Open Democracy Advice Centre

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Submissions in respect of: General Intelligence Laws Amendment Bill [B25-2011]

Our Organisation

The Open Democracy Advice Centre is a section 21 non-profit company based in Cape Town. ODAC's mission is to promote open and transparent democracy; foster a culture of corporate and government accountability; and assist people in South Africa to be able to realise their human rights. ODAC seeks to achieve its mission through realising the right to know so that it makes a material, tangible difference to the lives of the poor, and thereby contributes to social and economic justice. Hence ODAC provides practical and niche services to individuals and organisations with a social justice agenda to help citizens access their rights in respect of three key pieces of legislation:

- The Protected Disclosures Act 2000 (PDA) Assented to and signed on 1 August 2000
- The Promotion of Access to Information Act 2000 (PAIA) Signed by the President on 2 February 2000
- The Promotion of Administrative Justice Act 2000 (PAJA) Signed by the President on 3 February 2000.

Introduction

It is due to our work in transparency and good governance that we have accepted the invitation to make written submissions on the General Intelligence Laws Amendment Bill [B25-2011] (the "Bill") .

As part of our review of the Bill, we have consulted with other civil society members such as the Institute of Security Studies, the South African History Archive and the Right2Know campaign. While we have considered our civil society partners inputs, we submit this review on behalf only of our own organization with an attempt to focus on areas on which we have an interest – due to our focus on transparency work – and a degree of expertise. This is also part of our broader monitoring of the changes that are currently happening within the security sector within South Africa.

We note that there are three main Acts affected, and have dealt with our concerns in regard to each affected Act for ease of reference.

We would like to note, generally, that the Security Agency are encouraged to use the "Intelligence in a Constitutional Democracy: 2008" Report (also known as the "Matthews Commission Report") as the central guiding document for any proposed changes within the sector, including the proposals made under this Bill.

Constitution of the Republic of South Africa, 1996

For ease of reference, we have copied the primary sections of the Constitution of relevance to this Bill:

"198 **Governing principles** - The following principles govern national security in the Republic:

a. National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.
b. The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.
c. National security must be pursued in compliance with the law, including international law.
d. National security is subject to the authority of Parliament and the national executive.

199. **Establishment, structuring and conduct of security services**

1. The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.
2. The defence force is the only lawful military force in the Republic.
3. Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.
4. The security services must be structured and regulated by national legislation.
5. The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.
6. No member of any security service may obey a manifestly illegal order.
7. Neither the security services, nor any of their members, may, in the performance of their functions-
    a. prejudice a political party interest that is legitimate in terms of the Constitution; or
    b. further, in a partisan manner, any interest of a political party.
8. To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament."

Amendments to the Intelligence Services Act, 2002

The Bill, in s 18(k), removes the current subsection 5 (6) that obliges the CEO to forward the report of the Auditor-General and the annual report of the (Academy)

Agency to the Minister and relevant committee of Parliament. We note that section 199 provides for Parliamentary oversight of the Agency – which would include training expenses incurred by the Agency. We acknowledge that it may be possible to read into ss 3(a)(i) of Act 40 of 1994 that those audited records would automatically include the additional audited records of the Training Fund, but this is not a certainty particularly given the wording of that section which refers to a singular audited report which implies the report created for the Agency as a whole. The fact that a separate audit report is created for the Training Agency must be accounted for in consideration of parliamentary oversight. After all, the Parliamentary Committees power to receive audit reports has not been tampered with – despite the exclusion of the imperative on the CEO to submit it in this section. It would lead to an absurdity if the general finances of the Security Agency were subject to parliamentary oversight, but the Training Fund (which has a potentially greatly enhanced pool of resources due to the Bill) was not through submission of its particularised reporting. We cannot presume it will form a portion of the larger audited report, because it has a specific audit under section 5 which must mean it will be separately managed (though all oversight of finances lies with the Director-General). In the alternative to reinstating a re-worded section 5 that takes into account the new entities, it should be expressly included as a part of the report submitted to the Minister in terms of the new section 10(5)(a) as created by ss 23(f) of the Bill.

ODAC would like to commend the provision made for consultation by the Minister with the advisory panels under 15 (2), 16 (3), 17 (3) and 18 (4) of the Act (as amended by 28(2), 29, 30 and 31(b) of the Bill) and would encourage the exercise of these powers. Given the labour vulnerabilities of Security Agency employees due to their exclusion from the Labour Relations Act, additional advice sought could only be of assistance. It may also positively serve to give an enhanced role to the Intelligence Services Council on Conditions of Services.

As an aside, it is hoped that the Minister when considering training expenditure as provided for by the extension of the Training Fund established, includes the allocation of monies specifically for comprehensive training of relevant officials on the Protection of State Information Bill, once enacted.

Amendments to the National Strategic Intelligence Act 39 of 1994

ODAC notes that the definition of ‘national security’ as amended by s 1(e) of the Bill is the definition as contained in the Protection of State Information Bill. As such the definition contains the defect present in the Protection of State Information Bill in that:

> “. . . section b(v) of the definition of ‘national security’ refers to the exposure of ‘economic, scientific, or technological secrets vital to the Republic’– not vital to the defence or security of the public, but the Republic in general. What economic secrets does the Agency propose are vital to the Republic, and are held by defence, SAPS, or intelligence? This may allow for the classification of commercial secrets through the “backdoor”, which is surely not the intention of the provision. This should also be balanced the controls already existing in terms of the Regulation of Interceptions of Communications Act, 2002.
>
> We argue this is the reintroduction of classification of commercial information held by the state, including tender documents. We argue this is unnecessary,

> unwise, and not justified and should be very explicitly framed within security phraseology."[1]

In regard to the roles and functions of Nicoc, ODAC would first like to raise concern as to the rewording of section 2 of the Act. Ss (c) has been amended and obliges Nicoc to report national security intelligence products to the Minister and no longer to Cabinet, with Cabinet now only being informed under (f) as to recommendations (and thus not being able to review the primary data that led to those recommendations). National Executive oversight is required by section 199 of the Constitution. However, ODAC would like to acknowledge that the newly inserted ss 4 is an important oversight mechanism for ensuring that the Agency is not abused as a mechanism for venting internal factions within government.

Nicoc has a vital role to play in terms of national security, as it is the key coordinating entity for the security services. As such, it is particularly necessary that this centralising and coordinating power is legitimately run. Section 199 (d) of the Constitution prescribes that national security is subject to the authority of Parliament and the National Executive. By removing the President (who is the Head of the National Executive) from his role in appointing the Head of Nicoc (new section 5), it leaves the position vulnerable to interference, and is also a questionable appointment in terms of the constitutional imperative. ODAC would suggest that it would be constitutionally preferable if the new section 5(1) prescribed that the President appoints the Head of Nicoc in consultation with the Minister, but that Ministers approval is needed for a final decision – thus not reducing the importance of the Minister's involvement.

Amendments to the Intelligence Services Oversight Act 40 of 1994

While ODAC notes that our observation is not technically within the purview of a review of the Bill per se, we wish to draw the Committee's attention to section 5 of this Act. To give effect to real parliamentary oversight and power, as provided for in section 199 of the Constitution, ss 5(2)(c) should not allow for the veto power of the Head of a Service. However, the Head of a Service and the Inspector-General should be consulted when a decision under this subsection is being made.

Similarly, in section 6(3) the standard for inclusion is unnecessarily vague in a section which is seeking to give meaning to parliamentary oversight. Consideration might be had to rephrasing it such as: "the inclusion of which will be demonstrably more harmful to the national security than its exclusion will be to the national interest" to avoid subjectivity.

ODAC would like to draw the Committee's attention to the recommendations of the Matthews Commission in regard to the audit reports only being made available to the Committee, as opposed to Parliament. At page 20 of that report its states:

> "The budgets and financial reports of the intelligence services are reviewed by the JSCI, which reports to Parliament, but these documents are confidential and are not presented to Parliament. As a result, according to the National Treasury, the services are not directly accountable to Parliament for their budgets and spending. This is inconsistent with the Constitution, which states that national budgets must promote transparency and accountability.

[1] As submitted to the National Council of Provinces, under submission no. 95 on the Protection of State Information Bill.

> We endorse the National Treasury's proposal that the intelligence services should have their own vote in respect of monies approved annually by Parliament and should present their annual budgets and financial reports to Parliament. They would not be expected to disclose information that would prejudice security or compromise intelligence operations."

This is especially supported, given the review done by the Committee which could ensure that any sensitive information could be redacted.

Amendments to the Protection of Information Act, 1982

ODAC appreciates that the scheduled change to the Protection of Information Act was merely a technical attempt to align this Bill and that law. However, any amendment to the Protection of Information Act must consider the full wording of that section. The words: "…or which to the functions of the Agency or the Office *or to the relationship between any person and the Agency or Office*" unnecessarily broadens the application outside of security functions to potentially include personal relationships between members of the Agency and external parties. Particular caution should be taken in regard to this definition due to its relevance to the application of the broad offences created by section 4 of the Act. The addition of consideration of the performance of duties in the definition could be of assistance.

Additional Comments

We would like to note that we acknowledge there are other organisations with a better understanding of the security infrastructure, some of whom have raised concerns of the over-centralisation of the services. However, our submission on this issue is that the Constitution should be the guide and that we also acknowledge the concerns raised by the Minister in the Memorandum attached to the Bill.

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