Submission on the Private Security Industry Regulation Amendment Bill [B 27—2012]

Submission made by Gun Free South Africa (GFSA), a national NGO established in 1995 with the aim of contributing to a safer and more secure South Africa by preventing and reducing gun violence, 6 October 2012.

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A General Overview

GFSA recognizes the need to review the Private Security Industry Regulation Act, 2001 from time to time, to assess its provisions and to refine or tighten them up as needed. With this in mind we support the Private Security Industry Regulation Amendment Bill [B 27—2012] particularly as it promotes and strengthens the effective control and management of firearms by the private security industry, an objective recognised in the Memorandum on the Objects of the Private Security Industry Regulation Amendment Bill, 2012, "the challenges of the private security industry manifested themselves in many ways which included...the lack of proper accountability for fire-arms in the possession of members of the private security industry… and the criminality within the private security industry."

Our submission consists of two parts:

- Part 1 notes amendments we support, including recommendations to strengthen these clauses.
- Part 2 identifies omissions that have not been addressed in Amendment Bill [B 27—2012].

GFSA's submission is based extensively on a research paper: Jaynes, N (2012), ***Flying Below the Radar? The armed private security sector in South Africa***[i], we have attached a summary of this paper as an Addendum to this submission, full copies of the report can be downloaded from the Open Society Foundation for South Africa website: www.osf.org.za.

B Detailed comments on proposed amendments in order to strengthen them

1 Substitution of section 10 of Act 56 of 2001

Ad Clause 3:
The following section is hereby substituted for section 10 of the principal Act:
''Accountability of Council
10. (1) The Council is accountable to the Minister for the performance of its functions and must supply the Minister with such information and particulars as the Minister may in writing require in connection with the functions of the Authority or any other matter relating to the Authority.
(2) The Council must submit a report to the Minister—
(a) on any matter required by the Minister under subsection (1) and on any matter which it is necessary or expedient to bring to the attention of the Minister; and
(b) at least once a quarter in connection with the activities of the Authority.''

GFSA's response and recommendations

a. GFSA welcomes the requirement that PSIRA report quarterly to the Minister.

b. GFSA urges that this amendment and related regulations specify the information to be included in each quarterly report, and recommends that PSIRA be required to report on the following each quarter:
   - Number of security firms registered.
   - Number of security guards registered, including category and functions.
   - Details of training guards have received, including most recent training.
   - Number of firearms registered to, lost by and stolen from private security companies.
   - All instances in which firearms are discharged by security guards, including circumstances and consequences thereof e.g. death or injury.
   - Detailed information on criminal investigations involving the private security industry.

Rationale

GFSA's recommendation 1b above is based on Jaynes' observation that:

- There is a need for more information on the private security industry including personnel, equipment, cases of misconduct, budgets, types of functions and training regimes.

- Currently, neither PSIRA nor the South African Police Service (SAPS) keep a record of how many cases of death and injury are perpetrated with private security company firearms.
- While every PSIRA annual report contains a heading 'Criminal Investigations', the reports don't detail reasons for and progress of these investigations other than a broad statement of 'criminal contraventions of the Act'. As Jaynes points out, this could include all manner of crimes and violations, including threats to public safety. While she notes that reports indicate that these matters are referred to the SAPS and National Prosecuting Authority (NPA) for further investigation and prosecution; there is no sense of any remedial action taken by PSIRA itself, let alone accountability. The 2010/2011 PSIRA Annual Report notes 257 new cases recorded by PSIRA, an increase from 104 new cases in the previous Annual Report. There also appears to be a significant backlog of cases and no indication of how this is being tackled. The 2008/2009 PSIRA Annual Report notes a total of 839 cases still awaiting SAPS investigation.

2 Substitution of section 16 of Act 56 of 2001

Ad Clause 6:
The following section is hereby substituted for section 16 of the principal Act:
''Finances of Authority
16. (1) The Authority is financed from—
(a) money that is appropriated by Parliament; and
(b) registration fees, levies or monies from any legitimate source which have accrued to the Authority in terms of this Act or any other law.
(2) The Council must, subject to the Public Finance Management Act and section 16A—
(a) account for money received or paid on account of the Authority; and
(b) cause the necessary accounting and other related records to be kept.
(3) The records referred to in subsection (2)(b) must be audited by the Auditor-General.''.

GFSA's response and recommendations

a. GFSA welcomes this amendment, believing it will give PSIRA additional resources to function effectively as a regulatory authority of private security companies in South Africa.

b. GFSA urges that the PSIRA Act and Regulations be further amended to spell out in detail the exact responsibilities of the PSIRA in overseeing the private security industry. This detail would guide inspectors on exactly what they need to inspect e.g.
   - Confirming that the firearms for which security companies have licences for are actually in their possession, that they are safely stored in SABS compliant safes and that guards employed to use these firearms are 'fit and proper'.
   - Confirming that armed guards have undertaken the necessary training and that this training is of the requisite standard e.g. inspecting targets and ensuring that ammunition meets SABS standards.

c. GFSA urges that oversight of the private security industry is further strengthened, and suggests that just like the police service has an Independent Police Investigative Directorate (IPID) overseeing it, that such a body be established for the Private Security Industry.

Rationale

GFSA's welcome of this amendment in 2a is based on Jaynes' finding that compared to the budgets of the Civilian Secretariat of Police (CSP) and the Independent Police Investigative Directorate (IPID) - both of which are responsible for overseeing SAPS; PSIRA has a much smaller budget. Yet, PSIRA is responsible for overseeing 387,273 active guards, compared to CSP's and IPID's oversight of 150,000 active police officers.

GFSA's recommendation 2b is based on key informant interviews undertaken by Jaynes' which revealed allegations of certain training service providers and private security companies using cheap and low-grade ammunition to cut costs. Jaynes notes that this practice is allegedly facilitated through SABS corruption with poor quality ammunition approved as of the correct standard, with the end result that ammunition is less accurate and dangerous as it can cause injury or death due to the firearm jamming or the brass casing rupturing.

A leading provider of training for private security guards interviewed by Jaynes noted that the problem lay not with the training standards per se, but rather that these standards are not applied evenly across the board. Part of the problem seems to be because neither of the two key bodies responsible for security guard training – the Central Firearms Registry (CFR) and the Safety and Security Sector Education and Training Authority (SASSETA) – 'has the expertise to do practical inspections' to ensure that training is of the required standard. Interviewees indicated that two different private security companies, of a similar size, have vastly different training budgets. The Chair of the National Training Forum suggested that it takes roughly 100 rounds to ensure personnel are sufficiently trained for business purposes, but there are reports of certain service providers using as few as 25 rounds in training to cut costs. While the formal requirement from SASSETA is that targets are available as evidence to demonstrate that the trainee has had sufficient practice before armed public patrol, it is unclear to what extent this is implemented.

GFSA's recommendations 2b and 2c are based on Jaynes' observation that the most recent PSIRA annual report states that there are just 16 inspectors employed to undertake inspection visits at 8,828 PSIRA registered companies. Further, the role of these 16 inspectors employed nationally is unclear; Chapter 5 of the PSIRA Act, makes mention of inspections being carried at 'at the direction of the director' but it is not clear if an inspector can only act on instruction or whether there is a proactive element to their role. Further, as Jaynes notes, the inspection process itself needs to be standardised and made more rigorous.

Finally, unlike SAPS, which has IPID to "ensure independent oversight...and to conduct independent and impartial investigations of identified criminal offences allegedly committed by members of the SAPS...and make appropriate recommendations"[ii], the private security industry has no such oversight and remedial body.

3 Insertion of section 16A in Act 56 of 2001

Ad clause 7:
The following section is hereby inserted in the principal Act after section 16:
''Annual report
16A. (1) The Council must prepare and submit to the Minister an annual report in the form prescribed by the Minister within five months after the end of the financial year.
(2) The annual report referred to in subsection (1) must include the following documents:
(a) The audited financial statements prepared in terms of the Public Finance Management Act;
(b) the Auditor-General's report prepared in terms of the Public Finance Management Act; and
(c) a report on the activities of the Authority undertaken during the year to which the audit relates.

(3) The Minister must table in Parliament a copy of the annual report, financial statements and audit report on those statements, within one month after receipt thereof if Parliament is in session or, if Parliament is not in session, within one month after the commencement of its next ensuing session.
(4) The director must, upon tabling in Parliament, publish the annual report, financial statements and audit report on those statements.''.

GFSA's recommendation

a. In line with our recommendation 1b above regarding quarterly reports, GFSA would urge that the content of PSIRA's annual report be spelled out, specifying that the following information is included:
   - Number of security firms registered.
   - Number of security guards registered, including category and functions.
   - Details of training guards have received, including most recent training.
   - Number of firearms registered to, lost by and stolen from private security companies
   - All instances in which firearms are discharged by security guards, including circumstances and consequences thereof e.g. death or injury.
   - Detailed information on criminal investigations involving the private security industry.

4 Amendment of section 23 of Act 56 of 2001

Ad clause 11:
Section 23 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph *(d)* of the following paragraph:
Requirements for registration (1) Any natural person applying for registration in terms of section 21 (1), may be registered as a security service provider if the applicant id a fit and proper person to render a security service, and... '
'*(d)* was not found guilty of an offence specified in the Schedule **[within a period of 10 years immediately before the submission of the application to the Authority]**;'

GFSA's response and recommendations

a. GFSA welcomes this amendment, as it seems to imply that anyone guilty of any of the offences in the Schedule including public violence, intimidation, rape, murder, robbery, culpable homicide involving the use of a firearm, assault with intention to cause serious deadly harm, an offence in terms of the Domestic Violence Act, 1998 as well as an offence in terms of legislation pertaining to the control over the possession and use of firearms and ammunition would be permanently excluded from registering as a security guard.

b. GFSA would however submit that the Firearms Control Act, 2000 be specifically listed in the Schedule, seeing this as an omission.

5 Amendment of section 36 of Act 56 of 2001

Ad clause 14:
Section 36 of the principal Act is hereby amended by the addition after subsection
(2) of the following subsection:
''(3) The Central Firearms Register in the Service must—

(a) keep a separate updated database, in the prescribed form, of the details of every firearm issued to a security service provider; and
(b) at the written request of the director, submit the updated database of firearms referred to in paragraph (a) to the Authority within 30 days of the request being made.''.

GFSA's response and recommendations

a. GFSA warmly welcomes this amendment. As Jaynes has noted, "There is no indication that private security company firearm and ammunition stockpiles are known to either the PSIRA or CFR. Key informant interviews revealed that PSIRA is not interested in firearm holdings and that the CFR is grossly under-capacitated. The result is that this information is not being recorded.

b. As has been recommended in 1b and 3a above, we urge that in addition to keeping details of every firearm being made available within 30 days of request, that the PSIRA be responsible for reporting this information in both quarterly and annual reports.

6 Amendment of Schedule to Act 56 of 2001

Ad clause 18:
The Table of Offences in the Schedule to the principal Act is hereby amended—
(a) by the insertion after the expression ''Any offence in terms of the Regulation of Foreign Military Assistance Act, 1998 (Act No. 15 of 1998).'' of the following expression:
''Any offence in terms of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006 (Act No. 27 of 2006).'';
(b) by the substitution for the expression ''Any offence in terms of the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992).'' of the following expression:
''Any offence in terms of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2000 (Act No. 70 of 2002).''; and (c) by the substitution for the expression ''Any offence in terms of the Intelligence Services Act, 1994 (Act No. 38 of 1994).'' of the following expression: ''Any offence in terms of the Intelligence Services Act (Act No. 65 of 2002)".

GFSA's recommendation

a. As already recommended in 4b, GFSA urges that this amendment be expanded to include recognition of the Firearms Control Act, 2000.

C Additional amendments that have not been included in the Private Security Industry Regulation Amendment Bill [B 27—2012]:

Based on the research into the private security industry by Natalie Jaynes, GFSA notes a number of omissions in the Private Security Industry Regulation Amendment Bill [B 27—2012]. We urge parliament to address these by further amending Bill B27 - 2012, and related legislation as identified below.

7 Introduce client responsibility

GFSA's recommendation

a. Client-level responsibility be included in the PSIRA Act.

Rationale

According to Jaynes, emerging good practice internationally is tending towards client-level responsibility. Two international codes of conduct, the Montreux Document and the International Code of Conduct for Private Security Providers (ICoC), suggest that the contracting party take responsibility for ensuring that the private security company contracted is of good and proper standing, and that the company and its staff do not have a prior record of criminal involvement[iii].

Jaynes notes that in South Africa, the situation is one of client immunity; clients are viewed simply as end-users and do not face sanction for hiring private security companies that are negligent. E.g. Jaynes' key informant interviews revealed allegations of Airports Company South Africa (ACSA) utilising training service providers that do not adhere to even the most basic PSIRA standards when it comes to firearm training for guards. Similarly, large parastatals like Transnet manage to fly below the radar and remain unaccountable for firearm misuse by the guards that the company contracts.

GFSA believes that the Montreux Document and ICoC offer a model of emerging good practice in terms of mechanisms for client-level responsibility. As Jaynes points out, both texts suggest that the contracting party take responsibility for ensuring that the private security company contracted is of good and proper standing, and that the company and its staff do not have a prior record of criminal involvement. The Montreux Document suggests that contracting states should take into account whether the private security company acquires its weapons lawfully, uses its weapons in adherence with international law, and has complied with contractual provisions regarding return and/or disposal of weapons and ammunition.

This model of client-level responsibility could be replicated in South Africa to ensure that state institutions, parastatals and large listed companies are held liable for the private security company that they employ to guard their premises and personnel. The rationale for employing a security company is to protect assets and maximise profit, and it is thus reasonable to expect that the contractor be responsible for checking the track record and reputation of a security company in their employ, providing an additional incentive for private security companies to comply with the law.

8 Align and harmonise legislation

GFSA's recommendation

a. The PSIRA Act and Regulations be aligned with the Firearms Control Act and related Regulations.

Rationale

According to Jaynes, while PSIRA is responsible for authorising and issuing licences to private security guards, the CFR is responsible for issuing firearm licences and all matters related to firearms held by private security companies. Given the important points of contact between the two bodies, it follows that the legislation and accompanying regulations should be aligned. This is currently not the case. The FCA predates the PSIRA Act and the two pieces of legislation are not aligned, for instance:

- The FCA specifies a minimum age of 21 years for firearm possession, yet the PSIRA Act stipulates 18 years as the minimum age for registration as a private security guard. While not all security guards are armed, and one assumes that the CFR would not grant a licence to a person younger than 21 years of age, this ought to be spelt out in the legislation.
- Whereas the PSIRA legislation requires only a once-off background check on the individual seeking registration as a PSIRA-accredited guard, the FCA requires renewal of the competency certificate every five years.
- A current discrepancy exists in terms of the FCA's dual licensing system whereby both the firearm and the user must be registered and licensed. Currently the period of validity for a 'licence to possess a firearm for business purposes as a security provider' is two years, while a competency certificate for business purposes is five years. This discrepancy has caused much confusion, compounded further by a lack of harmonisation between private security company provisions in the FCA and PSIRA Act.

9 Align and standardise training practices and qualifications

GFSA's recommendations

a. Training standards and practices in the PSIRA Act and Regulations must be aligned with the Firearms Control Act and Regulations.

b. Training standards and practises must be standardised in the PSIRA Regulations.

c. The PSIRA Act and Regulations must spell out in detail the exact responsibilities of the PSIRA in overseeing training within the private security industry as described in recommendation 2b above.

Rationale

GFSA's recommendations are based on Jayne's observation that:

- While PSIRA published draft regulations on training for public comment in 2009, PSIRA's 2010/2011 Annual Report does not indicate if the regulations are any closer to proclamation.
- There's a disjuncture between the training requirements of the FCA and PSIRA e.g.:
  - The FCA Regulations of 2005 require that a private security company assess armed guards at least every 24 months though such assessment does not include psychological or psychiatric testing. However, this is contradicted by a later section which compels the company to provide 'appropriate counselling and debriefing… if the security officer has used a firearm against any person and has caused death or injury'. The FCA must be amended to address this inconsistency.
  - The legislation and the practice in terms of training security guards are out of sync. The PSIRA Act and Regulations require completion of a minimum of 'Grade E' training. However, the PSIRA Regulations contain a confusing clause regarding the waiver of this minimum in recognition of prior learning, provided the applicant has shown 'good cause'. In contrast the firearm training industry in South Africa has developed a detailed set of rules and requirements, as laid out by the SASSETA. This qualification contains core unit standards with clearly defined performance criteria. Yet none of this detail appears in the FCA, the PSIRA Act or accompanying Regulations.
  - Another problem relates to the maintenance training that is required for armed guards as per the PSIRA Act and FCA. The FCA's 2005 Regulations require that private security companies undertake periodic reviews of their armed employees' abilities and ensure that

they 'undergo at least one proper practical training session…at least every 12 months', and that all armed guards attend at least one proper briefing session every 12 months to keep them up to date with all legislation 'for the possession, carrying, safe custody and use of firearms and ammunition'. The 2005 Regulations also include a requirement that the private security company assess its armed guards at least every 24 months to ensure that 'they do not suffer from any condition that would render their continued possession of a firearm and ammunition as posing an unreasonable risk to any person'. However, the same clause specifically states that this assessment 'does not include psychological or psychiatric testing'. This not only contradicts the FCA, which requires that the criteria for firearm ownership include being of a 'stable mental condition' and 'not [being] inclined to violence' but also stands in contrast with the growing body of evidence showing a correlation between exposure to repetitive trauma and stress and an individual's propensity to irrational behaviour. In fact, the 2005 FCA Regulations affirm this logic five paragraphs later when the company is compelled to provide 'appropriate counselling and debriefing…if the security officer has used a firearm against any person and has caused death or injury'. It therefore appears that there is inconsistency between the FCA and the 2005 Regulations.

10 Increase monitoring of policing functions undertaken by private security companies

GFSA's recommendation

a. PSIRA develop a binding code of conduct and training for all private security companies with armed guards based on the International Code of Conduct for Private Security Providers (ICoC) on the use of force

Rationale

Jaynes' interviews showed that many private security companies, especially larger ones, engage in policing functions, primarily arresting suspects for copper and cable thefts, and that the guards undertaking this work are reportedly quite heavily armed. Yet private security guards are not law enforcers; they are civilians and are therefore bound to the same rules of conduct as ordinary civilians. However, relevant legislation and policy directives do not take cognisance of this fact, failing to cite private security companies as relevant actors, e.g. Section 49 of the Criminal Procedure Act, which discusses the modalities of use of force when effecting an arrest, doesn't recognise private security companies as a distinct category.

[i] Research for Natalie Jaynes' paper was undertaken while she was a Sarah Meek Fellow at the Institute for Security Studies Criminal Justice. Her paper was published by the Criminal Justice Initiative of Open Society Foundation for South Africa: www.osf.org.za.

[ii] The Independent Police Investigative Directorate website: http://www.ipid.gov.za.

[iii] The Montreux Document On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Part Two, para 6: a