

REPUBLIC OF SOUTH AFRICA

**NATIONAL STRATEGIC
INTELLIGENCE AMENDMENT
BILL**

*(As introduced in the National Assembly (proposed section 75);
explanatory summary of Bill published in Government Gazette No. 31126 of 5 June 2008)
(The English text is the official text of the Bill)*

(MINISTER FOR INTELLIGENCE)

[B 38—2008]

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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 insert new definitions; and to provide for the functions of the National Communications Centre; 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, section 1 of Act 66 of 2000, section 1 of Act 67 of 2002 and section 1 of Act 52 of 2003 5

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

(a) by the insertion after the definition of “Cabinet” of the following definition:
 “**communication**” means communication as defined in the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act No.70 of 2002);”; 10

(b) by the insertion after the definition of “foreign military intelligence” of the following definition:
 “**foreign signals intelligence**’ means intelligence derived from the interception of electromagnetic, acoustic and other signals, including the equipment that produces such signals, and includes any communication that emanates from outside the borders of the Republic, or passes through or ends in the Republic;”; 15

(c) by the substitution for the definition of “**National Intelligence Structures**” of the following definition: 20

“**National Intelligence Structures**’ means—

- (a) Nicoc;
- (b) the intelligence division of the National Defence Force, established under the Defence Act, 2002 (Act No. 42 of 2002);
- (c) the intelligence division of the South African Police Service; 25
- (d) the Agency; **[and]**
- (e) the Service; and
- (f) the NCC;”;

- (d) by the insertion after the definition of “Minister” of the following definition:
“‘NCC’ means the National Communications Centre established by section 3(2A) of the Intelligence Services Act, 2002 (Act No. 65 of 2002), as amended;”; and
- (e) by the addition of the following definition after the definition of “this Act”:
“‘vetting field work units’ means the vetting field work units referred to in section 2A(5A).”.

Amendment of section 2 of Act 39 of 1994, as amended by section 2 of Act 37 of 1998 and section 2 of Act 67 of 2002

2. Section 2 of the principal Act is hereby amended by the insertion after subsection (2) of the following subsection: 10

“(2A) (a) The functions of the NCC shall, subject to section 3, be—

- (i) to collect and analyse foreign signals intelligence in accordance with the intelligence priorities of the Republic; 15
- (ii) to control and advise on the provision and application of cryptographic solutions in the Republic, in consultation with the relevant stakeholders;
- (iii) to promote the co-ordination and optimal usage of all national signals intelligence resources and platforms in the Republic; and
- (iv) to undertake and co-ordinate research, design and development of all cryptographic solutions and information communications technology security systems and products for all organs of state, in consultation with the relevant stakeholders. 20

(b) The NCC may perform the functions contemplated in paragraph (a) only for the following objectives:

- (i) To identify any threat or potential threat to the security of the Republic or its people; 25
- (ii) to protect and advance international relations and the economic well-being of the Republic;
- (iii) to support the prevention or detection of serious crime directed and committed against the Republic and its citizens; and 30
- (iv) to support the prevention and detection of regional and global hazards or disasters that threaten life, property and the environment.

(c) The NCC shall perform the functions contemplated in paragraph (a) with due regard for the rights set out in Chapter 2 of the Constitution and subject to paragraph (d). 35

(d) The Minister shall regulate and authorise in writing the activities of the NCC under this section, and in particular authorise each target or communication which is to be monitored or intercepted, if the Minister is satisfied that such activities are necessary to achieve the objectives set out in paragraph (b). 40

(e) The NCC is prohibited from intercepting any communications that do not fall within the definition of “foreign signals intelligence”.

(f) The Director-General of the NCC may, in writing and at the expense of the NCC, request a telecommunications service provider or signals distributor to render such assistance as may be necessary to enable the NCC to execute its functions in terms of this Act. 45

(g) The Director-General of the NCC shall exonerate the telecommunications service provider or signals distributor contemplated in paragraph (f) from any liability which may arise as a result of rendering such assistance.

(h) The Director-General of the NCC shall, for the purposes of preventing or detecting serious crime in the Republic, retain the information pertaining to such crime, which comes into the possession of the NCC in the performance of its functions in terms of this section, and refer such information to the relevant law enforcement agency. 50

(i) The Inspector-General of Intelligence contemplated in section 7 of the Intelligence Services Oversight Act, 1994 (Act No. 40 of 1994), shall report annually to Parliament on the activities of the NCC, and in such report indicate any contraventions by the NCC of the provisions of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act No.70 of 2002). 55

(j) Any official of the NCC who monitors or intercepts any communication without the authorisation of the Minister as contemplated in paragraph (d), or who acts contrary to such authorisation, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.”

Amendment of section 2A of Act 39 of 1994, as amended by section 2 of Act 52 of 2003 5

3. Section 2A is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection:
 “(2) (a) The Agency shall be responsible for security screening of persons contemplated in subsection (1) **[and, on request of]**. 10
 (b) **[the]** The South African Police Service, the Service **[or]** and the National Defence Force, shall be responsible for security screening of persons employed by, applicants to or persons rendering a service to the South African Police Service, the Service **[or]** and the Department of Defence.”; 15
- (b) by the substitution for subsection (3) of the following subsection:
 “(3) Notwithstanding the provisions of subsection (2), the Agency may request the assistance of the South African Police Service **[or]**, the National Defence Force, the Service or the vetting field work units in the performance of the function contemplated in subsection (2)(a).”; 20
- (c) by the insertion of the following subsection after subsection (5):
 “(5A) (a) The organs of state may, on request by and with the permission of the Agency, establish units to be known as vetting field work units.
 (b) The vetting field work units may, on request by the relevant members of the National Intelligence Structures, assist such members in gathering the information contemplated in subsection (5).”; and 25
- (d) by the substitution for subsection (6) of the following subsection:
 “(6) The head of the relevant National Intelligence Structure or any official delegated by him or her in writing may, after evaluating the information gathered during the security screening investigation, issue, degrade, withdraw or refuse to grant a security clearance.”. 30

Amendment of section 4 of Act 39 of 1994, as amended by section 4 of Act 37 of 1998, section 25 of Act 66 of 2000 and section 4 of Act 67 of 2002

4. Section 4 of the principal Act is hereby amended— 35

- (a) by the substitution for subsection (1) of the following subsection:
 “(1) There is hereby established a National Intelligence Co-ordinating Committee, which shall consist of—
 (a)**[(b)]** the Co-ordinator for Intelligence appointed under section 5(1), who shall be the chairperson; 40
[(c)](b) the Director-General of the Agency;
[(d)](c) the Director-General of the Service;
[(e)](d) the **[chief of the intelligence division]** Chief of Defence Intelligence of the National Defence Force; **[and]**
[(f)](e) the **[head of the intelligence division]** Divisional Commissioner for Crime Intelligence of the South African Police Service[,]; 45
(f) the Director-General of the NCC;
(g) the Director-General of the Presidency; and
(h) the Director-General of the Department of Foreign Affairs, 50
 or the alternates of the persons mentioned in paragraphs (b) to **[(f)](h)**, and such members of departments of State who are co-opted by Nicoc on a permanent or an *ad hoc* basis.”; and
- (b) by the insertion after subsection (1) of the following subsection:
 “(1A) The alternates contemplated in subsection (1) must be of the rank of deputy head of the services in question.”. 55

Amendment of section 6 of Act 39 of 1994

5. Section 6 of the principal Act is hereby amended by the insertion in subsection (1) of the following paragraph after paragraph (c):

“(cA) the manner in which an authorisation contemplated in section 2(2A)(d) may be executed;”.

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Amendment of laws

6. The laws mentioned in the first column of the Schedule are hereby amended to the extent specified in the third column of that Schedule.

Short title and commencement

7. This Act is called the National Strategic Intelligence Amendment Act, 2008, and 10 comes into operation on a date fixed by the President by proclamation in the *Gazette*.

Schedule 1

PART A

LAWS AMENDED

(Section 6)

No. and year of Act	Short title	Extent of amendment	
Act 40 of 1994	Intelligence Services Oversight Act, 1994	<p>1. Amendment of section 1 by—</p> <p>(a) the substitution for the definition of “Head of a Service” of the following definition:</p> <p style="padding-left: 40px;">“Head of a Service” means the Director-General of the Agency [or] of the South African Secret Service or of the National Communications Centre, the head of the Intelligence Division of the National Defence Force or the head of the Intelligence Division of the South African Police Service, but for the purposes of financial and administrative accounting, the head of the Intelligence Division of the South African National Defence Force means the Secretary for Defence and of the South African Police Service means the National Commissioner;”;</p> <p>(b) the insertion after the definition of the “National Defence Force” of the following definition:</p> <p style="padding-left: 40px;">“NCC” means the National Communications Centre established in terms of section 3(2A) of the Intelligence Services Act, 2002;”;</p> <p>(c) the substitution for the definition of “Services” of the following definition:</p> <p style="padding-left: 40px;">“Services” means the Agency, the South African Secret Service, the NCC, the Intelligence Division of the National Defence Force and the Intelligence Division of the South African Police Service;”; and</p> <p>(d) the substitution for the definition of “intelligence services” of the following definition:</p> <p style="padding-left: 40px;">“intelligence services” means the National Intelligence Agency [and] the South African Secret Services and the National Communications Centre, as [referred to] defined in section 1 of the Intelligence Services Act, 2002;”.</p>	<p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p> <p>40</p> <p>45</p> <p>50</p>

No. and year of Act	Short title	Extent of amendment
		<p>2. Amendment of section 7 by the substitution in subsection (7) for paragraph (cA) of the following paragraph: “(cA) to receive and investigate complaints from members of the public and members of the Services on alleged mal-administration, abuse of power, transgressions of the Constitution, laws and policies relating to intelligence and counter-intelligence referred to in paragraph (a), the commission of an offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and improper enrichment of any person through an act or omission of any member;”.</p>
Act 70 of 2002	Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002	<p>1. Amendment of section 1 by— (a) the substitution for paragraph (c) of the definition of “law enforcement agency” of the following paragraph: “(c) the Agency, [or] the Service or the NCC;”; and (b) the substitution for paragraph (c) of the definition of “law enforcement officer” of the following paragraph: “(c) the Agency, [or] the Service or the NCC;”.</p> <p>2. Amendment of section 34 by the substitution in subsection (4) for paragraph (a) of the following paragraph: “(a) members of the law enforcement agencies, seconded or designated to the Office for that purpose by the— (i) National Commissioner; (ii) Secretary for Defence; (iii) Director-General: National Intelligence Agency; (iv) Director-General: South African Secret Service; [and] (v) National Director; and (vi) Director-General: National Communications Centre; and”.</p>

MEMORANDUM ON THE OBJECTS OF THE NATIONAL STRATEGIC INTELLIGENCE AMENDMENT BILL, 2008

1. OBJECTS OF BILL

The Bill seeks to amend the National Strategic Intelligence Act, 1994 (Act No 39 of 1994) (hereinafter referred to as the principal Act), in order to—

- (a) insert new definitions;
- (b) provide for clarity on the security-screening functions of the National Intelligence Agency;
- (c) regulate the functions of the NCC; and
- (d) allow the Director-General of the National Intelligence Agency to delegate responsibility for the issuing, downgrading, withdrawing or refusal of security clearances.

2. Clause-by-clause analysis

2.1 Clause 1 amends and inserts certain definitions.

2.2 Clause 2 regulates the activities of the NCC as the national signals intelligence capacity for the Republic with the authority to collect and analyse foreign signals intelligence. The NCC will be authorised to engage in interception of foreign signals and cross-border communications. The NCC will be prohibited from intercepting domestic communications.

This clause provides for the Minister for Intelligence to regulate and authorise the activities of the NCC and makes it an offence for the NCC to engage its activities without or contrary to such an authorisation. This clause also provides for the Inspector-General for Intelligence to report to Parliament annually on the activities of the NCC. The NCC will be required to conduct its activities in the interests of national security, in the interests of the economic well-being of the Republic of South Africa, and in support of the prevention or detection of serious crime directed and committed against the Republic and its citizens.

2.3 Clause 3 amends section 2A of the principal Act so as to provide—

- (a) for the South African Secret Service (“the Service”) to provide security-screening services on request by the Agency;
- (b) for the Director-General of the Agency to delegate his or her functions under this subsection to a delegated official;
- (c) for the establishment of vetting field work units by organs of state to assist the National Intelligence Structures in conducting security-screening investigations.

2.4 Clause 4 amends section 4 of the principal Act by extending the membership of NICOC to include not only representatives of the National Intelligence Structures, but also the following individuals:

- a. Director-General of the NCC;
- b. Director-General of the Presidency;
- c. Director-General of the Department of Foreign Affairs.

This clause also insert a new subsection which provides that the alternates to members of NICOC must be at the level of deputy head of the organisation they represent on NICOC.

3. DEPARTMENTS CONSULTED

All government departments in the JCPS cluster were consulted. In addition the Department of Public Service and Administration has been consulted in connection with the establishment of National Communications as a Schedule 1 Department in terms of the Public Service Act, 1994 (Proclamation 103 of 1994).

4. FINANCIAL IMPLICATIONS FOR STATE

None.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department of Intelligence 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.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.