CAMPAIGN FOR FREE EXPRESSION
PROTECTING AND EXPANDING THE RIGHT TO FREEDOM OF EXPRESSION FOR ALL

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The Hon. Mr G Magwanishe, MP

Chairperson: PC on Justice and Correctional Services

Per email: Ricabill@parliament.gov.za

2 October 2023

Dear Mr Magwanishe

WRITTEN SUBMISSIONS ON THE REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISIONS OF COMMUNICATION-RELATED INFORMATION AMENDMENT BILL (B28 – 2023) ("RICA")

I enclose CFE's written submissions on the above Bill for the Committee's consideration.

We request the opportunity to make oral submissions to the Committee, please.

Sincerely

Anton Harber

Executive Director

Submission on The Regulation Of Interception Of Communications And Provisions Of Communication-Related Information Amendment Bill (B28 – 2023) ("Rica")

To: The Parliamentary Committee on Justice and Correctional Services
From: The Campaign for Free Expression NPC (CFE)

1. Background on CFE

The Campaign for Free Expression (CFE) is a registered Public Benefit Organisation, a non-profit body dedicated to defending and expanding the right to free expression for all in Southern Africa. It is independent and non-partisan.

CFE's aims and activities include:

- Monitoring the free flow of ideas and information and reporting on relevant events and developments;
- Injecting an informed, principled, consistent, and fact-based freedom of expression position into the national discourse;
- Encouraging awareness of and support for freedom of expression across all elements of society, ensuring it is not just a concern for members of the media, but one for all citizens and members of civil society;
- Promoting transparency and access to information in all sectors of society;
- Undertaking strategic litigation to promote and defend free expression;
- Acting as a think-tank on policy, particularly around the complex issues arising from digital media, disinformation, and regulation.

CFE's Directors are Advocate Carol Steinberg SC, Prof Sizwe Mabizela, Dr Ismail Mahomed, Editor Adriaan Basson and Professor Anton Harber (Executive Director).

2. CFE's concern with RICA

CFE's concern that surveillance of citizens be properly regulated arises out of the impact of surveillance on privacy and therefore on free expression. In the words of Carly Nyst of Privacy International, "privacy and free expression are two sides of the same coin, each an essential prerequisite to the enjoyment of the other".[1] If one is to be free to form and express one's beliefs and opinions, then one needs the space and the privacy – the freedom from undue state interference – to develop these. A state that is monitoring its citizens and their communications without good cause is one in which citizens cannot freely exercise the right to hold, express and exchange ideas and thoughts. In particular, journalists and lawyers cannot conduct their work if they are subject to improper surveillance. Our

[1] https://privacyinternational.org/blog/1111/two-sides-same-coin-right-privacy-and-freedom-expression

concern therefore is to ensure that the Bill sets firm rules to ensure that surveillance is only carried out constitutionally, when absolutely necessary and with respect for the rights to privacy and free speech.

3. Process

CFE is concerned that the legislature is responding to the Constitutional Court judgement in amaBhungane v Minister of Justice[2] in a hurried and piecemeal way rather than undertaking what is really needed: a thorough review of policy and legislation to bring RICA up to date and in line with the Constitution. The Constitutional Court judgement in *amaBhungane* dealt only with matters raised in that case, and there are other elements of RICA that may be unconstitutional and should be reviewed. The most glaring example of this is the need to address the fact that the most frequently used law to access telephone and other data is Section 205 of the Criminal Procedures Act, which has lower requirements to obtain a warrant for data than RICA and none of the protections for journalists and lawyers. It would be remiss not to use this opportunity to address other potential problems in RICA.

4. Independence of Designated and Review Judges

The Bill set out that the RICA Judges will be appointed by the Minister in consultation with the Chief Justice. We believe that to maximise the protection from political interference, the appointments should be made by the President based on a nomination/s by the Chief Justice. Too much is at stake in this to cut corners in the process.

5. The Review Process

The proposed role of the Review Judge – to consider the Designated Judge's decision and either confirm, vary or set aside any decision by the Designated Judge – does not provide a substantial review. It means only that there will be two individual judges making successive decisions and the last one's decision will stand. Since they do not consult, and there is no requirement for the first judge to give the second judge reasons for their decisions, it is no more than a second, separate consideration of the decision. While we understand the need for a process that is efficient and confidential, this provides insufficient protection against error or abuse.

The fact that applications for surveillance will be dealt with *ex parte* opens up the process to potential error and abuse, as both judges will be dependent on the information provided by the applicant, who has an interest in gaining approval and not providing information which may undermine their application. The surveillance subject has no opportunity to challenge this information or provide other information. This means there is no adversarial element in this judicial process, and scrutiny of the evidence and argument presented by the applicant is limited to the judge's propensity to question it. Given the volume of applications that will likely come before these judges, this is insufficient protection.

There has been a proposal for a public advocate to be brought into the system. This would be a person with security clearance who is able to represent the absent surveillance target in ensuring that there is full and proper examination of the reasons for surveillance and to assist a person who wants to review the decision when they learn of it. This person would be there to assist the judges to ensure the process is full and proper. We support this.

We welcome the requirement that the subject be informed of the surveillance within 90 days of it lapsing, but the Bill does not require the official to do any more than inform the subject that they had

[2] AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC [2021] ZACC 3;2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC).

been under surveillance. They are not required to give documentation, reasons or the evidence on which it was based. They are not required to offer any appeal or review mechanism if the subject feels they were illegally surveilled. This is insufficient protection against the potential for error or abuse in an *ex parte* situation.

There are a number of possible ways to mitigate against the risk of error or abuse:

- Introduce a public advocate
- Both judges should be required to give reasons for their decisions, so that these are on record if their decisions are challenged at a later stage.
- The requirement to inform the subject within 90 days of the lapsing of the surveillance is too long. Undue delay potentially prejudices the subject and their capacity to retrospectively challenge the decision. In the event that there is cause for delay, the applicant could make an application to delay informing the subject within 30 days and there could be a limit on how long this extension can be.
- When notified of the surveillance, the subject should be given or be entitled to access the supporting documentation for the application, so that they are able to challenge any mis- or partial information.
- The subject should be entitled to see the judges' reasons for their decisions.
- The subject should be offered a quick and inexpensive channel for a review of the decision if there is prime facie evidence that the surveillance was wrongly approved.

6. Management of the data

The Constitutional Court ruled in *amaBhungane* that RICA failed to "adequately prescribe procedures to ensure that data obtained … is managed lawfully and not used or interfered with unlawfully, including prescribing procedures to be followed for examining, copying, sharing, sorting through, using, storing or destroying the data".

This new Bill is minimalist in dealing with this issue. It gives the Minister the power to make regulations and only sets out broad principles for these regulations. These principles are too broad and vague to meet the Constitutional Court's requirements. To deal with these crucial matters in regulation rather than in the statute delegates the authority downwards. It also makes no specific allowance for public consultation or transparency in the drawing up of these regulations. To comply with the Constitutional Court ruling, these matters need to be dealt with fully and properly in the law and not left to secondary regulation. If they are to be left to regulation, then an open process of public consultation should be a minimum requirement.

There is also no explicit oversight into the implementation of these regulations. Since this happens in secret, it is open to error and abuse unless there is a system of oversight. There should be a system of reporting on and/or oversight of the implementation of the data management regulations, possibly involving the RICA judges.

7. Section 205

Section 205 of the Criminal Procedure Act is used much more frequently than RICA to obtain call-related data or metadata. Since metadata can provide a considerable amount of information about a person's movements, habits and relationships, this is also a potential intrusion into privacy which needs to be properly regulated to protect against abuse. But controls over the use of Section 205 to obtain data are more lax and do not have the limitations and oversight elements of RICA. The most straightforward way to close this loophole would be to include a provision that only RICA may be used to access communication data for the purpose of surveillance. These applications would then be subject to the checks and balances in RICA.

8. Recommendations

We recommend that:

- **RICA judges be appointed by the President based on nominations by the Chief Justice.**
- **A public advocate be introduced into the process to ensure that the interests of the subjects of surveillance and the general public are represented in closed application hearings.**
- **RICA judges be required to give reasons for their decisions.**
- **The requirement to inform the subject within 90 days of the lapsing of the surveillance be shortened to 30 days, and a limit is put on the length of an extension.**
- **Subjects of surveillance, when notified post facto, should be entitled to access supporting document for the application for surveillance and the judges' reasons for their decisions.**
- **There be an efficient and inexpensive channel for a review of the decisions once the subject is informed of the surveillance.**
- **The provisions for proper management of surveillance data should be tightened and not left to regulation.**
- **Provision be made for full and detailed reporting on the implementation of the regulations governing the handling of data obtained through surveillance.**
- **A provision be introduced to ensure that all communication and data surveillance is done only through RICA.**
- **There be a full review of RICA with a view to updating it and ensuring that all of it – not just those dealt with in the Constitutional Court ruling – is brought into line with the Constitution.**

9. Conclusion

We request the opportunity to make oral representation to the Parliamentary Committee considering these submissions.

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