



Centre for
CONSTITUTIONAL
RIGHTS

CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

Patron: The Hon Mr Justice Ian G Farlam

Ms Nonkululeko Sindane
Director-General: Department of Justice and Constitutional Development
Department of Justice and Constitutional Development
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Attention: Mr S J Robbertse

Per email: cybercrimesbill@justice.gov.za

26 November 2015

Dear Mr Robbertse

CONCISE SUBMISSION ON THE *DRAFT CYBERCRIMES AND CYBERSECURITY BILL* [B-2015]

Introduction

1. The Centre for Constitutional Rights (CFCR) is a unit of the FW de Klerk Foundation - a non-profit organisation dedicated to upholding the *Constitution of the Republic of South Africa, 1996* (the Constitution). To this end, the CFCR seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The CFCR does so in the interests of everyone in South Africa.
2. As such, the CFCR welcomes the opportunity to make a concise submission to the Department of Justice and Constitutional Development (the Department) regarding the *Draft Cybercrimes and Cybersecurity Bill* [B-2015] (the Bill) in response to your call for submissions as published on www.justice.gov.za on 28 August 2015.
3. It is not the purpose or intention of this submission to provide comprehensive legal analysis or technical assessment of the Bill, but rather to draw attention to key concerns in relation to the

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Bill - particularly insofar as it relates to the aforementioned constitutional values, rights and principles.

Key concerns regarding the Bill

4. In principle, the CFR welcomes the Bill to the extent that it seeks to prevent, suppress and criminalise cybercrimes and related cybersecurity matters. However, some provisions of the Bill - especially regarding the right to freedom of expression, as well as powers of security services - do raise legitimate and serious concerns.

Ad clause 1 Definitions and interpretation

Definition of "critical data"

5. With reference to clause 1 and the definition of "*critical data*", the latter is defined to mean, among others, "*data that is important for the protection of - ... (e) trade secrets; ... (g) commercial information, the disclosure of which could cause undue advantage or disadvantage to any person*".
6. It is unclear from this definition whether "*trade secrets*" and "*commercial information*" are limited to information held by an organ of State (likely public enterprises), or whether it would also include information held by private persons or entities. If the definition includes information held by private persons or entities, it is contended that this definition is extremely wide. Such a definition would include almost any "*data that is important for the protection of*" any "*trade secret*" - including the secret muffin recipe of the proverbial corner bakery. Moreover, should a customer of the latter bakery post a photo of an early morning special-of-the-day on a social network and the bakery across the street, based on the posted information, lowers his price in order to lure the majority of customers from the corner bakery to his own bakery, the corner baker will possibly suffer undue disadvantage, whilst the other baker will be advantaged by the disclosure of this "*commercial information*". The possible absurd outcomes of such a wide definition is obvious.
7. It is hence recommended that in relation to sub-clauses (e) and (g) of the definition of "*critical data*", the definition be limited to trade secrets and confidential commercial information (information which an entity has taken steps to protect from disclosure, where disclosure would help a competitor in the market, or the confidential commercial information of another where such information is subject to a contractual obligation of confidentiality in circumstances where such an obligation of confidentiality would normally be undertaken or imposed) held by the State, or alternatively, to trade secrets and confidential commercial information, the disclosure of which will cause serious damage to the economy or national security.
8. Nonetheless, in line with section 1 and section 195 of the Constitution, the State and public enterprises must be accountable and must conduct their business in a transparent manner. As such, "*commercial information*" held by the State or public enterprises should, in principle, be in the public domain unless a justifiable reason exists not to disclose such information. With

reference to the provisions of the *Promotion of Access to Information Act, 2000*, the provisions of this Bill may not result in the suppression of commercial information where such suppression is aimed at protecting the government from embarrassment, or for the purpose of hiding unconstitutional or unlawful activities.

Definition of “foreign State”

9. It is recommended that the definition of “foreign State” be amended to read as follows: “foreign State” means any State other than the Republic and includes any territory, aircraft or vessel under the sovereignty or control of such State.

Ad clause 17 Prohibition on dissemination of data messages which advocates, promotes or incites hate, discrimination or violence

10. Freedom of *expression* - much wider than the notion of freedom of *speech* - is a cornerstone of our democracy. Section 16 of the Constitution enshrines this right, including, among others, “freedom of the press and other media”, “freedom to receive or impart information or ideas”, “freedom of artistic creativity” and “academic freedom and freedom of scientific research”.
11. Save for expressions, information or ideas which are “propaganda for war”, “incitement of imminent violence”, or “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm” (emphasis added) as provided for in section 16(2) of the Constitution, the Constitutional Court has held that *all* other forms of expression are protected.
12. In *Islamic United Convention v Independent Broadcasting Authority and Others (CCT36/01) [2002] ZACC 3*, the Constitutional Court held that the right to freedom of expression includes not only information or ideas that are favourably received, regarded as inoffensive or as a matter of indifference, but also those ideas or information that may offend, shock or disturb.
13. Accordingly, any limitation - legislative or otherwise - of the right to freedom of expression which falls outside of the provisions of section 16(2) will amount to an unjustifiable infringement of this right unless such a limitation is justifiable in terms of section 36 of the Constitution.
14. Clause 17 of the Bill provides as follows:

“17. (1) Any person who unlawfully and intentionally—
(a) makes available, broadcasts or distributes;
(b) causes to be made available, broadcast or distributed; or
(c) assists in making available, broadcasts or distributes, through a computer network or an electronic communications network, to a specific person or the general public, a data message which advocates, promotes or incites hate, discrimination or violence against a person or a group of persons, is guilty of an offence.

(2) Any person who contravenes the provisions of subsection (1) is liable, on conviction to a fine or imprisonment not exceeding 2 years.

(3) For purposes of this section “**data message which advocates, promotes or incites hate, discrimination or violence**” means any data message representing ideas or theories, which advocate, promote or incite hatred, discrimination or violence, against a person or a group of persons, based on—

- (a) national or social origin;
- (b) race;
- (c) colour;
- (d) ethnicity;
- (e) religious beliefs;
- (f) gender;
- (g) gender identity;
- (h) sexual orientation;
- (i) caste; or
- (j) mental or physical disability.”

15. It is contended that the provisions of clause 17 - especially clause 17(3) - are extremely wide in relation to the provisions of section 16(1) and section 16(2) of the Constitution. For example, should a person post a message on a social media platform or send a text message to a specific person proclaiming “I hate women”, or “All men are idiots”, these statements would, according to the provisions of clause 17(3), be representing an idea or theory which advocates and promotes hatred against a person or a group of persons based on gender. Any person who “*unlawfully and intentionally*” makes available, causes to be made available, or assists in making available such a statement by means of a “*data message*” will be guilty of an offence.
16. Although offensive, shocking or even disturbing to some, it is contended the author of such and similar messages would be entitled to express such an opinion. The limitation (and in this case, even the criminalising) of the freedom to express “*ideas or theories, which advocate, promote or incite hatred, discrimination or violence*” without limiting such expressions to expressions which incite *imminent violence*, or that constitutes *incitement to cause harm*, would be limiting freedom of expression in an unjustifiable manner.
17. It could be argued that section 10 and section 12 of the *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000* (PEPUDA) respectively prohibits hate speech, and dissemination and publication of information that unfairly discriminates, in a similar manner. In our opinion both section 10 and section 12 of PEPUDA equally fail the constitutional test insofar as those provisions seek to prohibit messages or utterances which may offend, shock or disturb without determining whether such messages or utterances are intentionally aimed at propagating *war*, inciting *imminent violence*, or advocating hatred *that constitutes incitement to cause harm*. As such, PEPUDA cannot serve as justification to limit the right to freedom of expression by means

of this Bill, especially not in a manner that is unjustifiable in terms of section 16(2) of the Constitution and therefore unconstitutional.¹

18. In relation to clause 17 of the Bill, it is unclear how *unlawfulness* in context of the provisions of clause 17 will be determined - perhaps using one's mobile telephone to post a social media message proclaiming to hate someone while driving a vehicle?

19. In addition, in order to uphold freedom of the press and other media, it is of utmost importance that this Bill provides for a "public interest" clause in order to allow the media to lawfully report, by means of any medium, on matters criminalised by this clause and other provisions of the Bill.

Ad clause 20 Infringement of copyright

20. In regards to clause 20 and the infringement of copyright, it is unclear why matters related to copyright - which is in principle a private law matter - are criminalised in the manner proposed by this clause.

21. It is contended that, by rights, protection of copyright belongs in copyright laws such as the *Copyright Act, 1978* and the *Copyright Amendment Bill* - both of which already address the copyright issues covered in this Bill.

Ad clause 26 Definitions and interpretation

Definition of "investigator"

22. The definition of "investigator" under clause 26 provides as follows: "...means an appropriately qualified, fit and proper person, who is not a member of a law enforcement agency, and who is appointed by the National Commissioner or the Director-General: State Security, on the strength of his or her expertise in order to, subject to the control and directions of a member of a law enforcement agency, assist a law enforcement agency in an investigation in terms of this Act".

23. It is contended that this provision allows for the "appointment" or deputising of a person or persons as quasi law enforcement officials without such persons being appointed in terms of, or being subject to the relevant constitutional or legislative provisions governing the appointment, powers and conduct (including oversight) of members of the respective security services - whether the South African Police Service (the SAPS), the State Security Agency (the SSA) or any other security service as defined in Chapter 10 of the Constitution. As such, this provision allows for the appointment of individuals who would not be subject to the aforementioned constitutional and legislative provisions, but who would be able to engage in certain law enforcement activities. The obvious dangers in this regard, but also the constitutionality of such a provision need no further analysis.

¹ Also refer to De Vos P, "Malema judgment: A re-think on hate speech needed", *Constitutionally Speaking*, 12 September 2011 (<http://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed>) in this regard.

24. The appointment or secondment of any person to fulfil any function in relation to the mandates of any security service as defined in Chapter 10 of the Constitution, must be done in terms of the relevant primary legislation governing the respective security services - and not haphazardly by means of various other legislation such as this Bill. Moreover, any such appointment must clearly reflect the powers, responsibilities and qualifications pertaining to such appointment (including the necessary security vetting and clearance) and must be subject to the command, control and oversight as prescribed by the Constitution and legislation governing the respective security services.

Definition of “law enforcement agency”

25. In terms of clause 26, “law enforcement agency” is defined as to mean “(a) the South African Police Service referred to in section 5 of the South African Police Service Act, 1995 (Act No. 68 of 1995); and (b) the State Security Agency referred to in section 3(1) of the Intelligence Services Act, 2002 (Act No. 65 of 2002)”.

26. This definition sets a dangerous precedent by defining the SSA as a “law enforcement agency”, which it is not. The SSA has no executive powers, whether it be powers of arrest, or powers to institute criminal investigations.

27. Section 199(1) of the Constitution provides that “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” (emphasis added). In terms of section 205(3) of the Constitution, the national police service (as the “single police service” referred to in section 199(1) of the Constitution) is empowered to “prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law” (emphasis added).

28. In turn, the SSA’s objects, powers and functions are regulated by the *National Strategic Intelligence Act, 1994* (the NSIA), as required by section 110 of the Constitution. In regard to the latter, the SSA must, in principle, and in terms of section 2 of the NSIA:

- a. “...gather, correlate, evaluate and analyse domestic and foreign intelligence, in order to (i) identify any threat or potential threat to national security; (ii) supply intelligence regarding any such threat to Nicoc”;
- b. “...fulfil the national counter-intelligence responsibilities...in order to...”, among others, “supply (where necessary) intelligence relating to any such threat to the South African Police Service for the purposes of investigating any offence or alleged offence” and “supply intelligence relating to any such threat to any other department of State for the purposes of fulfilment of its departmental functions”; and
- c. “...gather departmental intelligence at the request of any interested department of State...”

29. Moreover, section 11 of the *Intelligence Services Act, 2002* (the ISA), specifically provides that the powers and duties of members of the SSA relates to the functions of the SSA as

contemplated in section 2 of the NSIA - thus to “gather, correlate, evaluate and analyse domestic and foreign intelligence, counter-intelligence information and departmental intelligence”.

30. It is clear from the provisions of the Constitution and aforementioned legislation that the SSA is not conferred with executive powers and may therefore not engage in criminal investigations, effect an arrest, or execute a search warrant other than a search as contemplated in section 11(2) of the ISA. At best, it must “supply (where necessary) intelligence relating to any such threat to the South African Police Service for the purposes of investigating any offence or alleged offence”.
31. As such and for the reasons argued above, it is strongly recommended to delete any reference to the SSA from the definition of “law enforcement agency” as provided for in clause 26. By implication, any other reference in the Bill to the SSA (including the definition of “specifically designated member of a law enforcement agency” under clause 26) in context of being a “law enforcement agency”, or its members having the powers of law enforcement officials (other than as contemplated in the ISA), must also be corrected.
32. Of course, the *Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002* (RICA) also defines “law enforcement agency” and “law enforcement officer” in a similar and even wider manner. Nonetheless, it is our considered opinion that, for the same reasons as argued in relation to clause 26 of the Bill, the relevant provisions of the RICA also fail to meet constitutional muster and cannot serve as justification for making the same error in this Bill.

General comments

33. Much of the conduct criminalised by the provisions of the Bill is already unlawful under existing laws - for example the incitement of violence in terms of the PEPUDA and damage to property in terms of the *Criminal Procedure Act, 1977*. In this regard, it will be necessary to carefully align, and in an appropriate manner refer to, the provisions of this Bill with other relevant legislation.
34. We trust that our submission will be of assistance in guiding the Department in finalising the Bill. Nevertheless, the CFR will be available to elaborate on this submission, whether during public hearings, or at any other time as the Department may deem appropriate.

Yours sincerely



ADV JOHAN KRUGER
DIRECTOR