

14 February 2024

TO: Ms Alutho Sombexé
Committee Secretary
Ad hoc Committee on the General Intelligence Laws Amendment Bill
PER: (Email) GILAB2023@parliament.gov.za

Dear Ms Alutho Sombexé

CALLS FOR COMMENTS: GENERAL INTELLIGENCE LAWS AMENDMENT BILL (GILAB) (B40-2023)

1. This submission speaks to the invitation directed to the members of the South African public on 17 December 2023 to make written submissions on the General Intelligence Laws Amendment Bill (GILAB) [B40 – 2023].

OUTA'S INTEREST IN THE BILL

2. Organisation Undoing Tax Abuse (hereinafter referred to as "OUTA") wishes to convey its apprehensions regarding the General Intelligence Laws Amendment Bill 2023 (hereinafter referred to as "GILAB"), a sentiment shared by numerous civil society organisations and stakeholders. We express our deep concern about the potential threats to South Africa's democracy posed by the GILAB, currently under deliberation in the National Assembly. We firmly believe that this proposed legislation may lead to an unwarranted intrusion of state security agencies into our society, posing a risk to democracy, enabling overreach by these agencies and creating conditions conducive to a resurgence of state capture.

GENERAL CONCERNS IDENTIFIED ON GILAB

3. EXPANSION OF THE STATE INTELLIGENCE AGENCIES' VETTING POWERS

- 3.1. Section 1(p) of GILAB inserts the following definition into section 1 of the National Strategic Intelligence Act, 39 of 1994 ("NSIA"): **"person or institution of national security interest"** which is defined as *"any person or institution, identified by the Agency in the form and manner prescribed, that conducts himself/herself or itself or engages in activities that are inconsistent with the principles set out in section 198 of the Constitution including any person or institution that engages in activities that are defined as a threat to national security in terms of this Act"*.
- 3.2. Granting state intelligence agency the authority to conduct mandatory security vetting of any "person or institution of national security interest," with the definition being so excessively broad, could empower the state to vet private individuals or institutions, including non-profits, faith-based organisations and businesses, opening the door to potential abuse of this intrusive power.

- 3.3. Furthermore, the Agency is given the power to decide which “person or institution”, according to its own definitions, is identified to engage in activities deemed as “inconsistent”. It is unclear what these **specific** activities may be and according to which guidelines these persons or institutions and related activities are decided upon.
- 3.4. There is also no clarity in GILAB on the “form and manner” which will be used by the Agency.
- 3.5. The principles as set out in section 198 of the Constitution is proffered as a guideline. For the purposes of this concern, section 198 states: “*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***”. The items identified in the section, although aligned with general and accepted notions of human rights and social justice, together with actions deemed inconsistent thereto, are left open for mis/interpretation.
- 3.6. Civic protests and demonstrations are acceptable activities within any democracy and is also enshrined in the Constitution under section 16 and section 17. The Agency can deem any protest or demonstration as being inconsistent with the notions of peace, harmony and being free from fear. Protests and demonstrations are meant to display citizens’ dissatisfaction with private and public sectors’ decision-making, actions, policies and regulations. Should the Agency disagree with their reasoning, their civil right to protest can be seen as a threat.
- 3.7. In addition, section 3(a)(a) of GILAB amends section 2A of the NSIA, which provides the Agency with the authority to vet individuals accessing national key points, such as the SABC, this poses a threat to journalistic independence.

4. **EXPANSION OF MASS SURVEILLANCE CAPABILITIES**

- 4.1. GILAB attempts to expand the the powers of state security agencies’ surveillance capabilities through the National Communications Centre (“NCC”). Section 2(b)(b) that will substitute section 2 of the NSIA, sets out how this will be achieved. However, the section does not provide for the requisite protections for privacy and freedom of expression, nor for meaningful oversight of the NCC, in that, although the NCC’s mass surveillance system would have formal oversight from a retired judge, that judge would be appointed by the President and advised by two ‘interception experts’. This falls far short of the new standards for surveillance oversight set by the Constitutional Court in *amaBhungane judgement*,¹ which demands sufficient independence of judges authorising surveillance and the post-surveillance notification of any people whose communications had been intercepted. GILAB does not attempt to meet these

¹ *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others*, 2021 (3) SA 246 (CC)

standards: rather, it just seeks the shortest path to re-granting the state security agencies mass surveillance powers.

5. FAILURE TO DELIVER ON OVERSIGHT AND ACCOUNTABILITY

- 5.1. Several commissions and inquiries have identified the lack of proper oversight and accountability of the State Security Agency (“SSA”) as enabling abuses of power, politicisation and corruption within the agency. GILAB fails to address these issues. For example, GILAB neglects to ensure the independence of the Inspector-General of Intelligence, the overseer of intelligence agencies, and his or her capacity to enforce decisions. This undermines accountability.
- 5.2. Furthermore, GILAB fails to implement measures to prevent the abuse of secret funds, reminiscent of the state capture era, risking illegal expenditure and mismanagement of funds from the secret service account.

6. EXPANDING THE DEFINITIONS OF NATIONAL SECURITY

- 6.1. GILAB broadens a few definitions including the definitions of domestic intelligence, foreign intelligence, intelligence gathering, national security, national security intelligence and threats to national security. This allows unrestricted intrusion by these agencies into various aspects of our daily lives, beyond the legitimate scope of state intelligence.
- 6.2. Section 1(f) of GILAB inserts “**domestic intelligence**” in the NSIA and defines it as “*intelligence on any internal threat or opportunity or potential opportunity or threat or potential threat to national security*”.
- 6.3. Both “domestic” and “intelligence” in this instance are very vague and can be interpreted as any information relating to the country. This information, based on the broad scope of “potential opportunity [...] or potential threat”, can be anything which the State identifies as a threat to national security. Without these items being specified, it disconcertingly provides the platform for the State to manipulate its meaning to suit its own purposes.
- 6.4. Section 1(j) of GILAB inserts “**intelligence gathering**” in the NSIA and defines it as “*the acquisition and processing of relevant and reliable information into intelligence products related to any domestic or foreign opportunity or potential opportunity or threat or potential threat to national security or threats to the advancement or protection of national security*”.
- 6.5. The term “information” is extremely broad and in consideration that we function in a Knowledge Economy within an Information Society – meaning everything we deal with is information-based – this term can be mis/used to include any and all information distributed and consumed within South Africa, which the State may deem to be threatening. Without the various categories of “information” being specified, it

disconcertingly provides the platform for the State to manipulate its meaning to suit its own purposes.

- 6.6. Section 1(k) of GILAB inserts “**national critical information infrastructure**” in the NSIA and defines it as *“infrastructure, products or systems used to receive, transmit and store information and communications that have been identified and declared as critical for the socio-economic well-being of citizens and which are necessary for the protection of the national security of the Republic in terms of section 2(2)(B) of this Act”*.
- 6.7. Similar to the argument above of South Africa and the entire globe functioning within a Knowledge Economy and Information Society, it is an obvious deduction that all the produced data, information and knowledge products ought to be stored and kept within suitable infrastructure and categorised by suitable systems. Without the various categories of “infrastructure, products or systems” being specified, it disconcertingly provides the platform for the State to manipulate its meaning to suit its own purposes. In addition, the scope for items critical for the “the socio-economic well-being of citizens” is left wide open for mis/interpretation and any action can be argued to be a threat to either well-being or supposed national security. These items must be specified.
- 6.8. Section 1(o) of GILAB inserts “**national security intelligence**” in the NSIA and defines it as *“intelligence which relates to or may be relevant to the assessment of any opportunity or potential opportunity or threat or potential threat to the national security of the Republic in any field”*. In this instance, “intelligence” can be interpreted as “information”, which once again leaves the definition incredibly vague and open to potential misuse and abuse by the State to further its own aims.
- 6.9. Section 1(r) of GILAB inserts “**security competence test**” in the NSIA and defines it as *“administering a vetting investigation to determine the security competence of a person or institution and if such person or institution is suitable to access classified information or critical infrastructure of the State or is viewed as vulnerable to blackmail, undue influence or manipulation or security compromise or is a person or institution of national security interest in terms of Section 4(2)(a)(i) of the Act”*.
- 6.10. The terms “*classified information*” and “*critical infrastructure*” are left open to mis/interpretation, allowing the State to decide on an ad hoc basis which instances it might apply to. The State is also given the power to classify any such information and infrastructure it may deem to be made private, and therefore, not available to the public. Section 31 of the Constitution explicitly states that:
- “Everyone has the right of access to— (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.”*
- 6.11. In addition, whistle-blowers, are a crucial feature in any political landscape, democratic or otherwise, to expose corruption and illegal activities within the public and private

sectors. Whistleblowers provide information which they deem are within the public's interest, and this may include "confidential information", which by definition and implication of its exposure, will make the State vulnerable. With the inclusion of this definition within the amended bill, together with the lack of examples provided, significantly weakens the rights of citizens to exercise their civic duty.

7. **MORE INSTANCES OF VAGUENESS IN GILAB**

7.1. Repeated instances of vagueness in the term "*opportunity or potential opportunity*", leaving scope for misinterpretation and broad application, with severe consequences should a person or institution be deemed to create such an "opportunity or potential opportunity". This sentence is inserted no less than seven times in the NSIA by the following GILAB sections:

- 7.1.1. Section 1(f),
- 7.1.2. Section 1(h),
- 7.1.3. Section 1(j),
- 7.1.4. Section 1(n),
- 7.1.5. Section 1(o),
- 7.1.6. Section 1(p), and
- 7.1.7. Section 2(a)(i)

7.2. The knock-on effects, and potential scope for mis/interpretation and ab/use by the State, is not only dangerous, but also destructive to the core notions of civic rights and the exercise of democratic principles.

8. **RECOMMENDATIONS**

8.1. The aforesaid concerns represent our primary apprehensions. Together with others, we perceive the amendments to NSIA and other legislation, by GILAB as an attempt to interfere with civil society and religious institutions, jeopardising our rights to free expression, organisation, assembly, engagement in civil and political life, as well as religious and cultural practices. Civil society has historically served as a crucial defence against state capture and now we observe attempts to exert control over these institutions.

8.2. We concede that there is an urgent need for reforms to boost oversight and accountability in the state security agencies to prevent further abuses of power and corruption. However, it is our view that no blanket approach should be utilized. The State should clearly identify the risks and develop policies and procedures and implement them to those specific circumstances.

8.3. The State should have in place focused, proportionate and risk-based measures, without unduly disrupting or discouraging legitimate civil society activities, in line with the risk-based approach.

8.4. This amendment bill must be redrawn and absolute care must be placed in clearly defining key instances so as to safeguard against any potential ab/use of power and mis/interpretation of information provided therein.

CONCLUSION

9. We urge Parliament to either withdraw or comprehensively redraw GILAB to align it with the Constitution thereby avoiding the prospect of a constitutional challenge.
10. We trust these comments are received with due consideration and we look forward to receiving your response.

Yours Sincerely



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