



RIGHT 2 KNOW

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R2K Submission on the General Intelligence Laws Amendment Bill: March 16, 2012

Honourable Chairman and Members of the Ad-hoc Committee,

1. Executive Summary

Although it has been proposed that the General Intelligence Laws Amendment Bill [download] (“the Bill”) provides for mere ‘technical’ amendments, we believe it will have the effect of broadening the policy framework in which the Agency will operate. We believe that it would be extremely premature to legislate such changes in policy while key recommendations of the 2008 Ministerial Review Commission on Intelligence [download] (the “Matthews Commission”) have yet to be implemented – indeed, to do so would go against the recommendations of the Commission – and before undertaking a new White Paper review. In particular, we have identified the following concerns:

- The Bill leaves intact the dangerously broad domestic intelligence mandate contained in the National Strategic Intelligence Act, while it is desirable that the SSA’s mandate should be clearly and narrowly defined;
- The Bill expands the Agency’s powers to monitor and intercept domestic communications, without adequate regulation or judicial oversight;
- The Bill would have the consequence of diminishing public oversight of the Agency where it is desirable that the Agency’s budget, policies and non-operational activities be open to public scrutiny

1.1 R2K Point of departure

We share the concerns raised by the Matthews Commission of an overly broad domestic intelligence mandate, and endorse the recommendations calling for a new White paper on intelligence to review:

- The mandates, functions and powers of the intelligence organisations, including oversight of, and controls over, their powers to infringe constitutional rights.
- Executive control and accountability, and the relationship between the intelligence services and

the President, Cabinet and the Minister for Intelligence Services.

- Civilian oversight, including oversight by the JSCI and the Inspector- General of Intelligence. The relationship between the different intelligence organisations in South Africa, the co-ordination of intelligence and the functions of NICOC.
- Relations with foreign intelligence services and sharing intelligence about South African citizens with foreign governments.
- Secrecy and transparency, covering both the provision of information and the protection of information.
- The institutional culture of the intelligence services and ensuring respect for the Constitution and the rule of law.

The Right2Know campaign believes these matters need to be opened up for a rigorous public review process as a matter of urgency. The Bill seeks to legislate on these matters in the absence of a public participatory review process and should be redrafted in line with the Matthews Commission recommendations on the domestic intelligence mandate and interception of communications (subject to the review called for by the Commission) or shelved entirely until the public participatory review process is complete.

2. Mandate of the SSA

2.1 Definition of National Security Mirroring drafting in the Protection of State Information Bill, this Bill provides that:

‘national security’ includes the protection of the people of the Republic and the territorial integrity of the Republic against (a) the threat of use of force or the use of force; (b) the following acts:

(i) Hostile acts of foreign intervention directed at undermining the constitutional order of the Republic;

(ii) terrorism or terrorist related activities;

(iii) espionage;

(iv) exposure of a state security matter with the intention of undermining the constitutional order of the Republic;

(v) exposure of economic, scientific or technological secrets vital to the Republic;

(vi) sabotage; and

(vii) serious violence directed at overthrowing the constitutional order of the Republic;

(c) acts directed at undermining the capacity of the Republic to respond to the use of, or the

threat of the use of, force and carrying out of the Republic's responsibilities to any foreign country and international organisation in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not, but does not include lawful political activity, advocacy, protest or dissent;"

While we welcome the explicit exclusion of lawful political activity, advocacy, protest or dissent from consideration of national security matters, we believe this drafting in both pieces of legislation does not adequately narrow the domestic mandate of the SSA.

2.1.1. Provision for extraordinary protection for the Agency

The protection afforded to “the exposure of a state security matter...” creates a circular reference when read with the definition of “state security matter” and the classification provisions in the Protection of State Information Bill currently before the National Council of Provinces. As the definitions stand, it appears that any matter dealt with by, or relating to the functions of, the SSA may be considered per definition to be a national security matter and therefore subject to protection from public scrutiny not afforded to other organs of state. Thus, on the current definition the SSA might consider itself justified in treating any or all activities, operations and policies as a national security matter. This may draw an unintended veil of secrecy over all aspects of the SSA’s activities; even those that should properly be in the public domain to ensure accountability on the part of the SSA.

2.1.2. Provision for inclusion of economic matters as a matter of national security

As with the Protection of State Information Bill, the pertinent protection afforded to “*economic, scientific or technological secrets vital to the Republic*” may bring commercial information under the mandate of the SSA. This is explicitly against the recommendations of the Matthews Commission which stated that organs of state security should be concerned with strictly-defined matters of national security: that is, prevention of terrorism, sabotage, organised crime, etc.

2.2. Expansion of the SSA’s mandate in the definition of “counter-intelligence”

The Bill provides that:

“counter-intelligence” means measures and activities conducted, instituted or taken to impede and to neutralise the effectiveness of foreign or hostile intelligence operations, to protect intelligence and any classified information to conduct vetting investigations and to counter subversion, sedition, treason and terrorist and related activities;

A number of changes to this definition in the amended laws invite the Agency to a broader mandate.

The inclusion of “sedition” in this definition is extremely problematic, as it is not clear how broadly the Agency can define its scope, and should be scrapped. The substitution of the relatively narrowly defined “sabotage and terrorism aimed at, or against personnel, strategic installations or resources of the Republic” with the broader “terrorist and related activities” – without specifying what nature “related activities” may take, invites the Agency to interpret a broader mandate for itself. The Bill does little to address the concerns raised by the Matthews Commission, that key functions of the SSA, to impede and neutralise the effectiveness of foreign or hostile intelligence operations, and to counter subversion, treason, sabotage and terrorism are not described precisely and are not regulated.

2.3 Domestic intelligence mandate

The Bill defines domestic intelligence as:

“intelligence on any internal activity, factor or development which is detrimental to the national stability of the Republic, as well as threats or potential threats to the constitutional order of the Republic and the safety and well-being of its people”.

This is potentially the most problematic of all provision relating to the mandate of the SSA. The definition is extraordinarily broad – it is not clear how terms such as ‘national stability’ and ‘threats to the constitutional order’ are to be defined. It effectively makes the SSA responsible for monitoring every aspect of South Africa’s national, social, economic and most especially political life – at the same time as other provisions may seal off the SSA from appropriate levels of public scrutiny and expand its powers to intercept communications. The SSA’s domestic intelligence mandate must be completely overhauled to restrict it to clearly and strictly defined threats to national security.

3. Expansive provisions for interception of communications

The Bill provides that:

‘foreign signals intelligence’ means intelligence derived from the interception of electromagnetic, acoustic and other signals, including the equipment that produces such signals, and includes any communication that emanates from outside the borders of the Republic, or passes through or ends in the Republic;

The provisions in the Bill that relate to interception of communications contain a range of problems and several concerning omissions, especially when read in concert with the findings and recommendations of the Matthews Commission.

3.1 Lack of judicial oversight for interception of foreign communications

It is a significant problem that the Bill does not require a warrant for interception of foreign communications. There must be strict judicial oversight for such operations, as all citizens of the world are entitled to the right to privacy, enshrined in the Universal Declaration of Human Rights which our nation recognises. Interception of foreign signals may also ensnare South African citizens who happen to be abroad. In addition, persons in South Africa who may be on the receiving end of such communication are protected by the Constitution. In all cases interception without the express permission of a judge is unconstitutional.

3.2 Definition of “foreign signals” may include domestic signals

While this definition may be intended to mean ‘foreign’ signals, it is drafted such that it includes signals which merely pass overseas in the course of a transmission. However, the increasingly internationalised nature of electronic communications mean that even domestic signals could be regarded as ‘foreign’ because email communication, social media communication, and internet applications such as Skype may use foreign addresses and servers – thus, a signal between two people within South African borders may pass through foreign gateways in the course of its transmission. Again, this absolutely must be subject to judicial oversight.

3.3 Bulk interception/environmental scanning must be strictly regulated

The Matthews Commission report describes “bulk interception” and “environmental monitoring” undertaken by the National Communications Centre (NCC) – functions that presumably would fall to the SSA under the Bill. The practice appears to be that voice prints and written and spoken keywords are “listened to” by the system, which automatically records these signals when there is a ‘hit’, after which the recordings can be analysed. It is claimed that the recordings are discarded after a while, and that any follow-up, targeted bugging is done through the RICA warrant procedure. However, even if the recordings are discarded, there is nothing to prohibit the SSA from retaining and using intelligence such as who contacted whom, as well as personal data culled such as email addresses and phone numbers. Clearly – even if environmental scanning can be justified – there should be strict judicial controls, for example on which “keywords” can be listened to; and judicial warrants for the retention and use of any info. This should be clearly legislated. This is a key recommendation of the Matthews Commission and must be included in the legal framework governing the Agency as a matter of urgency.

4. Conclusion

Given that the ad hoc committee turned down civil society requests for more time for public comment on the Bill (as per letter to the ad hoc committee from the Institute for Security Studies and others), this submission provides only a brief summary of concerns. We look forward to the opportunity to expand on this submission at the public hearings.

ENDS