

REPUBLIC OF SOUTH AFRICA

**NATIONAL STRATEGIC
INTELLIGENCE
AMENDMENT BILL**

*(As amended by the Ad Hoc Committee on Intelligence Legislation (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF INTELLIGENCE)

[B 51B—2002]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the National Strategic Intelligence Act, 1994, so as to exclude the Minister as a member of Nicoc; to redefine counter-intelligence; to provide for security screening by the relevant members of the national intelligence structures; to further define the functions of the Minister pertaining to co-ordination of intelligence; and to regulate the functions of the National Intelligence Structures; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 39 of 1994, as amended by section 1 of Act 37 of 1998 and section 24 of Act 66 of 2000

1. Section 1 of the National Strategic Intelligence Act, 1994 (hereinafter referred to as the principal Act), is hereby amended— 5

(a) by the substitution for the definition of “counter-intelligence” of the following definition:

“ ‘counter-intelligence’ means measures and activities conducted, instituted or taken to impede and to neutralise the effectiveness of foreign or hostile intelligence operations, to protect **[classified]** intelligence and any classified information, to conduct security screening investigations and to counter subversion, treason, sabotage and terrorism aimed at or against personnel, strategic installations or resources of the Republic;”;
and 15

(b) by the insertion after the definition of “regulation” of the following definition:

“ ‘relevant members of the National Intelligence Structures’ means—
(a) the intelligence division of the National Defence Force;
(b) the intelligence division of the South African Police Service;
(c) the Agency; and
(d) the Service;”;
20

(c) by the insertion after the definition of “South African Police Service” of the following definition:

“ ‘subversion’ means any activity intended to destroy or undermine the constitutionally established system of government in the Republic of South Africa;” 25

Amendment of section 2 of Act 39 of 1994, as amended by section 2 of Act 37 of 1998

2. Section 2 of the principal Act is hereby amended—

- (a) by the addition to subsection (1)(b) of the following subparagraphs:
- “(iv) supply intelligence relating to any such threat to the Department of Home Affairs for the purposes of fulfilment of any immigration function; and 5
- (v) supply intelligence relating to national strategic intelligence to Nicoc;”;
- (b) by the substitution for subparagraphs (a) and (b) of subsection (3) of the following subparagraphs: 10
- “(a) to gather, correlate, evaluate, co-ordinate and use crime intelligence in support of the objects of the South African Police Service as contemplated in section 205(3) of the Constitution;
- (b) to institute counter-intelligence measures within the South African Police Service;”; and 15
- (c) by the addition to subsection (3) of the following paragraph:
- “(c) to supply crime intelligence relating to national strategic intelligence to Nicoc.”.

Insertion of section 2A in Act 39 of 1994

3. The following section is hereby inserted in the principal Act after section 2: 20

“Security screening investigations

- 2A.** (1) The relevant members of the National Intelligence Structures may conduct a security screening investigation to determine the security competence of a person if such a person—
- (a) is employed by or is an applicant to an organ of state; 25
- (b) is rendering a service or has given notice of intention to render a service to an organ of state, which service may—
- (i) give him or her access to classified information in the possession of the organ of state; or
- (ii) give him or her access to areas designated national key points in terms of the National Key Points Act, 1980 (Act No. 102 of 1980). 30
- (2) The Agency shall be responsible for security screening of persons contemplated in subsection (1) and, on request of the South African Police Service or the Department of Defence, persons employed by, applicants to or persons rendering a service to the South African Police Service or the Department of Defence. 35
- (3) Notwithstanding the provisions of subsection (2), the Agency may request the assistance of the South African Police Service or the National Defence Force in the performance of the function contemplated in subsection (2). 40
- (4) (a) In performing the security screening investigation contemplated in subsection (1), the relevant members of the National Intelligence Structures may use a polygraph to determine the reliability of information gathered during the investigation. 45
- (b) For the purpose of this section, “polygraph” means an instrument used to ascertain, confirm or examine in a scientific manner the truthfulness of a statement made by a person.
- (5) The relevant members of the National Intelligence Structures may gather information relating to— 50
- (a) criminal records;
- (b) financial records;
- (c) personal information; or
- (d) any other information which is relevant to determine the security clearance of a person: 55
- Provided that where the gathering of information contemplated in paragraphs (c) and (d) requires the interception and monitoring of the communication of such a person, the relevant members shall perform this

function in accordance with the provisions of the Interception and Monitoring Prohibition Act, 1992 (Act No.127 of 1992).

(6) The head of the relevant National Intelligence Structure may, after evaluating the information gathered during the security screening investigation, issue, degrade, withdraw or refuse to grant a security clearance. 5

(7) The head of the relevant National Intelligence Structure may establish a security screening Advisory Board comprising of members or employees of the relevant National Intelligence Structure to assist him or her in the determination of the security competency of a person.

(8) (a) A person whose security clearance has been refused, withdrawn or degraded may in the prescribed manner appeal to the Minister responsible for the relevant National Intelligence Structure. 10

(b) Such appeal shall—

(i) be lodged within 60 days from the date on which the decision was made known by the head of the relevant National Intelligence Structure or such later date as the Minister permits; and 15

(ii) set out the grounds for the appeal.

(c) After considering the grounds of appeal and the head of the relevant National Intelligence Structure's reasons for the decision, the Minister shall as soon as practicable— 20

(i) confirm, set aside or vary the decision; or

(ii) substitute any other decision for the decision of the relevant National Intelligence Structure.

(9) The Director-General of the Agency may in the prescribed manner issue functional directives on— 25

(a) usage and application of polygraph;

(b) criteria for determining security competence; and

(c) levels of security clearance.

(10) The directives contemplated in subsection (9) shall be issued with the approval of the Minister, who shall act in consultation with the Minister of Safety and Security and the Minister of Defence, and shall apply to all the relevant National Intelligence Structures.”. 30

Amendment of section 4 of Act 39 of 1994, as amended by section 37 of Act 37 of Act 37 of 1998 and section 25 of Act 66 of 2000

4. Section 4 of the principal Act is hereby amended by the deletion of paragraph (a) of subsection (1). 35

Amendment of section 5 of Act 39 of 1994, as amended by section 5 of Act 37 of 1998

5. Section 5 of the principal Act is hereby amended by the deletion of paragraph (b) of subsection (1).

Amendment of section 5A of Act 39 of 1994, as inserted by section 5 of Act 37 of 1998 40

6. Section 5A of the principal Act is hereby amended by the substitution for subsection (3) of the following subsections:

“(3) Subject to subsection (2), the Minister may, for the purposes of the functions contemplated in subsection (1), establish such support structures as are necessary— 45

(a) for the efficient co-ordination of intelligence; and

(b) to assist the Minister to advise the President and the national executive.

(4) The Minister may delegate, the function contemplated in subsection (3) to the Co-ordinator for Intelligence. 50

(5) The Minister shall advise the President and the national executive on national strategic intelligence and co-ordination of intelligence.”.

Substitution of section 6 of Act 39 of 1994, as amended by section 7 of Act 37 of 1998 and section 26 of Act 66 of 2000

7. The following section is hereby substituted for section 6 of the principal Act: 55

“Regulations

- 6.** (1) The Minister may, subject to subsection (2), make regulations regarding—
- (a) the protection of information;
 - (b) the carrying out of security screening investigations by members of the National Intelligence Structures;
 - (c) co-ordination of intelligence as an activity;
 - (d) production and dissemination of intelligence for consideration by Cabinet and the executive;
 - (e) the co-ordination of counter-intelligence by the Agency;
 - (f) the co-ordination of crime intelligence; and
 - (g) any other matter necessary for the effective administration of this Act.
- (2) Any regulation which may affect a function of the National Defence Force or the South African Police Service shall be made in consultation with the Minister responsible for that Force or Service, as the case may be.
- (3) A security screening investigation contemplated in subsection (1)(b) may entitle the relevant members of the National Intelligence Structures concerned to subject the person undergoing a security screening investigation to a polygraph examination as prescribed, in order to determine the reliability of information provided by him or her.
- (4) Where a person is subject to a security screening investigation contemplated in subsection (1)(b), the relevant members of the National Intelligence Structures may have access to—
- (a) his or her financial records;
 - (b) his or her criminal records;
 - (c) personal information in the possession of referees or any other person who has knowledge of the person who is subject to a security screening investigation; and
 - (d) any other information which is relevant to determine the security competency of that person:
- Provided that where the gathering of information contemplated in paragraphs (c) and (d) requires interception and monitoring of the communications of such a person, the relevant members of the National Intelligence Structures shall perform this function in accordance with the provisions of the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992).
- (5) A regulation made under this Act may not be published in the *Gazette*, but where such a regulation affects the members of the National Intelligence Structures or their functioning, the affected parties must be notified in a manner determined by the Minister.
- (6) A regulation made under this section may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.”.

Short title and commencement

8. This Act is called the National Strategic Intelligence Amendment Act, 2002, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM OF THE OBJECTS OF THE NATIONAL STRATEGIC INTELLIGENCE AMENDMENT BILL, 2002

1. The National Strategic Intelligence Act, 1994 (Act No. 39 of 1994) (“the Act”) was promulgated in 1995 to provide for:
 - The establishment of the National Intelligence Co-ordinating Committee (“Nicoc”);
 - the Co-ordinator of Intelligence within the national intelligence structures;
 - the defining of the functions of the national intelligence structures;
 - a Co-ordinator who would be responsible for the co-ordination of intelligence;
 - Nicoc to advise Cabinet with respect to national strategic intelligence.
2. In 1995, subsequent to the promulgation of the Act, the President called for the demarcation of the political responsibility of the Minister responsible for Intelligence and that of the Co-ordinator of Intelligence.
3. As a result of the abovementioned, the Act was amended in 1998 to provide for:
 - Separation of the responsibilities of the Co-ordinator from those of the Minister for Intelligence Services with regards to co-ordination of intelligence;
 - the Minister as a member of Nicoc to advise Cabinet on co-ordination of intelligence;
 - a Co-ordinator who would be chief functionary of Nicoc;
 - Nicoc and the Co-ordinator to function under the supervision of the Minister of Intelligence;
 - The Minister as the political head responsible for co-ordination of intelligence.
4. A review of the functioning of Nicoc was conducted and a need arose to strengthen the legal mandate, in order to put intelligence at the centre of government business.

5. CONTENTS OF THE BILL

- (a) To exclude the Minister as a member of Nicoc;
- (b) To define counter-intelligence to expressly:
 - encompass security screening investigations; and
 - include treason as part of the definition;
- (c) To define subversion;
- (d) To empower the Minister to establish structures to assist him or her in the advisory function to Cabinet and the national executive on co-ordination of intelligence and national strategic intelligence;
- (e) To provide for the Agency to supply counter-intelligence relating to national strategic intelligence to Nicoc;
- (f) To provide for the South African Police Service to co-ordinate crime intelligence and to supply crime intelligence relating to national strategic intelligence to Nicoc; and
- (g) To provide for regulations on:
 - security screening investigations;
 - co-ordination of intelligence; and
 - protection of information.

6. CONSULTATION

The following bodies and departments were consulted:

- Presidential Intelligence Budget Advisory Committee
- Department of Safety and Security
- Department of Public Service and Administration
- Department of Defence

7. FINANCIAL IMPLICATIONS FOR STATE

None.

8. PARLIAMENTARY PROCEDURE

The State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

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