Submission to the ad-hoc committee on the General Intelligence Laws Amendment Bill (National Council of Provinces)

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[1] This submission was prepared by Jane Duncan, Professor of Digital Society, School of Social and Political Sciences, University of Glasgow. It is an output of an eight-country surveillance research project titled 'Public oversight of digital surveillance for intelligence purposes: a comparative case study analysis of oversight practices in southern Africa'. This research project is supported by the British Academy's Global Professorship Programme, through the School of Social and Political Sciences at the University of Glasgow, and I am the holder of the Global Professorship. The submission also draws on the work, produced over several years, of the Media Policy and Democracy Project, which was a joint project of the Department of Communication and Media, University of Johannesburg and the Department of Communication Science, University of South Africa, as well of Intelwatch, a non-governmental organisation devoted to strengthening democratic oversight of state and private intelligence, and a series of published opinion pieces I have written.

Table of contents

Summary of recommendations

Amendment of intelligence laws in the absence of a National Security Strategy and architectural review

- The National Security Strategy and architectural review need to be completed as soon as possible as they have been deprioritised for too long.
- The architectural review needs to include a review of the appropriateness of the decision to locate the Agency and the Service in the Presidency, as well as the appropriateness of having them report to the Minister in the Presidency as opposed to a dedicated Minister of Intelligence.
- The committee should include recommendations to this effect in its report to the National Council of Provinces (NCOP), for action by the Joint Standing Committee on Intelligence (JSCI).

Definitions and mandates of foreign and domestic services

- The definitions identified in the submission need to be narrowed to ensure that they focus on domestic and foreign threats of organised violence against society and other maladies that threaten physical survival on a national scale.
- References to national security opportunities should be removed in all definitions, as should the entire definition of opportunity.

Oversight of foreign and domestic intelligence

- Recommendations of the Inspector General of Intelligence should be binding even if no agreement has been reached with the relevant agency.
- Provision should be made for a Deputy Inspector General

Security competence test

- The Bill should state that security competence tests are not a condition of employment of journalists of the SABC.

Bulk surveillance

- Details around the management of bulk interception data should be included in the primary legislation and not in the regulations.
- It should be made clear that the interception judge has the power to reject interception applications and a procedure should be spelt out in the event of their rejection.

Powers of arrest of agency members

- Cases involving members suspected of contravention of this Act and related regulations should be referred to the relevant law enforcement agencies, and references to agency members neutralising and impeding suspects should be removed.

Secret Services Account and Security Services Special Account

- The Security Services Special Account Act No. 81 of 1969 and the Secret Services Act, No. 56 of 1978 should be repealed. In their place, their measures proposed by Vicky Heideman in her report (see pp. 23-24), should be considered. In the interim, and while the Acts are being reviewed, the evaluation committee established in terms of the Secret Services Act should be established within a period of 12 months.

Ministers becoming involved in operational matters.

- The Bill should be amended to ensure that the Minister is confined to executive oversight, which could be achieved by retaining a clause around effective oversight but removing the references to control and functioning of the Agency, Services, Centre or Academy, and including a clause expressly forbidding the Minister from becoming involved in operational matters.

Submission to the ad-hoc committee on the General Intelligence Laws Amendment Bill

Introduction

At the outset, it should be said that it is very difficult to comment on the Bill comprehensively, as it is extremely broad ranging in scope and intends to amend several laws - including South Africa's main intelligence laws - to achieve wide-ranging objectives. The fact that these laws are being amended is welcome and in fact overdue, as the basic legal architecture of civilian intelligence dates from 1994, with some amendments down the years. This submission will confine itself to the following issues:

- Amendment of intelligence laws in the absence of a National Security Strategy and architectural review,
- Definitions and mandates of foreign and domestic services,
- Oversight of foreign and domestic intelligence,
- Security competence test,
- Bulk surveillance
- Powers of arrest of agency members,
- Secret Services Account and Security Services Special Account,
- Ministers becoming involved in operational matters,
- Coordination.

Amendment of intelligence laws in the absence of a National Security Strategy and architectural review

While the Bill is welcome, it is concerning that these laws are being amended in the absence of a revised National Security Strategy, followed by a policy and architectural review, which would have been the correct sequence of events. The most important objective of the Bill is to dis-establish South Africa's civilian intelligence agency, the State Security Agency, hereafter referred to as the Agency, and replace it with separate foreign and domestic agencies, the South African Intelligence Service, and the South African Intelligence Agency, with their own separate mandates. This decision was taken following a recommendation by the 2018 High-Level Review Panel on the State Security Agency (Mufamadi et al 2018), on which I served. By this stage, it would have been entirely possible to revise the Strategy and conduct an architectural review, as nearly six years have lapsed since the Panel made this recommendation.

During his 2022 State of the Nation address, President Cyril Ramaphosa announced that the government will prioritise the development of a National Security Strategy (Ramaphosa 2022). He called on South Africans to participate in its development and argued that parliament should facilitate inclusive consultation on the Strategy. This announcement followed a recommendation by the Expert Panel into the July 2021 civil unrest that a Strategy should be developed and reviewed every three years. The panel argued the following:

> A National Security Strategy should be just that, national. For too long, we have delayed embarking on an inclusive process of defining what we regard as the threats to our common security. We propose that the President initiates the drawing up of a national security strategy, in an open manner that involves all sectors of society (Africa et al 2021, pg. 141) .

A National Security Strategy is meant to be an up-to-date document that sets out a country's strategic vision for national security, the major threats it faces, and how the government intends to deal with them. At the same time, it should also set out the longer-term strategies to be used, and the resources needed, to achieve that vision. However, the last time the public was included in policy formulation around intelligence was in 1994, and the last time they were consulted about a National Security Strategy was in 2007. This strategy included a proposal for a National Security Advisory Council, including the public and private sectors and civil society. When the Strategy was reviewed by the Jacob Zuma administration in 2013, it was classified Top Secret, and was not developed in a form that lent itself to consultation (Duncan 2022).

Rightfully, the National Security Strategy should be followed by an architectural review of all intelligence and locate civilian intelligence within this overall picture. According to the High Level Review Panel:

> The Panel recommends that, on the basis of the above National Security Strategy and other considerations, there is a comprehensive review of the architecture of the South African security community which considers, inter alia:
> a) The separation of the SSA (State Security Agency) into two services - a domestic and a foreign service – with maximum or, preferably, total separation.
> b) Locating the Coordinator for Intelligence and the NICOC (National Intelligence Coordinating Committee) analysis arm in the Office of the Presidency.
> c) Formally re-establishing the National Security Council.
> d) Refining the mandates of the intelligence departments, including defence intelligence and crime intelligence, to ensure minimum duplication and maximum coordination (Mufamadi et al, 2018).

However, there is no public indication of when this Strategy is likely to be revised, which means that important decisions about the mandates and structure of intelligence are being taken in the context of the Bill in the absence of strategic direction that rests on public consensus. A public process around a National Security Strategy can become a democratic moment for more genuine debates and contestations about national security. When it is debated in public meetings and through the media, the country will be forced to think deeply about these issues and ask questions about how national security is defined, who it truly serves, and whether state agencies that claim to defend it, are delivering on their mandates. Had these processes happened before the Bill was drafted, there would most likely be much more public understanding and consensus about its contents, which in turn would likely have resulted in a far more coherent, less divisive Bill.

In 2022, following the July unrest, the State Security Agency was absorbed into the presidency and the position of Minister of Intelligence was done away with, with political responsibility for the Agency resting with the presidency. Rather than being an attempt to create a super-presidency, or worse, a dictatorship, President Cyril Ramaphosa claimed at a hearing of the Judicial Commission of Inquiry into Allegations of State Capture (hereafter referred to as the State Capture Commission) that he intended to make the Agency non-partisan and professional. He also wanted to bring intelligence into line with institutional arrangements globally.

Major structural changes of this nature need to include scenario planning, to ensure that they are future-proofed. The biggest danger by far of this decision is that it relies overwhelmingly

on the assumption that South Africa will not have another president intent on abusing the intelligence services. The fact that the new Agency and Service will remain in the Presidency – which is also accumulating other government entities and functions – needs review, as centralising intelligence in a centralised and ever-expanding presidency could be a gift to any new president intent on repeating the abuses of the former administration.

In terms of the Constitution, the president has the discretion to decide whether to appoint a Minister of Intelligence or supervise the intelligence services themselves. The High-Level Review Panel recommended that a decision about whether to retain the Minister position should be made subject to the architectural review. This is still the most appropriate approach as it means that issues around oversight of intelligence, including executive oversight, are considered in an integrated fashion. The current arrangement means that one Minister – the Minister in the Presidency – is responsible for them, as well as a host of other government entities, which makes it difficult to impossible for this Minister to give intelligence the dedicated focus it needs at this critical juncture and is likely to make oversight more difficult rather easier. It would be most appropriate in the circumstances for there to be a sunset clause on the Agency and Service being based in the Presidency, after which they should revert to being under a separate Ministry of Intelligence, but this issue should be finalised through the architectural review.

Recommendation

- The National Security Strategy and architectural review need to be completed as soon as possible as they have been deprioritised for too long.
- The architectural review needs to include a review of the appropriateness of the decision to locate the Agency and the Service in the Presidency, as well as the appropriateness of having them report to the Minister in the Presidency as opposed to a dedicated Minister of Intelligence, as there are strong arguments to revert back to having a Minister.
- The committee should include recommendations to this effect in its report to the NCOP, for action by the JSCI.

Definitions and mandates of foreign and domestic services

Many of the most basic definitions impacting on civilian intelligence were included in the previous version of the Bill and were unacceptably broad as they included references to threats or potential threats to national security, as well as opportunities or potential opportunities for national security. The below definitions in the latest version of the Bill remain too broad and need to be narrowed.

‘‘ ‘intelligence gathering’ means the acquisition and processing of relevant and reliable information into intelligence products related to any domestic or foreign opportunity or threat to the advancement and protection of national security;’’

‘‘ ‘national security intelligence’ means intelligence which relates to or may be relevant to the assessment of any opportunity or threat to the national security of the Republic in any field;’’

‘‘ ‘opportunity’ means, subject to the Bill of Rights and the principles enshrined in the Constitution, such capability, measure or activity employed to pursue and advance national security in accordance with section 198 of the Constitution;’’

These definitions allow the Agency and the Service to undertake any activity that could advance South Africa’s interests, creating the potential for overlap with the mandates of other government and state entities. However, they will be able to do so secretly, using the invasive surveillance capabilities at their disposal. Such capabilities should only be used in exceptional circumstances when the country is under legitimate threat, and to normalise their use in everyday government functions threatens democracy in fundamental ways. A case in point is the exploitation of economic opportunities by intelligence agencies, including trade. The Department of Trade, Industry and Competition claims that its mandate is to achieve a dynamic industrial and globally competitive economy, including through managing trade and investment flows. But, now pursuing trade opportunities to achieve human security may fall under the Agency’s mandate, too, leading to a massive overreach into South Africa’s trade relationships on national security grounds.

This kind of intelligence overreach has happened elsewhere. Beyond the more conventional roles of preventing violent attacks and other threats of national significance, increasingly, governments are requiring intelligence agencies to ensure that policymakers enjoy decision advantages in a range of areas, such as ensuring trade advantages over other countries. Once intelligence mandates are broadened in this manner, then all manner of abuses become possible, and even likely. Edward Snowden’s leaks of classified US and UK intelligence documents showed how these countries misused broad understandings of national security to engage in industrial espionage. Snowden’s leaks showed how the UK government used its powerful signals intelligence capability to surveill African politicians, diplomats and businesspeople to gain competitive advantages unfairly during trade negotiations, thereby deepening inequalities established during colonialism. It is precisely these kinds of abuses that make the case for narrowing intelligence mandates rather than broadening them and reducing rather than expanding state intelligence power (Duncan 2023).

According to the Agency’s presentation to Parliament on the Bill, the purpose of introducing ‘opportunity’ into the above definitions is to give effect to the national security principles in section 198 the South African Constitution, which states that ‘…national security must reflect the resolve of South Africans, as individuals and as a national to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.’ (Constitution of the Republic of South Africa 1996).

This principle is based on the human security definition of national security, referred to by the United Nations General Assembly has referred to as freedom from fear and want. State security focuses on protecting the state from threats, whereas in its broadest sense, human security focuses on protecting individuals from a wide range of threats facing then and addressing the underlying drivers of these insecurities, including poverty, underdevelopment and deprivation. The cause of human security may be noble, namely, to promote a progressive policy agenda by ensuring that states address the totality of factors that create insecurity.

However, the underlying assumptions of the human security definition of national security have been criticised for being analytically incoherent, un-implementable, and even dangerous in that human security could lead governments to engage in more secretive, forceful or

military responses to myriad societal problems (Newman 2010; MacFarlane and Foong Khong 2006). If a broad range of social issues are securitised, or treated as national security issues requiring intervention by the state's security services (including intelligence), then it becomes difficult to distinguishes the work of these agencies from the social welfare arms of the state (Duncan 2023).

Neil MacFarlane and Yuen Foong Khong suggested as far back as 2006 that it is entirely possible to address this conundrum by maintaining the focus on broader society as the entity that needs protection, rather than the state, while narrowing the definition of national security. This can be done by distinguishing between '…the maladies that impinge on our well-being and those that threaten ….physical survival' (MacFarlane and Foong Khong 2006). Legislators could take a similar approach and narrow the focus of the Agency and Service to domestic and foreign threats of organised violence against society, such as genocide or terrorism. By doing so, they would still be recognising the best of what human security has to offer as an intelligence doctrine, while providing a much more appropriate focus for civilian intelligence (Duncan 2023).

Recommendations

- The above definitions need to be narrowed to ensure that they focus on domestic and foreign threats of organised violence against society and other maladies that threaten physical survival on a national scale.
- References to national security opportunities should be removed in all definitions, as should the entire definition of opportunity.

Oversight of foreign and domestic intelligence

One of the Acts the Bill amends is the Intelligence Services Oversight Act. The Bill has been strengthened by the ad-hoc committee by addressing some of the legacy weaknesses in the oversight of domestic and foreign intelligence, relating to the need for independence of the Office of the Inspector General of Intelligence from one of the agencies it oversees, the SSA: a major issue identified both by the High-Level Review Panel and the State Capture Inquiry.

However, the most serious problem the Inspector General faces, and that the Bill fails to address adequately, is that the agencies it oversees largely ignore its findings as they are not binding and have the status of recommendations. The incumbent does not have access to the kinds of remedial measures that the Public Protector has, to ensure implementation. The JSCI is aware of this problem as it pointed it out in an annual report. The problem has led to a situation where, in the words of the Committee, 'the implementation rate of [the Inspector General's] recommendations was two percent and in some cases zero per cent'.

The reason for the ad hoc committee refusing to make the Inspector General's findings binding appears to be related to a fear that disputed findings will be taken to court, leading to intelligence being aired in court in ways that may compromise national security. However, this fear is misplaced and not borne out by experience. The court system has procedures for hearing and adjudicating on national security matters that are truly sensitive, including holding in-camera hearings.

In the Constitutional Court case Masethla v President, *Independent Newspapers* sought an order compelling public disclosure of a record of proceedings. In this judgment, the majority

of the court found that the mere fact of classification of a document does not render them immune from disclosure by the court, and that it found it fitting for some of the documents relating to the case to be released as doing so did not constitute a threat to national security, while others – significantly including an Inspector General report – remained secret (Independent Newspapers Pty (Ltd) v Minister for Intelligence Services 2008).

In the more recent Supreme Court of Appeal case (Makwakwa v State Security Agency), the court affirmed the finding of the 2008 Constitutional court judgment that mere classification of a document does not prevent it from assessing whether disclosure truly threatens national security. It ordered the upliftment of an interim interdict preventing disclosure of an intelligence report compiled by the SSA, on the basis that much of its contents were in the public domain already, and the Minister had failed to make a case for why its disclosure threatened national security and in fact did not exercise good faith during the proceedings. The court also pointed out a misrepresentation by the SSA as well as material misstatements made by the SSA in its representations, which called the accuracy and truthfulness of its representations into question (Makwakwa and others v Minister of State Security 2024).

These court proceeding show a high degree of sensitivity to the need to protect national security on the part of the judiciary, combined with its willingness to critique (in)adequacies in how the executive goes about protecting it. There can be little doubt that national security has been strengthened through these court proceedings, in that they have checked executive overreach, but not recklessly. Based on these cases, there is no reason to believe that having courts review disputed Inspector General findings is likely to threaten national security: on the contrary. Furthermore, the soon-to-be-established South African Intelligence Service and South African Intelligence Agency can minimise the risks of the Inspector General's findings landing up in court by not taking them to court, which will require them to take the Inspector General's office more seriously than they have.

In a misguided attempt to give the Inspector General more 'teeth' but without making recommendations binding, the Bill envisages a situation where the Minister must submit to the JSCI an implementation plan for the recommendations within 90m days of the receipt of the certificate about how they intend to implement the recommendations. If they fail to do so then they must submit a written explanation of non-compliance. However, there is no clarity on what process will be followed beyond that point in the event of the disputed recommendations. The result of this process is likely to be a protracted back-and-forth between the Minister and the JSCI that ties both up in protracted wrangling. The High Level Review Panel noted a long list of legacy issues the SSA had failed to act on, and such a process is likely to make it even more difficult to clear that list, never mind attend to any new issues. The JSCI has also had an unfortunate history of dysfunctionality in the past, which could well be repeated in the future. To make the effectiveness of the Inspector General subject to an entity whose effectiveness has been open to question in the past, is to risk turning it into the entity it has been: toothless, and one that can do little more than whimper at the margins of state intelligence.

Furthermore, there is no distinction drawn in the Bill between the Inspector General's certification function and the ombud function, with s3(e)(i) referring to the certification function only. While the argument for the JSCI to be the ultimate arbiter of the Inspector General's findings is stronger for the certification function – as the role of the JSCI is to hold the intelligence services to account based on the certificates – no argument can be made for the same to apply to the ombud function. It is not practical for the JSCI to re-hear the

evidence from complaints to determine the appropriateness of findings, so it stand to reason that the Inspector General should make binding recommendations regarding complaints.

The non-binding nature of Inspector General decisions is the source of some disagreement internationally. The Inspectors General in New Zealand and Australia, which provided benchmarks in the past for the South African Inspector General, appear to have the status of recommendations. However, the Edward Snowden disclosures, which revealed widespread abuses of surveillance powers in the Five Eyes countries, has shaken this issue up and caused a reconsideration. For instance, in the context of its investigation into surveillance spyware, the European Parliament in its June 2023 recommendations to the Council and the Commission called for boundaries to national security, which included the following observations:

> 49. Further notes that Convention 108+ stresses that the oversight 'shall have powers of investigation and intervention'; considers that effective review and supervision implies binding powers where the impact on fundamental rights is the greatest, particularly in the accessing, analysis and storage phases of processing personal data;
> 50. Considers that the lack of binding powers of oversight bodies within the domain of national security is incompatible with the criterion laid down in Convention 108+ that this 'constitutes a necessary and proportionate measure in a democratic society' (European Parliament 2023)

In the Netherlands, the complaints handling department of the Dutch oversight body, CTIVD, can impose binding sanctions such as deleting data or terminating activities in response to third party complaints; however, the oversight department cannot. According to CTIVD:

> The Complaints Handling Department issues binding decisions on the ministers concerned and may impose sanctions in that context, such as terminating an ongoing investigation of the services, terminating the use of special investigatory powers or removing and destroying data processed by the services. The Complaints Handling Department may impose such a sanction if it ruled, for example, that the use of the special investigatory power was unlawful (CTIVD 2021, pg. 21).

While this arrangement is substantially better than not having binding powers at all, it is a complicated system in that third parties need to have sufficient knowledge of a possible infraction to lay a complaint, which is difficult in such a notoriously secretive area (Houwing, 2022). In other words, this is an evolving area and one that is likely to see significant reform in time to come, so South Africa will need to take a decision that makes the most sense in the circumstances, and in the knowledge that this issue is contested.

Disappointingly, the provision included by the ad-hoc committee in the Bill for a Deputy Inspector General to exercise these powers in their absence, has been removed. This means that if the position is vacant, nothing can happen. The position has been vacant in the past, and in fact was vacant for 22 months before Setlhomamaru Dintwe took over. According to Dintwe's testimony to the State Capture Commission, some of the most serious abuses of the agencies occurred during the time when there was no Inspector General.

Recommendations

- Recommendations of the Inspector General should be binding even if no agreement has been reached on these recommendations with the relevant agency.
- A position of deputy Inspector General should be created, and this person should have full powers to act as the Inspector General if the position is vacant.

Security competence tests

The previous version of the Bill was controversial for including a provision that would have allowed for the vetting of people seeking to establish non-governmental and religious organisations. A later version of the Bill narrowed the grounds for these tests, but still made it possible for tests to be conducted on people of national security interest. Thankfully, this clause has been removed. The latest version of the Bill is greatly improved in that it restricts these tests to individuals who will be handling classified information or critical national infrastructure. However, the definition of critical national infrastructure is broad and could potentially encompass the public broadcaster, the South African Broadcasting Corporation (SABC). In the interests of media freedom, it should be made clear that security competence tests will not be conducted on SABC journalists as a condition of employment. The fact that this provision is now mandatory and not optional makes this qualification even more important.

Recommendation

- The Bill should state that security competence tests are not a condition of employment of journalists of the SABC.

Bulk interception

Issues relating to bulk interception of electronic communications are dealt with in the attached policy brief, and only the most pertinent are dealt with here.

In March 2021, the Constitutional Court found that the SSA was conducting bulk interception illegally and unconstitutionally because there was no law authorising the practice, and that they should cease bulk interception until there was. In the judgment, the Court gave some indication that it would be looking for a law for the authorising bulk interception that sets out '…the nuts and bolts of the [National Communications Centre's, or NCC] functions', and spells out in '…clear, precise terms the manner, circumstances or duration of the collection, gathering, evaluation and analysis of domestic and foreign intelligence.' It would also be looking for detail on '…how these various types of intelligence must be captured, copied, stored, or distributed.' After the judgment, amaBhungane wrote to the SSA to ask if they had shut down the NCC, and they confirmed that they had (Sole 2021). These are features of a new law that the Court would be looking for.

Probably the most well-known benchmark for the proper regulation of bulk interception for strategic intelligence purposes has been set by the European Court of Human Rights which adapted an earlier set of principles for the regulation of strategic surveillance, often referred to as the Weber principles. It recognised that these principles were not completely applicable to bulk interception as technological advancements have made interception at scale much more possible than it was when the Weber Principles were developed. Consequently, in 2021, it adapted these principles to make them more applicable to large bulk interception programmes. They require a domestic legal framework to provide what they refer to as 'end-

to-end' safeguards covering all stages of the bulk interception, and clearly define the following:
• The grounds on which bulk interception may be authorised;
• The circumstances in which an individual's communications may be intercepted;
• The procedure to be followed for granting authorisation;
• The procedures to be followed for selecting, examining and using intercept material;
• The precautions to be taken when communicating the material to other parties;
• The limits on the duration of interception, the storage of intercept material and the circumstances
in which such material must be erased and destroyed;
• The procedures and modalities for supervision by an independent authority of compliance with the
above safeguards and its powers to address non-compliance;
• The procedures for independent ex post facto review of such compliance and the powers vested in the competent body in addressing instances of non-compliance.

They require that the bases of interception should be spelt out in a law authorising bulk surveillance.

Clause 2C of the Bill appears to respond to these safeguards. However, they are to be included in regulations and not in the primary legislation, which does not meet the benchmark set by the Constitutional Court. The problem with including so much detail in the regulations is that it gives the Minister too much power to set the ground rules for bulk interception. Furthermore, it is likely that these regulations will be developed in secret, which means that the public will not know the bases for surveillance. Instead, this detail should be included in the primary legislation, and therefore subjected to Parliamentary and public scrutiny and debate.

Furthermore, while the appointment of a judge to approve bulk surveillance is a major advance on what existed, and the appointment process of the judge has been improved to ensure greater independence, it is not clear that the judge should have the right to deny surveillance requests, and in such situations, what procedures should be followed

Recommendations

- Details around the management of bulk interception data should be included in the primary legislation and not in the regulations
- It should be made clear that the interception judge has the power to reject interception applications and a procedure should be spelt out in the event of their rejection.

Powers of arrest of Agency members

According to the Bill, in a proposed amendment to the National Strategic Intelligence Act, one of the functions of the Agency will be to '… impede and apprehend members suspected of contravention of this Act and related regulations and hand them to the relevant law enforcement agencies'. This clause suggested that members of the Agency will have the powers of arrest. This clause has been revised to read that Agency members will have the powers to '…impede and neutralise members suspected of contravention of this Act and related regulations and hand them to the relevant law enforcement agencies'. This formulation is also unclear as to what impede and neutralise will involve. In the absence of

clarity, it would be better simply to call for the relevant law enforcement agencies to effect arrests, rather than becoming involved in murky activities that may involve violations of rights (such as kidnapping or unlawful detention).

Recommendation

- S. 2(b)(v) should be replaced with the following: refer cases involving members suspected of contravention of this Act and related regulations to the relevant law enforcement agencies.

Secret Services Account and Security Services Special Account

The Bill is silent on reforms that are needed to the governance of the Secret Services account and the Security Services Special account. Issues relating to these accounts, their governing acts and their abuse are dealt with exhaustively on the attached report by Vicky Heideman, entitled 'Secret funding and the State Security Agency: holding intelligence services accountable' (2023). The High Level Review Panel recommended the following:

The Ministry should initiate a process together with the ministries of Finance, Defence and Police to explore the options and consequences for repealing the Security Services Special Account Act No. 81 of 1969 and the Secret Services Act, No. 56 of 1978 and design a process towards that end. In the interim, as recommended in Chapter 2, the Council established by this legislation is activated and functioning.

It noted that:

The Security Services Special Account Act No. 81 of 1969 and the Secret Services Act, No. 56 of 1978 are apartheid-era pieces of legislation designed at the time to facilitate the regime's secret operations such as sanctions-busting, assassinations, propaganda etc and have no place in our constitutional democracy and are a key factor in facilitating the avoidance of financial controls and accountability.

Recommendations

- The Security Services Special Account Act No. 81 of 1969 and the Secret Services Act, No. 56 of 1978 should be repealed. In their place, their measures proposed by Vicky Heideman in her report (see pp. 23-24), should be considered. In the interim, and while the Acts are being reviewed, the evaluation committee established in terms of the Secret Services Act should be established within a period of 12 months.

Ministers becoming involved in operational matters

One of the most serious governance issues identified by the High-Level Review Panel and the State Capture Commission related to the Minister becoming involved in operational matters, and that current legislative provisions gave too much scope for them to do just that. Their involvement breached the desired boundaries between the executive and the department. In this regard, s. 12 of the Intelligence Services Act which empowers the Minister, subject to the Act, to do or cause to be done all things which are necessary for the efficient superintendence, control and functioning of the Agency. This is replaced in the Bill with s.24, which states that: '…The Minister may, subject to this Act, do or cause to be done all things

which are necessary for the efficient superintendence, control and functioning of the [Agency] Intelligence Services, Centre or Academy.' This means that the current, and problematic, provision has merely been restated, albeit updated to reflect the separation of services, and this matter has remained unaddressed by the ad-hoc committee. This is a disappointing stance that fails to address this important issue.

Recommendation

- The above provision should be amended to ensure that the Minister is confined to executive oversight, which could be achieved by retaining a provision around efficient oversight but removing the references to control and functioning of the Agency, Services, Centre or Academy, and including a clause expressly forbidding the Minister from becoming involved in operational matters.

Coordination

Intelligence coordination, or the lack of it, has been a major weakness in recent times. The Expert Panel into the July 2021 Unrest was the latest in a series of reports that found that NICOC's role in strategic intelligence coordination needed to be affirmed; yet NICOC as an organisation has lacked powers, as has the coordinator. The Bill has addressed these issues satisfactorily as it has upgraded the independence of the entity.

Recommendation

- No recommendation

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