to section 59 of the Act in order to establish procedurally fair measures for termination of service. The amendments to section 59 is in fact a testimony to the resolve of the SANDF to ensure compliance with the rule of law in all matters.

14. We therefore refrain from expressing any views on the merits of the Right2toKnow arguments with regard to section 104. That section deals with extremely important measures that are of extreme importance in a military context, but which may be perceived as too harsh from a civilian perspective. It is suggested that Right2toKnow submit a detailed submission of their views, arguments and proposals regarding section 104 of the Defence Act to the Minister of Defence and Military Veterans for consideration with a view to possible inclusion of amendments in a future Defence Amendment Bill.

15. Conclusion. It is submitted that clause 15 of the DAB is a justified, reasonable and necessary amendment of the Defence Act, 2002. There are no ulterior motives to its insertion and there is no reason to presuppose that the envisaged regulations will be invalid, impractical, unreasonable or ambiguous, will not comply with the Constitution or will be in conflict with other laws.

16. Section 104 of the Defence Act, 2002, is not at issue in the DAB. Right2toKnow is advised to raise their concerns regarding that section with the Minister of Defence and Military Veterans and follow the correct procedural processes, should it still wish to raise its concerns pursuant to this response.

17. For your consideration and further action.

Maj Gen

(B.Z. MNISI)
ADJUTANT GENERAL: MAJ GEN (DR)