MEMORANDUM ON THE OBJECTS OF THE REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF COMMUNICATION-RELATED INFORMATION AMENDMENT BILL, 2023

PURPOSE OF BILL

1. The purpose of the Regulation of Interception of Communications and Provision of Communication-related Information Amendment Bill, 2023 (''the Bill''), is to amend the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, (Act No. 70 of 2002) (''the RICA''), to give effect to the Constitutional Court judgment in *Amabhungane Centre for Investigative Journalism and Others v Minister of Justice and Correctional Services and Others* [2021] ZACC 3. The Constitutional Court declared RICA unconstitutional, to the extent that it fails to provide adequate safeguards to protect the right to privacy, as buttressed by the rights of access to courts, freedom of expression and the media, and legal privilege. Parliament was given three years from 4 February 2021 to rectify the position.

2. The Bill gives effect to the Constitutional Court's judgment by providing for the notification of persons of their surveillance as soon as the notification can be given without jeopardising the purpose thereof after surveillance has been terminated. The Bill seeks to provide for the designation of an independent designated judge, the designation of an independent review judge, powers and functions of the review judge and the tenure of designated and review judges. It also seeks to provide for safeguards to address the fact that interception directions are sought and obtained *ex parte*. It further provides for procedures to ensure that data obtained pursuant to the interception of communications is managed lawfully and not used or interfered with unlawfully. The Bill further seeks to provide for procedures to be followed in examining, copying, sharing, sorting through, using, storing or destroying the data. Finally, the Bill provides for adequate safeguards where the subject of surveillance is a practising journalist or lawyer.

CLAUSE-BY-CLAUSE ANALYSIS

3. Clause 1 seeks to amend section 1 of RICA, by the substitution of the definition of ''designated judge'', the deletion of the definition of ''Telecommunications Act'' and the insertion of definitions of ''prescribe'', ''review judge'' and ''this Act''.

4. Clause 2 inserts Chapter 2A in RICA.

5. Proposed new section 15A provides for the designation of a designated judge. The Minister must designate a designated judge in consultation with the Chief Justice, by notice in the *Gazette*. A designated judge must perform all the functions conferred upon them independently and without fear, favour or prejudice. A designated judge is required to, in respect of an application in terms of section 16, 17, 18, 19, 20, 21 or 22, within five days of his or her decision to issue an order, judgment, direction, entry warrant, deferral order, declaratory order, subpoena, notice or other process, refer his or her the information or documentation considered in arriving at his or her decision together with a copy of the decision to the review judge. The clause also requires the designated to, in respect of applications in terms of section 23, after issuing a direction or entry warrant under subsection (3), or for an oral direction or an oral entry warrant under subsection (7); and for a decision under subsection (11) immediately refer a copy of his or her decision to the review judge. The clause further makes provision for the immediate implementation of the decision by the designated judge pending the review thereof by the review judge in terms of section 15C(1).

6. Proposed new section 15B provides for the designation of a review judge. The Minister must designate a review judge in consultation with the Chief Justice, by notice in the *Gazette*. A review judge must perform all the functions conferred upon them independently and without fear, favour or prejudice.

7. Proposed new section 15C provides for the powers and functions of the review judge and provides, *inter alia*, that the judge must, in respect of an application in terms of section 16, 17, 18, 19, 20, 21 or 22, within five days of the receipt of the information or documentation considered by the designated judge and the copy of the decision of the designated judge, consider and either confirm, vary or set aside the decision of the designated judge. The clause further requires the review judge to, in respect of an application in terms of section 23, confirm, vary or set aside any decision of a designated judge immediately or as soon as practicable upon receipt of the decision. The clause further provides that any decision by the review judge must be executed immediately upon receipt thereof by the applicant.

8. Proposed new section 15D provides for the tenure of the designated and review judges. It provides for a non-renewable period not exceeding seven years. It further provides for the termination of the tenure of designated and review judges.

9. Clause 3 inserts the new proposed section 23A in RICA. This clause provides that when the person in respect of whom a direction, extension of a direction or entry warrant is sought, is a journalist or practising lawyer, the designated judge must grant the direction, extension of a direction or entry warrant only if satisfied that it is necessary to do so, notwithstanding the fact that the subject is a journalist or practising lawyer, but on the conditions necessary to protect the confidentiality of a journalist's source or, in the case of a practising lawyer, to protect the legal professional privilege enjoyed by his or her clients.

10. Clause 4 inserts the new proposed section 25A in RICA to provide that within 90 days of the date of expiry of a direction or extension issued, the person who was the subject of the direction must be notified in writing of such direction. The applicant that obtained the direction or, if not available, any other law enforcement officer within the law enforcement agency concerned must within, 15 days of notifying the subject, certify in writing to the designated judge, Judge of a High Court, Regional Court Magistrate, or Magistrate that the person has been so notified. The clause also provides for the withholding of the notification for a period which must not exceed 90 days at a time or two years in aggregate on application to the designated judge, Judge of a High Court, Regional Court Magistrate, or Magistrate, if notification cannot be given without jeopardising the purpose of the surveillance, or if the notification has the potential to impact negatively on national security, such notification may, on application, be withheld for a period as may be determined by the designated judge.

11. Clause 5 amends section 35 of RICA by the deletion of paragraphs (*f*) and (*g*) of subsection (1). These paragraphs deal with prescribing information to be kept by the head of an interception centre and the manner in, and the period for, which such information must be kept.

12. Clause 6 amends section 37(1) of RICA by providing that the head of an interception centre must keep or cause to be kept proper records of such information as may be prescribed.

13. Clause 7 inserts the new proposed section 37A in RICA to provide that the procedures to be followed for the processing, examining, copying, sharing, disclosing, sorting through, using, storing or destroying of any data obtained pursuant and resulting from the interception of communications in terms of RICA and any other Act, must be in the prescribed manner and on the prescribed conditions. It also provides for the principles that must be taken into account regarding the management of data such as, *inter alia*, accountability, processing limitations, purpose-specific processing of data, conditions for the storage of data and security safeguards.

14. Clause 8 inserts the new proposed section 62D in RICA to provide that the Minister may make regulations. Any regulation made, which may result in the expenditure of State monies, must be made in consultation with the Minister of Finance, or any regulation which have a bearing on any designated or review judge, must be made in consultation with the Chief Justice.

15 Clause 9 provides for the laws amended and provides, in the Schedule, for the amendment of section 3 of the Intelligence Services Oversight Act, 1994 (Act No. 40 of 1994), by the substitution in paragraph *(a)* for subparagraph (iii). The amendment provides for the review judge to submit, in addition to the report by the designated judge, a report regarding his or her functions, together with any comments or recommendations which such review judge may deem appropriate: Provided that such report shall not disclose any information contained in an application or direction referred to in that Act.

16. Clause 10 provides for transitional measures. It provides that any judge whose designation prior to the commencement of Bill is still in force, will remain in force for five years from the date of commencement of the Bill. It provides that any order, judgment, direction, entry warrant, deferral order, declaratory order, oral direction, oral entry warrant, subpoena, notice or other process issued or made prior to the commencement of the Bill, which is still in force on the date of commencement of that Bill, must be regarded as having been issued under the Bill and remains in force until the period or extended period for which that order, judgment, direction, entry warrant, deferral order, declaratory order, oral direction, oral entry warrant, subpoena, notice or other process was issued or made, lapses. All pending matters must be further dealt with in terms of the Bill.

17. Clause 11 amends the arrangement of sections by inserting the new clauses provided for in the Bill.

18. Clause 12 contains the short title and date of commencement.

CONSULTATION

19. The Bill was developed in line with the Constitutional Court's judgment, and other relevant government departments were consulted.

IMPLICATIONS FOR PROVINCES

20. There are no implications for provinces.

FINANCIAL IMPLICATIONS FOR STATE

21. The financial implications to implement the Bill arise from the appointment of the review judge, and these costs are minimal as the judge is either retired or discharged from active service.

PARLIAMENTARY PROCEDURE

22. In *Tongoane and Others v Minister of Agriculture and Land Affairs and Other* 2010 (6) SA 214 (CC), (''Tongoane'') the Constitutional Court confirmed the test formulated in order to determine the classification of a Bill (''tagging test''). According to the CC, what matters for the purposes of tagging, is not the substance or purpose of the Bill, but rather whether the provisions of the Bill in ''substantial measure'' fall within a functional area listed in Schedule 4 to the Constitution of the Republic of South Africa, 1996 (''Constitution'').

23. In commenting on the ''substantial measure test'', the Constitutional Court made the following remarks:

> *"**[60]** The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its contentocess is concerned with the question of how the Bill should be*

considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content. . . .

[71] *On the other hand, the "substantial measure" test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.*

[72] *To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)–(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence*.". **[Our emphasis]**

24. As stated above, a Bill, the provisions of which in substantial measure fall within a functional area listed in Schedule 4 to the Constitution, must be classified as a section 76 Bill. To test whether the provisions of a Bill fall within a functional area listed in Schedule 4, the cumulative effect of all the provisions of the Bill must be taken into account in order to determine its impact on the provinces.

25. The Bill proposes amendments to RICA to address the unconstitutionality of RICA. The Department and State Law Advisers are of the view that the subject matter of the Bill does not fall within any of the functional areas listed in Schedule 4 to the Constitution. In view of the above discussion, the State Law Advisers and the Department are of the opinion that the Bill must be dealt with in terms of section 75 of the Constitution.

26. The State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(*a*)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since the Bill does not contain any provisions which directly affect customary law or the customs of traditional or Khoi-San communities.

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