

15 February 2024

Ms A. Sombex
Committee Secretary
Parliament of the Republic of South Africa
P.O. Box 15
CAPE TOWN
8000

By email: gilab2023@parliament.gov.za
asombexe@parliament.gov.za

Dear Ms Sombex

AFRIFORUM'S SUBMISSION ON THE GENERAL INTELLIGENCE AMENDMENT BILL

Introduction

AfriForum is a dedicated civil rights organisation and a registered non-profit company ardently defending the rights of all South Africans, with a special focus on safeguarding the rights of minority communities. We are steadfastly committed to the principles of equality, justice, and the pursuit of a free and fair society.

At the core of AfriForum's mission is the unwavering belief that a democratic nation thrives when its citizens enjoy robust civil liberties, transparent governance, and effective checks and balances. As advocates for a just and inclusive society, we scrutinise legislation that may impact individuals' fundamental rights and freedom.

AfriForum submits these comments in response to the invitation to provide feedback on the General Intelligence Laws Amendment Bill (GILAB). The subsequent analysis is rooted in our commitment to preserving the democratic values enshrined in the Constitution of South Africa.

AfriForum's submission can be summarised as follows:

First, AfriForum expresses profound concern regarding the expansion of vetting powers proposed in the GILAB. The broad definition of "person or institution of national security

Address: 58 Union Avenue, Kloofsig, Centurion • **Tel.:** 086 10 200 30

Member Affairs – Email: ledesake@afriforum.co.za • **Directors:** Ms A. Bailey, Mr P.J.W. Buys, Ms H.K. Coetzee, Mr P.L. Dekker, Mr F.J.D. de Klerk, Mr G.R. de Vries, Dr D.J. Hermann, Mr C.M. Kriel, Prof. J.J. Malan and Dr R. Pretorius. • **Company Secretary:** Mr W.A. Vogel.

Registration number: 2005/042861/08 • **NGO number:** 054 - 590

interest” raises apprehensions about potential infringements on freedom of association and the right to privacy. We contend that such extensive vetting powers may lead to undue surveillance, particularly affecting civil society.

Second, our submission addresses the inadequacies in oversight of mass surveillance capabilities introduced by the GILAB. The attempt to legalise the National Communications Centre’s operations lacks essential safeguards for privacy and freedom of expression. We argue that the proposed oversight mechanisms fall short of the standards set by the Constitutional Court, risking unchecked surveillance powers with insufficient protection against potential abuses.

Third, AfriForum underscores the GILAB’s failure to address longstanding issues related to oversight and accountability within the State Security Agency (SSA). The lack of provisions to strengthen the independence of the Inspector-General of Intelligence, coupled with historical challenges in preventing abuses, politicisation and corruption raises significant concerns. Our submission advocates for comprehensive reforms to establish a robust oversight framework and prevent the recurrence of past shortcomings.

In presenting these submissions, AfriForum aims to contribute to a thorough and constructive dialogue on the GILAB, advocating for legislative measures that align with constitutional principles and safeguard the democratic rights of all South Africans.

The current form of the GILAB necessitates careful scrutiny and robust engagement due to its potentially far-reaching implications on the democratic fabric of South Africa.

AfriForum acknowledges the complex nature of intelligence legislation and recognises the need for a balance between national security imperatives and the protection of individual rights. However, it is our firm belief that the proposed amendments, as they stand, are unconstitutional and compromise the very democratic values they aim to uphold.

AfriForum records that its submission does not seek to delve into intricate analyses of specific sections within the GILAB. Instead, the focus is on presenting a comprehensive overview and advocating for broad principles that align with constitutional norms. The intention is to address overarching concerns that have the potential to impact the rights and freedoms of South African citizens on a fundamental level. By adopting a holistic approach, we aim to contribute to a constructive and informed discussion surrounding the

GILAB, encouraging legislative measures that uphold national security and safeguard the cherished democratic principles enshrined in the Constitution.

Expansion of the SSA's vetting powers

It is deeply concerning that the GILAB mandates mandatory security “vetting” for entities outlined in the Bill in section 1(p).¹ This contentious provision causes significant apprehension within civil society due to its potential and likely intrusion into the functioning of civil society, which plays a vital role in upholding democratic values, human rights, and societal development.

The proposed security vetting requirement, as outlined in the GILAB, surpasses the registration and reporting obligations introduced by the 2022 General Laws Amendment Act. Rather than focusing on relevant intelligence or security risks, the GILAB's blanket vetting requirement for institutions that fit into GILAB's definitions of a “threat to national security”^{2, 3} raises concerns about the government's intentions. This gives rise to the possibility of hindering, delaying or even obstructing the establishment and operation of civil society institutions in South Africa.

Definition and implications of “Person or Institution of National Security Interest”

One of the primary concerns AfriForum raises is the broad and ambiguous definition of a “person or institution of national security interest” within the GILAB.⁴ This lack of specificity leaves the provision open to potential abuse, especially considering the alarming revelations of infiltration and corruption within state security structures, as exposed during the State Capture Commission Inquiry. The expansive nature of this definition raises questions about the criteria used to determine what constitutes a threat to national security, potentially leading to arbitrary and unchecked applications.

The principle of the rule of law mandates that laws should be clearly articulated and easily understood by the public.⁵ Furthermore, it explicitly prohibits any capricious exercise of governmental authority.⁶

The Constitutional Court has consistently held that the exercise of public power, encompassing lawmaking, must be characterised by rationality rather than arbitrariness.

In this context, “rationality” denotes a logical connection between the measures implemented and a valid governmental objective, necessitating an objective examination.⁷

The “proportionality” test mandates the Court to evaluate whether limitations on rights are reasonable and justifiable in an open and democratic society, grounded in principles of human dignity, equality, and freedom.⁸ This assessment incorporates various factors, including the nature of the right, the significance of the limitation’s purpose, the extent of the limitation, the correlation between the limitation and its objective, and the availability of less restrictive means to achieve the legitimate purpose.⁹ Additionally, “reasonableness” emerges as a specific standard for certain constitutional rights, such as the right to health or housing. Moreover, it serves as a criterion when scrutinising both the proportionality of limiting a constitutional right (as per section 36(1) of the Constitution) and the appropriateness of actions taken by the government to fulfil constitutional duties or attain legitimate state objectives.

Within the framework of a constitutional state, there is the underlying assumption of a system whose functioning can be logically assessed against the principles of the law. Arbitrariness, being inherently incompatible with the foundational tenets of our contemporary constitutional framework, disrupts these fundamental concepts. Actions or laws characterised by arbitrariness, or those that inevitably result in arbitrary applications, are against the precepts and principles of the Constitution.¹⁰ The nature of arbitrariness also leads, inevitably, to the unequal treatment of individuals. Decision-making based on arbitrariness fails to offer a rational justification for treating similarly situated individuals in significantly different ways, thereby necessitating unequal treatment.

While any law characterised by vagueness and ambiguity is susceptible to being deemed constitutionally invalid, our legal jurisprudence underscores that the courts’ approach extends beyond a mere examination of the text.¹¹ The context in which the law is applied, encompassing the subject matter and whether it encroaches upon fundamental rights, emerges as a pivotal factor in determining the constitutionality of any law plagued by vagueness. In essence, the interpretative scrutiny extends beyond the literal wording of the law, considering the broader implications on individual rights and the substantive nature of the subject matter at hand. The British case (*FC) & Others v Secretary of State for the Home Department*, as articulated by Lord Hoffman, emphasises that, while the government bears the responsibility of safeguarding the lives and property of its citizens,

this duty must be fulfilled consistently without jeopardising constitutional freedoms.¹² This principle underscores the imperative to protect essential rights even while pursuing security objectives.¹³

AfriForum contends that the GILAB's vague and expansive definition of a "person or institution of national security interest" raises significant apprehensions about its potential for abuse. The lack of specificity in the criteria for identifying such entities creates a risk of arbitrary and unchecked application. This contravenes the fundamental principles of the rule of law and the Constitutional Court's insistence on rational and proportional exercise of public power. The potential for unequal treatment and the absence of a rational justification further underscores the inadequacy of this provision. AfriForum urges careful reconsideration and clarification of this definition to align with constitutional principles and ensure the protection of individual rights in the face of national security considerations.

The proposed mandatory security vetting holds significant implications for various entities, including non-profit organisations, faith-based institutions, and businesses. These institutions, traditionally recognised as pillars of civil society, could face unwarranted interference and delays in their operations. This could impede their ability to contribute to social welfare, advocacy, and community development. Additionally, businesses engaging with the government may find themselves subject to vetting, raising concerns about fair competition, transparency, and the undue influence of state security in economic affairs.

AfriForum emphasises the potential threats to constitutional rights, specifically the freedom of association and the right to privacy, posed by the GILAB's provision on mandatory security vetting. The Constitution of South Africa enshrines these rights as fundamental, acknowledging the importance of fostering diverse associations and protecting individuals from unwarranted intrusions into their private affairs. In its current form, the proposed vetting requirement jeopardises these constitutional principles by potentially subjecting individuals and organisations to invasive scrutiny without a clear and justifiable cause.

Threats to the right to privacy

Privacy is a fundamental human right and serves as a cornerstone in the protection of individual autonomy and personal dignity.¹⁴ It is a right that, while not absolute¹⁵, demands

careful consideration and protection, especially in the context of legislation like the GILAB. AfriForum, as a staunch defender of constitutional liberties, raises significant concerns about the potential threats to the right to privacy under the current provisions of the GILAB.

The expansive and vague nature of the GILAB's provisions regarding "persons or institutions of national security interest" raises red flags in relation to the right to privacy. Privacy, as elucidated by the legal scholars Neethling, Potgieter and Visser, encompasses the ability to control the disclosure of personal information, deciding "when and under what conditions private facts may be made public."¹⁶ It is a nuanced right that recognises the shifting boundaries of personal space concerning communal relations and activities. However, this nuanced understanding of privacy seems to be at risk under the GILAB.

The GILAB's lack of clarity on what exactly constitutes a "person or institution of national security interest" leaves room for interpretation and, consequently, potential misuse. The right to privacy, even in the context of communal interactions, should not be compromised by arbitrary or overreaching government actions. AfriForum contends that the GILAB, in its current form, fails to strike the necessary balance between national security interests and the protection of individual privacy.

Historically, South Africa has witnessed abuses within state security structures, as evidenced by revelations during the State Capture Commission Inquiry.¹⁷ These revelations underscore the importance of robust safeguards against unwarranted intrusion into private lives. The GILAB's vague provisions open the door to potential misuse and abuse, jeopardising the hard-fought rights and freedoms that form the foundation of South Africa's democratic order.

The right to privacy, while not absolute, requires a delicate balance in the face of legislation that seeks to empower state intelligence services. AfriForum contends that the GILAB, in its current form, lacks the necessary safeguards to prevent unwarranted intrusions into the private lives of individuals and entities.

Moreover, the GILAB's provisions may have a chilling effect on the activities of NGOs and other entities, including businesses, operating in the public domain. Although the right to privacy does not extend directly to include juristic persons, it goes without saying that these NGOs consist of natural persons as employees, members, and supporters who do

unequivocally enjoy the constitutional right to privacy.¹⁸ The GILAB's potential to curtail the activities of these organisations without clear and justifiable criteria poses a significant threat to the democratic principles enshrined in the South African Constitution.

AfriForum emphasises the need for explicit and precise definitions within the GILAB to ensure that the right to privacy is not unduly compromised. The legislation must provide clear guidelines on the criteria for identifying "persons or institutions of national security interest" to prevent arbitrary and discriminatory applications. This is crucial not only for the protection of individual rights but also for maintaining public trust in the functioning of state intelligence services.

In conclusion, AfriForum urges a thorough re-evaluation of the GILAB's provisions concerning the right to privacy. The potential for misuse and abuse inherent in vague and expansive definitions underscores the urgency of refining the GILAB to align with constitutional principles and safeguard the privacy rights of all South Africans.

Threats to the right to freedom of association

Freedom of association, recognised as a fundamental human right, plays a pivotal role in the fabric of a democratic society.¹⁹ Alexis de Tocqueville's assertion that attacking freedom of association undermines the very foundations of society resonates strongly, especially in the context of legislative developments like the GILAB.²⁰

South Africa's Constitution explicitly safeguards the right to freedom of association under section 18, viewing it as an intrinsic component of the broader framework of democratic rights.²¹ This right, intertwined with the freedom of assembly, forms the bedrock of the country's constitutional democracy, promoting accountability and the advancement of individual and collective rights.

Legislative instruments such as the Non-Profit Organisations Act (NPO Act)²² and the Companies Act (CA)²³ are designed to create an enabling environment for the flourishing of associations. The NPO Act, developed through extensive collaboration between the government and civil society, reflects a positive and enabling approach. It recognises the importance of simplicity, transparency, and engagement in fostering a conducive environment for non-profit organisations. The NPO Act and the Companies Act exemplify

a balanced approach that addresses the need for transparency and accountability without infringing on the right to freedom of association or piercing the veil of NGOs.

In contrast, the GILAB, despite being framed as a response to the need for intelligence service reforms, introduces provisions that have the potential to impede the right to freedom of association. This is particularly evident in the expansion of vetting powers granted to the SSA, as the Bill looks to broaden the definition of state security.

Without detracting from any of the above-mentioned points, it must be articulated that AfriForum harbours a specially heightened concern regarding the prospect of increased surveillance of civil society organisations, especially those critical of the ruling party. The vague and broad language used in the GILAB, coupled with the above-mentioned history of political interference surrounding state security, leaves the door open for intelligence services to target organisations and individuals engaged in lawful political activities, protests, dissent, or advocacy. This issue cannot be taken lightly, as any such enabling of political interference from state actors would be detrimental to any notion of a free, fair, and democratic South Africa. Rather than promoting our constitutional values, this raises the spectre of civil rights groups being unfairly labelled as terrorist organisations, propelling us towards a future eerily reminiscent of our country's oppressive past.

The vetting processes outlined in the GILAB are particularly invasive, granting intelligence officers the authority to delve into criminal records, personal matters, and other information deemed relevant for security clearance. This could include scrutinising cell phone records, internet browsing history, and communication records, which, as discussed above, raises serious concerns about the right to privacy.

The GILAB, if enacted in its current form, could have a chilling effect on public participation and civil society engagement. The intelligence services' ability to spy on organisations and individuals involved in lawful political activities, coupled with the discretionary gathering of extensive personal information, poses a real threat to the robustness and vibrancy of democratic discourse.

Civil society, often a critical voice in holding the government accountable, may find itself subjected to unwarranted scrutiny and surveillance. The fear of being targeted could stifle legitimate activism, protest, and dissent – crucial elements of a healthy democracy.

In conclusion, AfriForum contends that the GILAB, with its expanded vetting powers and potential encroachments on constitutional rights, seriously threatens the right to freedom of association. The legislation must strike a balance between national security imperatives and the protection of individual liberties, ensuring that enabling legislation prevails over measures that could unduly restrict civil society's essential role in shaping democratic discourse. The potential chilling effect on public participation necessitates a careful re-evaluation of the Bill to align with constitutional principles and safeguard the rights enshrined in South Africa's Constitution.

Likely potential for abuse and misuse

The likely potential for abuse and misuse embedded within the GILAB raises significant concerns, transcending its intended purpose. As discussed above, if enacted, the GILAB would mandate extensive vetting processes for entities operating in the private domain. Despite its professed objectives of combating money laundering and criminal infiltration, the Bill elicits genuine fears of paving the way for a surveillance state.

The context of widespread abuse and state capture highlighted by the Zondo Commission underscores the need for intelligence reforms, which the GILAB aims to address.²⁴ However, its potential to overburden intelligence organisations and create a platform for abuse cannot be ignored. The South African government's approach, described as a "blank cheque and shotgun," introduces the risk of intelligence services exploiting their expanded powers.

As also discussed above, the compulsory vetting provision, for individuals or entities identified by the State as begin of national security interest might be subjected to intrusive security investigations is gravely concerning as this process, usually reserved for those with access to state-classified information, grants intelligence officers' access to sensitive information, ranging from criminal records to personal details. The lack of clarity in the Bill's language leaves room for broad interpretations, potentially exposing a wide range of organisations to state-sanctioned surveillance.

The GILAB introduces a second area of concern with the establishment of the National Communications Centre (NCC), a clandestine mass communications interception facility under the SSA's control.²⁵ Despite the Constitutional Court's ruling declaring the NCC

unlawful and calling for changes in surveillance legislation, the GILAB deliberately tries to sidestep these gains. The Bill proposes a framework that lacks detailed regulation on mass surveillance, raising questions about the scope and limitations of the NCC's operations. The potential for the mass interception of communications, including internet data traffic and phone conversations, without clear guidelines on retention and oversight, poses a serious threat to privacy and freedom of expression.

Finally, the GILAB fails to address longstanding issues related to secrecy laws dating back to the Apartheid era. The Security Service Secret Account Act of 1969, the Secret Services Account Act of 1978, and the Protection of Information Act of 1982 create an environment lacking transparency and accountability.²⁶ In its current form, the Bill missed a crucial opportunity to revoke these laws and replace them with alternatives that espouse our democratic values, promote effective oversight, and prevent abuse.

In essence, the GILAB can potentially become a vehicle for abuse and a precursor to State Capture 3 instead of being a progressive step towards intelligence reform. The concerns regarding compulsory vetting, ambiguous regulations on mass surveillance, and the perpetuation of the apartheid-era secrecy laws collectively underscore the need for a more comprehensive and rights-based approach to intelligence reform in South Africa.

Oral submission

Should the Ad Hoc Committee on the General Intelligence Laws Amendment Bill call for oral hearings, AfriForum kindly requests the opportunity to present its submission to the Committee.

Conclusion

AfriForum acknowledges the imperative need for intelligence reforms to address contemporary challenges and safeguard national security. However, the current form of the GILAB gives rise to profound concerns that cannot be overlooked. The expansion of vetting powers, inadequacies in oversight mechanisms, and the failure to address longstanding issues within the State Security Agency collectively pose a significant threat to the democratic fabric of South Africa.

AfriForum contends that the GILAB, in its present state, compromises the integrity of fundamental constitutional principles, particularly the rights to privacy and freedom of association. The broad and ambiguous definition of “persons or institutions of national security interest” raises apprehensions about potential abuses and arbitrary applications. The lack of specificity in criteria and the absence of robust oversight mechanisms open the door to unchecked surveillance, posing a threat to civil liberties.

The likely potential for abuse and misuse embedded within the GILAB raises genuine fears of creating a surveillance state. The Bill’s compulsory vetting provision and the establishment of the National Communications Centre without clear regulations on mass surveillance pose serious threats to privacy. The perpetuation of secrecy laws adds to the concerns, emphasising the need for a more comprehensive and rights-based approach to intelligence reform.

In essence, AfriForum urges the Ad Hoc Committee on the General Intelligence Laws Amendment Bill to engage in thorough deliberations to:

- recognise the dangers of political interference;
- reflect on the dark history of oppression cultivated by unaccountable and unrestrained intelligence institutions; and
- grant due consideration to the potentially far-reaching implications of the democratic values enshrined in the Constitution of South Africa.

We reiterate our commitment to fostering a just and inclusive society, calling for legislative measures that uphold constitutional principles while addressing genuine national security imperatives.

Yours sincerely

Jacques Broodryk
Spokesperson: Community Safety
AfriForum
Cell: 066 473 4429
Email: jacques.broodryk@afirforum.co.za

References

- ¹ Section 1(p) of the General Intelligence Laws Amendment Bill, B40-2023
- ² Section 1(t) of the General Intelligence Laws Amendment Bill, B40-2023)
- ³ Swart, H. 2023. *OPINION. New 'spy bill': Will businesses be next to face state security vetting?* News24, 27 November. Available at <https://www.news24.com/fin24/opinion/opinion-new-spy-bill-will-businesses-be-next-to-face-state-security-vetting-20231123>. Accessed on 22 January 2024.
- ⁴ *The General Intelligence Laws Amendment Bill*, B40-2023 section 1(t)
- ⁵ *SA Liquor Traders Association v Gauteng Liquor Board* 2009(1) SA 565 CC, at paras 26–28.
- ⁶ *New National Party v Government of the Republic of South Africa & Others* (CCT9/99) 1999 (5) BCLR 489 (New National Party), at paras 15–19.
- ⁷ *Pharmaceutical Manufacturers Association of South Africa & Another*. In re Ex Parte President of the Republic of South Africa & Others 2000 (3) BCLR 241, at par. 29.
- ⁸ Section 36 of the Constitution.
- ⁹ *Ibid.*
- ¹⁰ *Pharmaceutical Manufacturers Association of South Africa & Another*. In re Ex Parte President of the Republic of South Africa & Others 2000 (3) BCLR 241.
- ¹¹ *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* (CCT 59/2004) [2005] ZACC 14, at par. 249.
- ¹² *(FC) & Others v Secretary of State for the Home Department* [2004] UKHL 56 [95].
- ¹³ Eloff, D. 2021. The rationality test in lockdown litigation in South Africa. *African Human Rights Law Journal*, 21(2):1–24. DOI <https://doi.org/10.17159/1996-2096/2021/v21n2a46>.
- ¹⁴ *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)
- ¹⁵ *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC), at par. 106.
- ¹⁶ Neethling, J., Potgieter, J.M. & Visser, P.J. (Eds.). 2001. *Law of delict*. Fourth edition. Durban: Butterworths, p. 355.
- ¹⁷ *Judicial Commission of Inquiry into State Capture Report: Part V: Vol I: State Security Agency, and Crime Intelligence* (n.d.) Department of Justice and Constitutional Development. Department of Justice and Constitutional Development. Available at <https://www.justice.gov.za/commissions/STCC.htm>. Accessed on 19 January 2024.
- ¹⁸ See for example *Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another* 1993 (2) SA 451 (A), where a corporation had the right to sue for invasion of privacy where a newspaper had obtained information from a private memorandum and unlawful tape recordings.
- ¹⁹ Section 17 of the Constitution.
- ²⁰ De Tocqueville, A.C.H.M.C. (1835) *Democracy in America*. Available at <http://images.pcmac.org/SiSFiles/Schools/AL/SaralandCitySchools/SaralandHigh/Uploads/Forms/Democracy%20in%20America.pdf>. Accessed on 19 January 2024.
- ²¹ Section 17 of the Constitution.
- ²² Non-Profit Organisations Act 22 of 2022
- ²³ Companies Act 71 of 2008
- ²⁴ *Judicial Commission of Inquiry into State Capture Report: Part V: Vol I: State Security Agency, and Crime Intelligence* (n.d.) Department of Justice and Constitutional Development. Department of Justice and Constitutional Development. Available at <https://www.justice.gov.za/commissions/STCC.htm>. Accessed on 19 January 2024.
- ²⁵ Section 5 of the General Intelligence Laws Amendment Bill, B40-2023.
- ²⁶ Africa, S. 2009. The South African intelligence services: A historical perspective. In Africa, S. & Kwadjo, S. (Eds.). *Changing intelligence dynamics in Africa*. Birmingham: Global Facilitation Network for Security Sector Reform (GFN-SSR) / African Security Sector Network (ASSN), pp. 61–94.