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SUBMISSIONS ON REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF COMMUNICATION-RELATED INFORMATION AMENDMENT BILL, 2023

Introduction and Background

1. AmaBhungane is an independent, non-profit company founded in 2009 to develop investigative journalism so as to promote free, capable and worthy media and open, accountable, just democracy. As amaBhungane practises investigative journalism, we are ideally placed to identify legal, policy and practical threats to the information flows that are the lifeblood of our field. We have worked on information rights matters of direct benefit to investigative journalists and the public at large since 2010

2. In 2021, the Constitutional Court declared the Regulation of the Interception of Communication Act, 2002 (Rica) unconstitutional. This was in response to the application amaBhungane brought in 2015 to challenge the Act after we learnt that our managing partner, Sam Sole's, communications had been intercepted in 2008.

3. We therefore have been following the developments in the amendments to the communications interception legal framework with great interest.

4. We welcome the opportunity to make submissions on this Bill.

5. However, we are concerned that this Bill does not go far enough to protect the rights of surveillance subjects.

6. We have separated these submissions into two sections: our concerns with what the Bill addresses; and our concerns with what is excluded from this Bill.

7. This Bill cannot be divorced from its broader environment of the use of interception of communications in crime fighting and intelligence gathering. It is therefore a serious error to omit from Rica's regulation the other forms of communication interception in South Africa. It is the exclusion of two forms – metadata collection under section 205 of the Criminal Procedure Act and bulk surveillance – that are the Bill's most glaring omissions.

Concerns with the Bill

The Designated Judge

8. The Bill introduces a new definition for a designated judge. The definition would read: 'designated judge means a judge contemplated in section 15A of this Act'.

9. The first problem with this definition is that it appears to explicitly envision only **one** designated judge. Although the practice has been to appoint only one judge, the old formulation of the definition – that a designated judge was 'any judge …' – would have allowed for the appointment of more than one judge.

10. We maintain that, for a designated judge to be able to perform their functions timeously but thoroughly, there should be a panel of designated judges. This is also necessary to create checks and balances to the process and avoid a consistent one-on-one relationship that can lead to informal institutional capture.

11. Therefore, we propose that the Bill's definition be changed to read 'designated judge means one of the panel of judges contemplated in section 15A of this Act'. This would then require an amended to section 15A(2) to read 'The Minister must designate a panel of judges as prescribed as contemplated in subsection (1) in consultation with the Chief Justice, by notice in the *Gazette*'. The regulations should then set out how many judges should sit on that panel.

    a. At a bare minimum, the definition should revert to the old formulation of 'any judge' (rather than 'a judge').

12. Another omission in the Bill is a provision requiring the resourcing and capacitation of the designated judge's office. There is precedent for this in Rica: section 32 is a detailed provision detailing what is required for the establishment and maintenance of interception centres. To have a legislative obligation on the minister of intelligence to equip the centres to conduct interception but not the office responsible for ensuring that interception be lawful is a distressing policy choice.

The Review System

13. We appreciate the inclusion of a review of the designated judge's decisions, but we do not believe that this goes far enough in alleviating the concerns about the *ex parte* nature of applications made to a designated judge.

14. One of the key problems with an *ex parte* system is that a judge is given only one side of an argument. We acknowledge that, in surveillance authorisation applications, enabling the potential surveillance subject to participate in the application process may defeat the purpose of the application. However, this does not mean that there is no way for an adversarial system to be introduced.

15. We maintain our arguments from the litigation that the use of an adversarial system will best ensure that the rights of potential surveillance subjects are protected by ensuring their interests are put before a court.

16. In dismissing our argument for the need for a public advocate, the high court stated that 'some degree of faith has to be put in the applicants' [for a surveillance authorisation] integrity.'[1] With respect, our recent history reinforces the experience under apartheid that we simply cannot assume security officials will act with integrity.

17. The Bill's introduction of a review system is therefore not strong enough. This is because it assumes integrity on the part of the official making the application for surveillance: because there are no new facts or an alternative position put before either the designated or review judge, all that the judges have before them is what is placed there by the law enforcement official.

18. The Constitutional Court accepted that the existing Rica system did not provide sufficient safeguards against the abuse of the *ex parte* process. It noted that the final decision on what system to be introduced should be left to Parliament.

19. We are disappointed that the drafters have not come up with a more rigorous mechanism. South Africa needs to be creative in fashioning systems and mechanisms to ensure accountability. We need to ensure that there are systems that can withstand the pressure placed on them by unscrupulous officials.

20. Other countries, including Canada, Hong Kong, New Zealand, Australia and the United Kingdom, and the European Court of Human Rights use a public advocate in matters requiring a degree of secrecy or protection of security.

21. We therefore strongly recommend that Parliament reconsider what is necessary to protect the rights of potential surveillance subjects. Our recommendation remains that this should include the introduction of a public advocate to provide an alternative position to the designated judge.

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[1] AmaBhungane v Minister of Justice and Correctional Services 2020 (1) SA 90 (CP) (High Court Judgment) at para 77.

Post-Surveillance Notification

22. We appreciate the inclusion of a requirement of a post-surveillance notification. However, there are three key weaknesses in the Bill's proposals: that the notification can be delayed indefinitely; that there is no express requirement that the decision to withhold a notification be reviewed; and that there is no detail on the nature of the notification itself.

23. Section 25A(2)(b) – which concerns the impact notification could have on 'national security' – would allow the designated judge to 'direct that the giving of notification be withheld for such period as may be determined by the designated judge'.

24. There is no definition of 'national security' in Rica, and so there is a clear risk that section 25A(2)(b) could be abused, with officials citing vague 'national security' concerns. The relevant definition in the proposed new General Intelligence Laws Amendment Bill is unacceptably wide.

25. Giving the designated judge unfettered discretion in determining the period for withholding the notification also risks abuse. The Bill should therefore set out the maximum period for which the notification could be withheld; it should not allow for potential indefinite withholding of this notification.

26. The wording of the functions of the review judge is not clear that the decision to withhold the notification is also subject to review. Section 15C(1) requires that any application made under sections 16, 17, 18, 19, 20, 21 and 22 be considered by the review judge. Section 15C(2) then also requires that applications under section 23 be considered.

27. Nothing is said in the Bill about the review of a decision to withhold the notification to a surveillance subject under section 25A.

28. This decision is clearly one of importance and a decision to withhold notification impacts severely on the surveillance subject's rights.

29. Accordingly, we recommend that any mechanism designed to address the risks of *ex parte* applications should apply to the application for a withholding of the notification.

30. Although we believe any application for delaying the notification should also involve a public advocate, in the absence of this, the Bill should include these decisions within

the scope of review as exists currently in the Bill. Accordingly, we recommend that section 15C(1) also include section 25A in its list of decisions requiring a review.

31. The Bill provides no detail on how this notification will be communicated to the surveillance subject. The legislation should clearly establish the manner in which this notification is made and the information which must be included in this notification. We recommend that a formal written notice be communicated, electronically, to the surveillance subject, and that this notice must include: the purpose for which the surveillance was sought; the time period of the surveillance; any extension of surveillance granted; any withholding of the notification granted by the designated judge; and an explanation for how the surveillance subject could challenge the lawfulness of the surveillance.

Data Management

32. We appreciate the inclusion of section 37A which addresses the management of data. However, similarly to our comments on the post-surveillance notification, we believe that the legislation itself should include details on how the data should be processed, examined, copied, shared, disclosed, sorted through, used, stored and destroyed. This is too important to be left to regulation.

Concerns with what is not included in the Bill

33. Rica states that its purpose is to 'regulate the interception of certain communications' and to 'regulate the making of applications for, and the issuing of, directions authorizing the interception of communications'.

34. It therefore makes logical sense to locate all regulation of communication interception within Rica. This will ensure consistency of application and oversight.

35. There are two other forms of surveillance in South Africa: section 205 of the Criminal Procedure Act; and bulk surveillance (which is currently unlawful but is likely to be regulated through the General Intelligence Laws Amendment Bill).

Section 205 of the Criminal Procedure Act

36. Section 205 of the CPA permits public prosecutors and police officers to request authorisation from a magistrate or high court judge to access a certain category of communications data – 'archived communication-related data', regularly referred to as metadata. Although the *content* of communications is not accessible through this

access, the metadata provides significant information about a surveillance subject as it indicates who that person communicates with, how often, and where communication takes place.

37. There are **no** safeguards in section 205, and it therefore provides an appealing mechanism for law enforcement who want to – with legitimate reason or for ulterior purposes – access communications data.

38. As this is a form of surveillance, any application for metadata must be subject to the same safeguards as applications for other forms of communication data. It is therefore imperative that the surveillance authorised by section 205 be brought within Rica's scope.

39. We support the recommendation by IntelWatch that this can be done by the Bill repealing sections 15(1) and 59 of Rica, to require that all applications for access to any form of communications data be made under section 19 of Rica.

Bulk Surveillance

40. The Constitutional Court confirmed the High Court's finding that there was no law regulating bulk surveillance carried out by the National Communications Centre, and that this form of surveillance was therefore unlawful.

41. It therefore became imperative for a law to be introduced to regulate this form of surveillance. We understand that a General Intelligence Laws Amendment Bill has been prepared which locates the regulation of this type of surveillance within the security apparatus.

42. We are deeply concerned that any form of communication interception and surveillance will be within the power of the intelligence services – particularly as there is a system within Rica to regulate interception of communications.

43. Just because Rica has not dealt with bulk surveillance in the past does not mean it should not address it now. The High Court stated that even if it is assumed that bulk surveillance is desirable (which it does not accept as a fact), 'the least that can be required is a law that says intelligibly that the State can do so'.[2]

[2] High Court Judgment at para 163.

44. The Constitutional Court highlighted that Rica itself prohibits any 'communication interception without interception directions'.[3]

45. We therefore submit that it is an error to not address the regulation of bulk surveillance within these amendments.

Conclusion

46. The *amabhungane* Constitutional Court judgment was welcomed across the world. Edward Snowden – the whistleblower who exposed the secret surveillance conducted by the American National Security Agency (NSA) – commented 'wow' in response to the judgment's declaration that bulk surveillance was unlawful.

47. By requiring a rewriting of the surveillance system in the country, the judgment should therefore provide a golden opportunity for South Africa to continue this world-leading approach to regulating surveillance.

48. We call on Parliament to take bold steps to introduce strong and robust systems to protect the rights of surveillance subjects.

49. We propose that Parliament request an extension from the Constitutional Court to enable it to engage properly with how best Rica should be amended to ensure the rights of all surveillance subjects are protected and to ensure that all forms of communication interception are regulated through a single law (Rica).

[3] AmaBhunange Centre for Investigative Journalism v Minister of Justice and Correctional Services; Minister of Police v amaBhungane Centre for Investigative Journalism 2021 (2) SA 246 (CC), at para 133.