MALAWI GOVERNMENT

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Act

No. 30 of 2018

I assent

PROF. ARTHUR PETER MUTHARIKA
PRESIDENT
24th October, 2018

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An Act to provide for the establishment of the National Intelligence Service, to define its powers, functions and duties; to regulate the administration and control of the Service; and to provide for matters connected with or incidental thereto.

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

Short title and commencement

1. This Act may be cited as the National Intelligence Service Act, 2017, and shall come into operation on such date as the Minister shall appoint by notice published in the *Gazette*.

Interpretation

2. In this Act, unless the context otherwise requires—

"Service" means the National Intelligence Service established under section 3 of this Act;

"classified information" means information of a sensitive nature and value that its unauthorized publication or disclosure would lead to a security risk being posed to the State;

"Deputy Director General" means the person appointed as the Deputy Director General of the Service under section 6;

"Director General" means the person appointed as the Director General of the Service under section 5;

"intelligence" means any information collected and processed by an intelligence officer which has a bearing on the security interest of the Republic;

"intelligence officer" means an officer of the Service performing technical work relating to intelligence matters;

"premises" means any place or location, and includes land, building, building works, instrument, equipment or means of transport;

"security clearance" means an authorization entitling a person to have access to information of a determined sensitivity or classification;

"security vetting investigations" means a systematic procedure used to examine and appraise a person to determine his or her security standing, including the continued monitoring thereof;

"sensitive information" includes any information—

(*a*) which is likely to disclose the identity of, or provide details of, sources of information, other assistance or operational methods available to the Service;

(*b*) which relates to particular operations which have been, or are being proposed to be undertaken by the Service in pursuance of any of its functions; or

(*c*) which has been provided by an agency of a foreign government where that agency or government does not consent to the disclosure of the information;

"threat", in relation to the security of the Republic, means—

(*a*) any activity relating to espionage, sabotage, terrorism or subversion or any activity directed against, or detrimental to the interests of the Republic and includes any other activity performed in conjunction with any activity relating to espionage, sabotage, terrorism and subversion, but does not include any lawful advocacy, protest or dissent not performed in conjunction with any such activity;

(*b*) any activity directed at undermining, or directed at or intended to bring about the destruction, or overthrow of the constitutionally established Government by unlawful means;

(*c*) any act or threat of violence or unlawful harm that is directed at or intended to achieve, bring about or promote any constitutional, political, industrial, social or economic objective or change in the Republic and includes any conspiracy, incitement or attempt to commit any such act or threat; and

(*d*) any foreign influenced activity within or related to the Republic that—

(i) is detrimental to the interests of the Republic; and

(ii) is clandestine, deceptive or involves any threat whatsoever to the State or its citizens or any other person lawfully resident in the Republic;

"vettable post" means a post in any Government Ministry, Department or Agency requiring the holder of that post to have, in the performance of his official duties, access to sensitive or classified information; and

"VVIP" means a very, very important person as prescribed by the Minister, from time to time.

PART II—THE NATIONAL INTELLIGENCE SERVICE

The National Intelligence Service

3.—(1) There is hereby established a National Intelligence Service (in this Act, hereinafter referred to as "the Service").

(2) The Service shall be an independent State institution and shall report to the President.

(3) The President may delegate some or all of his powers under this Act to a Minister.

Duties and functions of the Service

4. The duties and functions of the Service shall be to—

(*a*) gather, evaluate, correlate, interpret, investigate, disseminate and store information, whether inside or outside the Republic, for the purposes of—

(i) detecting and identifying of threats to the security of the Republic;

(ii) advising the President and Government of any threat or potential threat to the security of the Republic;

(iii) taking steps to protect the security interests of the Republic whether social, military or economic; and

(iv) supporting the prevention or detection of serious crime;

(*b*) perform such tasks as may be necessary to protect the State from threats and acts of espionage, subversion, terrorism, sabotage or actions intended to undermine parliamentary democracy or to overthrow the Government by unconstitutional means;

(*c*) assist with vetting investigations for persons who hold or may hold vettable posts subject to formal security clearance, or who have or may have access to sensitive or classified information including persons seeking to obtain a Malawian citizenship;

(*d*) advise Government Departments, public bodies or institutions, and statutory bodies or corporations, on the protection of vital installations and classified information;

(*e*) make recommendations to the President in connection with—

(i) policies concerning security intelligence;

(ii) security intelligence priorities; and

(iii) security measures in Government Ministries, Departments or agencies;

(*f*) protect VVIPs; and

(*g*) exercise such other functions and duties as are conferred on the Service by or under this Act or any other written law.

(2) In performing its functions under this Act or any other written law, the Service shall, at all times, act in the national interest and comply with Chapter IV of the Constitution.

The Director General

5.—(1) The President shall appoint a Director General of the Service on such terms and conditions as the President may determine:

Provided that the appointment of the Director General shall be subjected to confirmation by the Public Appointments Committee of the National Assembly.

(2) A person shall not be appointed as Director General unless he or she;

(*a*) is a citizen of Malawi and does not owe allegiance wherever or in part to another country;

(*b*) is of high integrity;

(*c*) holds a degree from a recognized university or possesses qualifications and experience in intelligence or security matters;

(*d*) has the most suitable knowledge of the nature and functions of government and the public sector;

(e) upon appointment is not or remains;

(i) a Member of Parliament;

(ii) a Minister or Deputy Minister;

(iii) a serving member of the Judiciary;

(iv) a holder of office in a political party or its affiliate;

(v) a minor or person under legal disability;

(vi) a person who has been responsible for a loss suffered by lincensed financial institution in Malawi or else where;

(vii) a person who has been removed by a court of competent jurisidiction, whether in Malawi or elsewhere from an office of trust on account of misconduct in the exercise of his duties in that office;

(viii) In terms of any law in force in any country, adjudged or otherwise declared bankrupt or insolvent and has not been rehabilitated or discharged, made an assignment to or arrangement or composition with his or her creditors whom has not been rescinded or set aside;

(ix) convicted of an offence, the punishment which has no option of a fine;

(x) be in a position where there is a conflict of interest between the office of Director General and his business or personal interest.

(3) The Director General shall hold office for a term of three (3) years, and may be eligible for reappointment two times:

Provided that the office of Director General may become vacant—

(*a*) upon removal of the person from office by the President after giving him or her an apportunity to be heard from inability to perform the functions of his office however caused or for misconduct;

(*b*) upon resignination or ritirement of the Director General; or

(*c*) up to the end of the President's term of office,

whichever is sooner.

(4) The Director General shall—

(*a*) advise the President and Government on matters relating to national security and intelligence;

(*b*) be responsible for the day to day running of the Service, including—

(i) the performance of its functions in terms of this Act;

(ii) its general administration;

(iii) the promulgation and review of its internal regulations; and

(iv) the conduct of its intelligence officers and staff, and its internal disciplinary procedures;

(*c*) ensure that no information is obtained by the Service and no action is performed by the Service except so far as necessary for the proper discharge of its functions in terms of this Act;

(*d*) ensure that the Service is not, in the performance of its functions, influenced by considerations not relevant to its functions and that no action of the Service could give rise to reasonable suspicion that the Service is furthering, protecting, or undermining the interests of any particular section of the population or any political party or other organization in the Republic; and

(*e*) prepare and submit an annual report on the work of the Service to the President, or the responsible Minister and may at any time report to either of them on any matter relating to its work.

Deputy Director General

6.—(1) The President may appoint a Deputy Director General on such terms and conditions as the President may determine.

(2) A person shall not qualify for appointment as a Deputy Director General unless he is of high integrity and possesses qualifications and experience necessary for the performance of the duties of that office.

(3) The Deputy Director General shall hold office for a term of three (3) years, and may be eligible for reappointment.

(4) A person holding the office of Deputy Director General may be removed from office by the President in the same manner and on the same grounds as apply to the removal of a person holding the office of Director General.

Staff

7.—(1) There shall be employed, in the service of the Service and subordinate to the Director General and Deputy Director General, other staff as the Service shall consider necessary for the performance and exercise of its functions, duties and powers and who shall be officers in the public service appointed by the Service.

(2) The staff of the Service shall include—

(*a*) intelligence officers;

(*b*) other specialized staff; and

(*c*) support staff,

who shall be appointed on terms and conditions of service as the Minister, in consultation with the Secretary for Human Resource Management and Development, shall determine.

Oaths

8.—(1) The Director General and the Deputy Director General shall take an oath set out in a prescribed manner before the President.

(2) Staff, consultants, agents or other service providers to the Service shall take an oath or an affirmation and sign a declaration before a Commissioner for Oaths, in a prescribed manner, before being engaged on any matter, by the Service.

(3) Staff of the Service shall, before taking the oath referred to in subsection (1), answer truthfully all questions put to that person as to—

(*a*) the person's previous and present employment;

(*b*) whether the person has at any time been charged or convicted of any offence; and

(*c*) any other matter that the Director General may consider necessary.

(4) Staff of the Service who, having been required to furnish information or answer questions put to that member of staff, knowingly and willfully gives false or misleading information, commits an offence and shall be liable on conviction to imprisonment for ten years.

(5) A person who willfully fails to take the oath or affirmation and sign the declaration referred to in subsection (1) shall be deemed to have declined the offer of employment in the Service.

Certificate of identification and appointment

9. The Director General shall cause to be issued to every member of staff of the Service on appointment, a certificate of identity and appointment in a prescribed manner, which shall be the evidence of his appointment for the purposes of this Act.

Disciplinary Code

10. Every member of staff of the Service shall be subject to a Disciplinary Code as may be prescribed by this Act.

Prohibition of engagement in political activities

11.—(1) Staff of the Service shall not engage in any political activity or represent or act as an agent of any political party, group or individual.

(2) A member of staff who contravenes subsection (1) commits an offence and shall be liable, on conviction, to imprisonment for ten years.

Prohibition of torture

12.—(1) Staff of the Service shall not, in the performance of the functions or the exercise of powers under this Act, subject any person to torture or to any other cruel, inhuman or degrading treatment.

(2) A member of staff who contravenes subsection (1) commits an offence and shall be liable, on conviction, to imprisonment for ten years.

Prohibition of unauthorized disclosure of information

13.—(1) Staff, consultants, agents or other service providers of the Service shall not, without the consent in writing given by or on behalf of the Director General, publish or disclose to any person otherwise than in the course of duty of the member of staff, consultant, agent or service provider, the contents of any document, communication or information whatsoever, which relates to, and which has come to that person's knowledge in the course of that person's duties or to which that person has had access owing to the position that person holds or held or through any person who holds or has held any such office.

(2) A person who contravenes subsection (1) commits an offence and shall be liable, on conviction, to imprisonment for fifteen years.

Prohibition of unauthorized disclosure of information by former staff, etc

14.—(1) A Director General, a Deputy Director General, member of staff, consultant, agent or service provider who previously worked or offered services to the Service and is no longer holding office, employed, acting or offering services to the Service shall not, without the consent in writing given by or on behalf of the Director General, disclose any information or material received by the person during, or subsequent to, the person's service or employment with the Service to which the person has had access owing to the person's association with the Service.

(2) A person who contravenes subsection (1) commits an offence and shall be liable on conviction to imprisonment for twenty years.

Prohibition of unauthorized disclosure of information by third parties

15. If any person having information which to that person's knowledge has been published or disclosed in contravention of section 13 or section 14, unlawfully publishes or communicates any such information to any other person, that person commits an offence, and shall be liable, on conviction, to a fine of two million, five hundred thousand Kwacha and to imprisonment for five years.

Prohibition of false representation as to association with the Service

16. A person who, without prior written approval of the Director General, in connection with any activity carried out by him, takes, assumes, uses or in any manner publishes any name, description, title or symbol indicating or conveying or purporting to indicate or convey, or which is calculated or is likely to lead other persons to believe or infer, that such activity is carried on under or by virtue of the provisions of this Act commits an offence and shall be liable, on conviction, to imprisonment for fifteen years.

Prohibition of entry or access to premises and documents of the Service

17.—(1) Notwithstanding the provisions of any other written law, officers or representatives of Government Ministries or Departments, organizations, institutions, statutory bodies or any other unauthorized person or individual shall not, without the authority of the Director General or any other person designated in writing by the President or the Director General in that behalf, enter any premises of the Service or have any access to books, records, returns or other documents of the Service.

(2) The President or the Director General, or a person designated in that behalf by the President or the Director General, may restrict entry to any premises of the Service if, in the President's or Director General's opinion or that of the person designated, in that behalf, by the President or Director General, such access or entry is likely to—

(*a*) prejudice the security, defence or international relations of the Republic; or

(*b*) cause damage to or compromise the operational activities of the Service.

Prohibition of disclosure of identity

18.—(1) A person who has at his disposal information which he has obtained or to which he had access —

(*a*) by virtue of the performance of his duties or his functions under this Act or his position as a person who holds or has held any office in the Service; and

(*b*) from which the identity of any person can be inferred, who is or was a confidential source of information to the Service or is or was a member of staff of the Service engaged in covert operational activities of the Service ;

and discloses such information to any person other than a person to whom he is authorized to disclose it or to whom it may lawfully be disclosed, commits an offence and shall be liable, on conviction, to imprisonment for fourteen years.

Obstruction of officers of the Service

19. Any person who assaults, or physically obstructs any intelligence officer or staff of the Service in the lawful execution of his duties under this Act commits an offence and shall be liable on conviction to imprisonment for five years.

Submission of report to Parliament

20. The Minister shall annually submit a report on the activities of the Service to the Defence and Security Committee of Parliament.

Disclosure before Parliament

21.—(1) The Minister or Director General of the Service shall not be required to produce before Parliament any document or other evidence where the Director General certifies—

(*a*) that the document or other evidence belongs to a class of documents or evidence the production of which is prejudicial to the security of the State; or

(*b*) that disclosure of the evidence or of the contents of the document will be prejudicial to the security of the State.

PART III—WARRANTS

Application for a warrant

22. Where the Director General believes, on reasonable grounds, that a warrant under this section is required to enable the Service to perform any of its functions under this Act, he may apply to a Resident Magistrate for a warrant in accordance with this Part.

Matters to be specified in an application for a warrant

23.—(1) An application under section 22 shall specify—

(*a*) the purpose for which the warrant is sought;

(*b*) whether other investigative procedures have been tried and have failed or are unlikely to succeed, or whether the urgency of the matter is such that it would be impracticable to carry out the investigations using any other investigative procedures or that

without a warrant it is unlikely that information with respect to the investigation would be obtained;

(*c*) the type of information, material, record, document or thing proposed to be obtained and the power referred to in subsection (2) proposed to be exercised for that purpose;

(*d*) the identity of the person, if known, who has possession of the information, material, record, document or thing proposed to be obtained;

(*e*) where the purpose is to intercept a communication—

(i) the type of communication proposed to be intercepted, the type of information, records, documents or things proposed to be obtained and the powers to be used; and

(ii) the identity of the person, if known whose communication is proposed to be intercepted or who has possession of the information, record, document or thing proposed to be obtained;

(*f*) the persons or class of persons to whom the warrant is proposed to be directed; and

(*g*) a general description of the place where the warrant is proposed to be executed, if a general description of that place can be given.

(2) A Magistrate may issue a warrant under this section authorizing the taking of such action as is specified in the warrant in respect of any person, property or thing specified therein if the Magistrate thinks it necessary for the action to be taken in order to obtain any information, material, record, document or thing which is likely to be of substantial value in assisting the Service in the investigation in question and which cannot reasonably be obtained by any other means.

Effect of warrant

24.—(1) Without prejudice to section 23 (2), a warrant issued under that section may authorize the Service to obtain any information, material, record, document or thing and for that purpose—

(*a*) to enter any place, or obtain access to anything; and

(*b*) to search for or remove, examine or record in any other manner the information, material, record, document or thing.

(2) A warrant issued under this section shall be valid for a period not exceeding three months at a time and the period for which it has been issued shall be specified in the warrant.

(3) The magistrate who issues a warrant or a magistrate acting in his stead may, upon a written application made by the Director

General before the expiry of the period or extended period for which the warrant was issued, extend that period for a further period not exceeding one (1) month at a time if the Magistrate is convinced that the extension is necessary for the reasons mentioned in section 23 (2) and the reapplication shall include details of any previous applications.

(4) If, upon an application made by the Director General before the expiry of the period or extended period for which a direction has been issued, the Magistrate who issued the direction or a Magistrate acting in his stead is convinced that the grounds on which the warrant was issued have ceased to exist, the Magistrate shall cancel the warrant.

(5) A person aggrieved by the issue of the warrant or by the extension of the period of a warrant under this section may, within thirty days of the issuance of the warrant, appeal to the High Court.

Prohibition of interception, monitoring and search without a warrant

25. Any person who, and without a warrant issued under section 23 (2)—

(*a*) intentionally and without the knowledge or permission of the dispatcher intercepts a communication which has been or is being or is intended to be transmitted by telephone or any other manner over a telecommunications systems;

(*b*) intentionally monitors a conversation by means of a monitoring device so as to gather confidential or classified information concerning any person, body or organization; or

(*c*) intentionally and without the permission of the person who is lawfully in charge or in occupation of any premises enters upon the premises with the purpose of gathering information concerning a threat or potential threat to the security of the Republic in the discharge of a function in terms of this Act, to—

(i) search the premises;

(ii) examine, copy, photograph or transcribe any record, document or other material on the premises; or

(iii) remove any record, document or other material from the premises for the purposes of examining, copying, photographing or transcribing it,

commits an offence and shall be liable, on conviction to term of imprisonment for fifteen years.

PART IV—COMPLAINTS TRIBUNAL

Establishment and composition of a Complaints Tribunal

26.—(1) There is hereby established a tribunal to be known as the Complaints Tribunal (in this Act, hereinafter referred to as "the Tribunal") the objective of which is to investigate complaints under this Act.

(2) The Minister shall appoint members of the Tribunal as follows—

(*a*) a chairperson who shall be a serving High Court Judge or a retired High Court Judge, nominated by the Chief Justice;

(*b*) one person who shall have at least ten years' experience in intelligence work nominated by the Director General and;

(*c*) a human rights advocate nominated by the Human Rights Commission.

(2) The persons appointed to serve on the Tribunal shall take an oath of secrecy before assuming their functions.

Functions of the Tribunal

27.—(1) The functions of the Tribunal shall be to—

(*a*) hear, consider and determine complaints made to the Tribunal under this Act; and

(*b*) notify complainants of its determinations.

(2) The Tribunal shall not be under any duty to consider or determine any complaint which—

(*a*) appears to the Tribunal to be frivolous or vexatious or is not made in good faith;

(*b*) is the subject matter of an action before a court; or

(*c*) it considers to be prejudicial to the national security of the Republic.

Tenure of members of the Tribunal

28. The members of the Tribunal shall hold office for a period of three years and shall be eligible for reappointment for a further term of three years.

Notification to the Director General

29. The Tribunal shall not commence the examination of a complaint unless it has submitted to the Director General a written notice and the substance of the complaint.

Representation before the Tribunal

30. A person appearing before the Tribunal may—

(*a*) make a representation to the Tribunal;

(*b*) be represented by a lawyer of his choice; or

(*c*) produce evidence that he considers necessary for the investigations.

31.—(1) The Tribunal may exclude from its proceedings persons other than parties to the proceedings where it considers it necessary in the interest of defence, public safety, public order, public morality or the protection of the private lives of persons concerned in the proceedings. Proceedings of the Tribunal

(2) The Tribunal may call witnesses and request the production of documents as it considers necessary in the interest of justice.

(3) An intelligence officer or a member of staff of the Service shall disclose or give to the Tribunal such information or documents as they may require for the purpose of carrying out their functions under this Act.

(4) The Tribunal shall ensure that no document or information given or disclosed to the Tribunal by any person is disclosed without that person's consent to any complainant, and accordingly the Tribunal shall not give any reasons for a determination notified by them to a complainant.

32. The Tribunal shall notify the Director General and the complainant of its decision on the conclusion of an investigation of a complaint. Determination of the Tribunal

33. Where a notice of complaint is referred to the Tribunal, the Tribunal shall, after affording all parties concerned an opportunity to be heard, and after considering such evidence as may be tendered by them or on their behalf, have power to— Remedies of the Tribunal

(*a*) order that the complaint be dismissed;

(*b*) direct that the obtaining and provision of information in relation to the complainant, the conduct of other activities in relation to the complainant or to any property of the complainant should cease and that any records relating to such information so obtained or provided be destroyed;

(*c*) direct that any warrant which the Tribunal finds to have been improperly obtained be quashed;

(*d*) award compensation, where there is proof of pecuniary loss or damage.

34. An appeal against a decision of the Tribunal shall lie to the High Court within thirty days of the decision of the Tribunal. Appeal to the High Court

35. The Tribunal shall submit an annual report of its activities to the Minister and the Director General. Annual report of the Tribunal

PART VI—FINANCIAL PROVISIONS

36. The funds of the Service shall consist of— Funds of the Service

(*a*) sums appropriated annually by Parliament for the purposes of the Service; and

(*b*) other sums and assets as may vest in or accrue to the Service, whether in the course of discharging its functions or otherwise.

Expenses of the Service

37. The administrative expenses of the Service including salaries, allowances, gratuities and pensions of staff shall be charged on the Consolidated Fund.

Accounts

38. The Service shall—

(*a*) keep and maintain proper books and other records of accounts in respect of every financial year relating to the funds and other assets of the Service;

Cap. 37:01
Cap. 37:02
Cap. 37:03

(*b*) in every respect, comply with the Public Audit Act, Public Finance Management Act and Public Procurement and Disposal of Assets Act; and

(*c*) furnish to the responsible Minister in every financial year, or as often as the responsible Minister may direct, accounts in respect of its funds and other assets including an estimate of income and expenditure for the following financial year.

Audit

39. The books of accounts of the Service shall be audited by the Auditor General after each financial year in a manner agreedwith the Director General or the Minister.

PART V—MISCELLANEOUS

Annual reports

40.—(1) The Service shall, in each year, at a date as the Minister may direct, make a report to the President of its activities during the preceding year, and the Minister shall submit the annual report to the Defence and Security Committee of Parliament.

(2) Whenever the President so directs, the annual report shall also include information on particular aspects of the Service's activities under this Act as the President may specify.

Immunity of staff of the Service

41. An action or other proceedings shall not lie against the Director General, the Deputy Director General or staff of the Service in respect of any act or thing done or omitted to be done, in good faith, in the exercise of his duties under this Act.

Pension and other funds

42.—(1) The Service may, out of its revenues, establish and maintain pension, superannuation, provident or other funds as it may consider desirable for the provision of payment of benefits or other allowances on death, sickness, injury, superannuation, resignation, retirement or discharge of its staff and may make rules providing for payment of money out of its revenues to the funds and providing for contributions to the funds by its staff.

(2) The Director General may enter into contract with insurance companies or other bodies for the maintenance and administration of the funds authorized under subsection (1).

Regulations

43. The Minister may make regulations for the better carrying out of the provisions of this Act.

Transitional arrangements

44.—(1) The person holding the office of Director General or Deputy Director General of the National Intelligence Bureau immediately before the commencement of this Act shall continue to hold office as the Director General or Deputy Director General of the Service on the same terms and conditions of employment and in accordance with the provisions of this Act.

(2) Every member of staff of the National Intelligence Bureau immediately before the commencement of this Act, shall continue to hold office as a member of staff of the Service upon the same terms and conditions of employment and in accordance with the provisions of this Act.

(3) Every work, assignment, investigation, inquiry or examination undertaken or being undertaken by the National Intelligence Bureau on or before the commencement of this Act shall continue to have effect or be undertaken by the Service in accordance with the provisions of this Act.

(4) A member of staff of the Service shall, at the commencement of this Act, take an oath and sign a declaration within three months after the commencement of this Act.

(5) A person who willfully fails to take the oath and sign the declaration within the period specified in subsection (4) shall be deemed to have resigned from the Service.

Passed in Parliament this twelveth day of June, two thousand and eighteen.

FIONA KALEMBA
Clerk of Parliament