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Upholding South Africa's National Accord

To: **Ad Hoc Committee on General Intelligence Laws Amendment Bill**
For attention: Hon Mr Maake
Committee Chairperson
Per email: GILAB2023@parliament.gov.za
Re: **Submission on the General Intelligence Laws Amendment Bill [B40-2023]**
Date: Tuesday, 13 February 2024 (**Deadline: 16:00 on Thursday, 15 February 2024**)

INTRODUCTION

Dear Honourable Mr Maake,

1. We refer to the invitation by the *Ad Hoc* Committee on General Intelligence Laws Amendment Bill ("the Committee") for written submissions on the [General Intelligence Laws Amendment Bill \[B40-2023\]](#) (the "Bill" or "GILAB").
2. The FW de Klerk Foundation ("the Foundation") is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Our vision is to make our constitutional democracy a reality for all South Africans.
3. To this end, the Foundation seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa.
4. As such, the Foundation welcomes the opportunity to make this concise written submission to the Committee, trusting it will be of assistance in guiding the Committee in its deliberations regarding the Bill.
5. We thank the Committee for granting us the opportunity to make a verbal submission.

SUBSTANTIVE CONCERNS

6. We are concerned the Bill will amend the National Strategic Intelligence Act, 1994; the Intelligence Services Act, 2002, and the Intelligence Services Oversight Act, 1994 (the “principal acts”) in a way that will depart from the Constitution’s framework, values and intentions in a democratic state, by infringing directly upon various constitutional rights, *inter alia* privacy¹ and access to justice². (The principal acts, as amended by the Bill, are attached to this submission as “Annexure A”.)
7. The State is not only bound by these rights,³ but it is in fact, constitutionally obligated to respect, protect and promote these rights⁴.
8. However, the Bill’s broad surveillance scope risks eroding privacy, empowering state interference, stifling dissent, and endangering democratic principles, raising concerns about abuse.
9. **Nett effect of Bill:** The Bill empowers the South African Intelligence Agency⁵ (“the Agency”) to conduct security competence tests on *inter alia* civil society, activists, religious organisations, journalists and even private businesses and their employees. These tests are for the purpose of issuing a security clearance certificate.⁶ The implied risk is that should one fail to obtain a security clearance certificate, one would no longer be able to continue operation and possibly face criminal prosecution as a terrorist.
10. Problematic definitions:
 - 10.1. “*threat*” a crucial concept underpinning the entire Bill and various definitions, is undefined. (Neither is this crucial concept defined in any of the principal acts.)
 - 10.2. The definition for “*person or institution of national security interest*” hinges on two (2) problematic concepts, namely: (i) these people or institutions’ activities are deemed by the Agency to be inconsistent with [section 198](#) of the Constitution, including, but importantly, not limited to, (ii) activities that are defined as a “*threat to national security*”. These concepts are problematic, because:

¹ Section 14 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

² Sections 34 and 38 of the Constitution.

³ Section 8(1) of the Constitution.

⁴ Section 7(2) of the Constitution.

⁵ Clause 3(b) of the Bill.

⁶ Clause 2(b)(xi) of the Bill.



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10.2.1. Any actions that are seen as affecting South African's resolve to *live as equals; live in peace and harmony; be free from fear and want; and seek a better life* will be contrary to section 198 of the Constitution. These are vague concepts that anything could potentially fall into, resulting in an overbroad definition that is open to abuse. The unintended consequences of such an overbroad definition could potentially be that no sphere of the public realm, whether that be education institutions, private businesses, journalists, or civil society organisations and their employees will be seen as persons or institutions of national security interest; and

10.2.2. "*threat to national security*"⁷ includes "*subversion and undue influence by hostile interests on government processes, policies and the sovereignty of the State and its organs*".⁸ However, because the Bill fails to define either "*threat*" or to exclude and protect "*lawful political activity, advocacy, protest or dissent*" (as it expressly does elsewhere⁹), the result is an overbroad definition that could potentially include citizens and/or institutions who oppose policies, regulations and draft legislation (bills) the government wants to adopt, such as civil society, could be seen as persons or institutions of national security interest.

10.3. Both "*national security*" and "*opportunity or potential opportunity*" are highly problematic for the following reasons:

10.3.1. They are defined as follows:

Clause 1(m) of the Bill defines "*national security*" as "*the capabilities, measures and activities of the State to pursue or advance (a) any threat; (b) any potential threat; (c) any opportunity; (d) any potential opportunity; or (e) the security of the Republic and its people, in or outside the Republic in accordance with section 198 of the Constitution*"¹⁰

⁷ Clause 1(t) of the Bill.

⁸ Clause 1(t)(f) of the Bill.

⁹ Clause 1(t)(i) of the Bill.

¹⁰ Own emphasis.

Clause 1(o) of the Bill defines “*opportunity or potential opportunity*” as “*subject to the Bill of Rights and the principles enshrined in the Constitution, such capability measure, or activity employed to pursue to pursue and advance **national security** in accordance with section 198 of the Constitution*”.¹¹

10.3.2. The result is circular definitions that read as follows:

national security: “*the capabilities, measures and activities of the State to pursue or advance (a) any threat; (b) any potential threat; (c) **national security**; (d) **national security**; or (e) the security of the Republic and its people, in or outside the Republic in accordance with section 198 of the Constitution*”¹²

opportunity or potential opportunity: “*such capability measure or activity employed to pursue and advance (a) any threat; (b) any potential threat; (c) any opportunity; (d) any potential opportunity; or (e) the security of the Republic and its people, in or outside the Republic in accordance with section 198 of the Constitution*”.¹³

10.3.3. An “*opportunity or potential opportunity*” is effectively defined as *any opportunity or any potential opportunity* the State pursues. First, the definition is unworkable and open to abuse due to circularity. Second, the concept of “*potential*” threat or opportunity is redundant as both a threat and opportunity by definition are a potential danger and potential good respectively. Third, the Agency¹⁴ seems to have *carte blanche* in deciding what will be deemed as either a threat or opportunity as the Bill fails to give any parameters (i.e. factors) to be considered for the identification and establishment of either a threat or an opportunity.

10.3.4. “*National security*”, similarly, is defined as the pursuit and advancement of national security. Not only is this unworkable and open to abuse due to circularity,

¹¹ Own emphasis.

¹² With the Bill’s proposed definition of “*opportunity or potential opportunity*” in clause 1(o) inserted.

¹³ With the Bill’s proposed definition of “*national security*” in clause 1(m) inserted.

¹⁴ Clause 2(a) of the Bill makes the Service responsible for foreign intelligence, while clause 2(b) of the Bill makes Agency responsible for domestic intelligence.



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but due to being arbitrary and thus, irrational, it fails to comply with the Republic's founding value of the rule of law¹⁵ and is unconstitutional.¹⁶

10.4. The definitions of “*domestic intelligence*”,¹⁷ “*foreign intelligence*”,¹⁸ “*intelligence gathering*”¹⁹ and “*national security intelligence*”²⁰ all include the concepts of “*threat or opportunity or potential opportunity or threat or potential threat to national security*”. First, due to the problems with the concepts, as stated above in paragraphs 10.1 through 10.3, these definitions are overbroad and workable, open to abuse.

10.5. The definition of “*security competency test*”²¹ contains a disjunctive reading (i.e. use of “or” as opposed to “and”) of the factors, making it overbroad, because literally every citizen in the Republic can be deemed to be vulnerable to e.g. “*manipulation*”. However, that does not mean that they are a threat to national security and that the State should be able to administer a security competency test on them. This disjunctive reading results in the clause failing to achieve its purpose (which is no doubt to only vet individuals with access to classified information and critical infrastructure of the State, not every citizen in the Republic. The clause's failure to achieve its purpose results in an arbitrary infringement of the affected constitutional rights²² and a failure of the justification analysis contained in section 36(1) of the Constitution.

11. Compulsory vetting:

11.1. In addition to these problematic definitions, the Bill²³ makes it compulsory for the Agency to conduct a vetting investigation to determine the security competence (for the purpose

¹⁵ Section 1(c) of the Constitution.

¹⁶ [Pharmaceutical Manufacturers Association of SA, In re: Ex parte Application of President of the Republic of South Africa 2000 \(2\) SA 674 \(CC\)](#) at para 85. See also: [New National Party of South Africa v Government of the Republic of South Africa 1999 \(3\) SA 191 \(CC\)](#) at paras 19 and 24.

¹⁷ Clause 1(f) of the Bill.

¹⁸ Clause 1(h) of the Bill.

¹⁹ Clause 1(i) of the Bill.

²⁰ Clause 1(n) of the Bill.

²¹ Clause 1(r) of the Bill.

²² Including, but not limited to sections 14, 34 and 38.

²³ Clauses 2(b) and 3(a) of the Bill.

of issuing a security clearance certificate), of persons or institutions suspected of being threats or potential threats to national security:

Clause 2(b) expands the functions of the South African Intelligence Agency¹ to include *“(a) be to fulfil national counter-intelligence responsibilities and for this purpose to conduct and coordinate counter-intelligence and to gather, correlate, evaluate, analyse information regarding counterintelligence and domestic intelligence in order to—(xi) conduct security competence test on categories of persons or institutions referred to in section 2A of the Act in order to issue or decline to issue a security clearance certificate”*. [Own emphasis.]

Clause 3(a) amends section 2A of the Act (referred to in clause 2(b) above), to read: *“(1) The relevant members of the National Intelligence Structures must conduct a vetting investigation in the prescribed manner to determine the security competence of a person, if such a person— (a) falls within a prescribed category of persons or institutions who must have a security clearance— (iv) if a person or institution is of national security interest in terms of Section 4(2)(a)(i) of the Act”*. [Own emphasis.]

Section 4(2)(a)(i) of the Act reads that: *“(2) The functions of Nicoc shall be- (a) 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- (i) the detection and identification of any threat or potential threat to the national security of the Republic”*. [Own emphasis.]

11.2. Due to the wide definitions of “*threat to national security*” and “*national security*”, as per paragraphs 10.2.2 and 10.3.4 above, these clauses could allow for civil society organisations and those working for them, to be seen by the Agency²⁴ as persons or institutions of national security interest and to be subjected to a vetting investigation²⁵ to determine their security competence – i.e. if they qualify for a security clearance certificate²⁶. Should a person or institution of national security interest (i.e. an external person who does not have access to classified information and is, therefore, not capable of espionage²⁷), be seen as acting inconsistent with section 198 or as a threat to national security, they will fail to get a security clearance certificate. The implied risk of failing to obtain a security clearance

²⁴ Clause 3(b) of the Bill.

²⁵ Clause 1(r) of the Bill.

²⁶ Clause 2(b)(xi) of the Bill.

²⁷ Defined by clause 1(g) of the Bill as: “*the unlawful and intentional communication, delivery or making available of classified information to directly or indirectly benefit a foreign state, persons or institutions*”.



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certificate is that you would no longer be able to continue operation and possibly face criminal prosecution as a terrorist.

11.3. This Bill will also result in the State being able to spy on *anyone* it deems to be a “*threat to national security*” (without ever telling the people spied upon it has done so)²⁸ – i.e. civil society, activists, religious organisations, journalists and even private businesses etc.

11.4. All of the above makes the Bill open to abuse by future governments wishing to threaten or even silence critical voices who oppose it.

12. Failure to comply with Constitutional Court judgments:

12.1. In the matter of [*Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others*](#)²⁹ the Constitutional Court held that the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002³⁰ was unconstitutional because it failed³¹ to provide post-surveillance notification to the person who had been the subject of the surveillance that they had been surveilled. This failure amounted to an unjustifiable infringement of their constitutional rights to privacy³² and access to justice.³³

12.2. The Bill contains the same failure and is, therefore, *prima facie* unconstitutional.

LEGAL FRAMEWORK:

13. From the above it is evident that the Bill will directly affect various constitutional rights, including but not limited to, the rights to privacy (section 14), freedom of expression (section 16), political rights (section 19), freedom of occupation and trade (section 22) and access to justice (sections 34 and 38 of the Constitution).

²⁸ Contrary to the Constitutional Court’s judgment in *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* 2021 (3) SA 246 (CC).

²⁹ 2021 (3) SA 246 (CC).

³⁰ Act 70 of 2002.

³¹ See paras 41 and 44 – 48.

³² Section 14 of the Constitution.

³³ Sections 34 and 38 of the Constitution.

14. The State is bound by these rights (section 8(1)) and is obligated to respect, protect and promote them (section 7(2)).
15. Should the State wish to limit a constitutional right, it may only do so in accordance with section 36 of the Constitution, which *inter alia* requires consideration of the nature and extent of the limitation; and of the relationship between the limitation and its purpose.
16. By failing to define the parameters to determine if something or someone is a “*threat*” (which shows a lack of relationship between the limitation and its purpose), and by including vague and overbroad definitions which are open to abuse – e.g. “*opportunity*”, “*potential opportunity*” and “*potential threat*” (which shows the utter nature and extent of the limitation) – the Bill fails the section 36 limitations test.
17. Due to the circularity of many of its definitions, it also fails to comply with a founding value of the Constitution, namely the rule of law (section 1(c)), which requires rationality.

REMEDIES:

18. Amend the problematic definitions to read as follows:

Clause	Term	Proposed definition or action
Clause 1(f)	<i>“Domestic Intelligence”</i>	<i>“intelligence on any internal threat to national security”.</i>
Clause 1(h)	<i>“Foreign Intelligence”</i>	<i>“intelligence on any external threat to national security”.</i>
Clause 1(j)	<i>“intelligence gathering”</i>	<i>“the acquiring and processing of relevant and reliable information into intelligence products related to any domestic or foreign threats to national security”.</i>
Clause 1(m)	<i>“national security”</i>	<i>“the protection of the Republic's interests, citizens, institutions, and sovereignty from internal and external threats, as governed by the principles set out in section 198 of the Constitution”</i>



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Clause 1(n)	<i>"national security intelligence"</i>	<i>"intelligence which relates to or may be relevant to the assessment of any threat to the national security of the Republic in any field".</i>
Clause 1(o)	<i>"opportunity or potential opportunity"</i>	Be deleted entirely from the Bill.
Clause 1(p)	<i>"person or institution of national security interest"</i>	<i>"any person or institution suspected of espionage".</i>
Clause 1(r)	<i>"security competency test"</i>	<i>"administering a vetting investigation to determine the security competence of a person in order to determine whether such person is suitable to access classified information or critical infrastructure of the State. Such vetting investigation should consider whether the person is a security compromise, because they are seen as vulnerable to blackmail, undue influence or manipulation".</i>
Clause 1(t)(f)	<i>"threat to national security"</i>	<i>"subversion and undue influence by hostile interests on government processes, policies and the sovereignty of the State and its organs; but does not include lawful political activity, advocacy, protest or dissent"</i>
Insert clause 1(v)	<i>"threat"</i>	<i>"impending danger of serious harm to the Republic as one, sovereign, democratic state founded on the values set out in section 1 of the Constitution".</i>

19. Amend the clauses pertaining to compulsory vetting to read as follows:

Clause	Pertains to	Proposed change
Clauses 2(b)	Vetting investigations and security competency tests on categories of persons or institutions	<i>“conduct security competence test on categories of applicants and employees of organs of the State and Departments of State, in order to issue, or decline to issue, a security clearance certificate.”</i>
Clause 3(a)	Reference to section 4(2)(a)(i) (Nicoc’s functions)	<i>“(b) is seen as a threat to the national security of the Republic.”</i>

20. We hope the above are constructive points and we reiterate the Foundation’s willingness to engage further in with the Committee on this important Bill by way of verbal presentations.

Sincerely,

Daniela Ellerbeck
Constitutional Programme Manager
FW de Klerk Foundation
 Email: daniela@fwdeklerk.org

and

Ismail Joosub
Legal Officer
FW de Klerk Foundation
 Email: ismail@fwdeklerk.org

END.