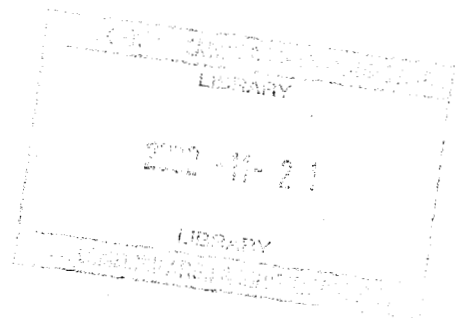


REPUBLIC OF SOUTH AFRICA

REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF COMMUNICATION-RELATED INFORMATION BILL

*(As amended by the Portfolio Committee on Justice and Constitutional Development
(National Assembly)) (introduced as Interception and Monitoring Bill
[B 50—2001]) (The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)



[B 50D—2001]

ISBN 0 621 33031 0

No. of copies printed 1 800

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 regulate the interception of certain communications, the monitoring of certain signals and radio frequency spectrums and the provision of certain communication-related information; to regulate the making of applications for, and the issuing of, directions authorising the interception of communications and the provision of communication-related information under certain circumstances; to regulate the execution of directions and entry warrants by law enforcement officers and the assistance to be given by postal service providers, telecommunication service providers and decryption key holders in the execution of such directions and entry warrants; to prohibit the provision of telecommunication services which do not have the capability to be intercepted; to provide for certain costs to be borne by certain telecommunication service providers; to provide for the establishment of interception centres, the Office for Interception Centres and the Internet Service Providers Assistance Fund; to prohibit the manufacturing, assembling, possessing, selling, purchasing or advertising of certain equipment; to create offences and to prescribe penalties for such offences; and to provide for matters connected therewith.

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

ARRANGEMENT OF SECTIONS

Section

CHAPTER 1

5

INTRODUCTORY PROVISIONS

1. Definitions and interpretation

CHAPTER 2

PROHIBITION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF REAL-TIME OR ARCHIVED COMMUNICATION- RELATED INFORMATION AND EXCEPTIONS

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Part 1

Prohibition of interception of communications and exceptions

2. Prohibition of interception of communication
3. Interception of communication under interception direction

15

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;”;

- (f) by the substitution for the definition of “Inspector-General” of the following definition: 5
 “ ‘Inspector-General’ means [a] the person appointed under section 7;”;
- (g) by the substitution for the definition of “Minister” of the following definition: 10
 “ ‘Minister’ means the [Minister to whom the portfolio of the Agency, the South African Secret Service, the National Defence Force or the South African Police Service has been allocated in terms of section 88 of the Constitution] President or the member of the Cabinet designated by the President in terms of section 209(2) of the Constitution to assume political responsibility for the control and direction of the intelligence services established in terms of section 209(1) of the Constitution;”;
- (h) by the insertion after the definition of “Inspector-General” of the following definition: 15
 “ ‘intelligence services’ means the National Intelligence Agency and the South African Secret Services as referred to in section 1 of the Intelligence Services Act, 2002;”;
- (i) by the insertion after definition of “National Defence Force” of the following definition: 20
 “ ‘prescribed’ means prescribed by regulation;”;
- (j) by the substitution for the definition of “Services” of the following definition: 25
 “ ‘Services’ means the Agency, the South African Secret Service, the Intelligence Division of the National Defence Force and the [National Investigation Service] Intelligence Division of the South African Police Service;”;
- (k) by the substitution for the definition of “South African Secret Service” of the following definition: 30
 “ ‘South African Secret Service’ means the South African Secret Service [established by] referred to in section 3 of Intelligence Services Act, 1994 (Act No. 38 of 1994);”.

Amendment of section 2 of Act 40 of 1994, as substituted by section 2 of Act 31 of 1995 and amended by section 2 of Act 42 of 1999 35

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

- (a) by the substitution for subsection (1) of the following subsection: 40
 “(1) There is hereby established a Parliamentary Committee to be known as the Joint Standing Committee on Intelligence, which shall, subject to the Constitution, perform the oversight functions set out in this Act in relation to the intelligence and counter-intelligence functions, which include the administration, financial management and expenditure of the Services, and report thereon to Parliament.”;
- (b) by the substitution in subsection (2) for paragraph (b) of the following paragraph: 45
 “(b) No member of Parliament shall be appointed as a member of the Committee before the Agency has issued a security clearance [has been issued] in the prescribed manner in respect of that member [by the National Intelligence Agency in a manner determined by the Minister as defined in section 1 of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994), by regulation].”;
- (c) by the substitution for subsection (4) of the following subsection: 50
 “(4) The Speaker and the Chairperson of the National Council of Provinces acting with the concurrence of the President, who shall act after consultation with the leaders of the political parties represented on the Committee, shall appoint a member of Parliament, excluding a member appointed to the Committee in terms of subsection (3), as the chairperson of the Committee and subsection (2)(b) shall apply with the necessary changes to such member.”; and 60

- (d) by the substitution in subsection (6) for paragraph (b) of the following paragraph:

“(b) The Committee **[shall be competent to]** may initiate and recommend to the Joint Rules Committee of Parliament any such rules and orders in so far as they relate to the **[functioning]** functions and activities of the Committee.”

Amendment of section 3 of Act 40 of 1994, as amended by section 3 of Act 31 of 1995 and section 3 of Act 42 of 1999

3. Section 3 of the principal Act is hereby amended—

- (a) by the substitution in paragraph (a) for subparagraph (i) of the following subparagraph:

“(i) the Auditor-General an audit report compiled in accordance with section 4(6) of the Auditor-General Act, 1995 (Act No. 12 of 1995), and after obtaining the report, to consider—
 (aa) the financial statements of the Services, Academy and Comsec;
 (bb) any audit reports issued on those statements; and
 (cc) any reports issued by the Auditor-General on the affairs of the Services, Academy and Comsec,
 and report thereon to Parliament;”;

- (b) by the substitution in paragraph (a) for subparagraph (iv) of the following subparagraph:

“(iv) **[each]** the Minister responsible for each Service, the Academy or Comsec, a report regarding the budget for [the] each Service [for which he or she is responsible], the Academy or Comsec;”;

- (c) by the substitution in paragraph (f) for the words preceding the proviso of the following words:

“to order investigation by and to receive a report from the Head of a Service or **[an]** the Inspector-General regarding any complaint received by the Committee from any member of the public regarding anything which such member believes that a Service has caused to his or her person or property”;

- (d) by the substitution for paragraph (h) of the following paragraph:

“(h) to consider and make recommendations regarding any matter falling within the purview of this Act and referred to it by the President, **[the]** any Minister responsible for a Service or Parliament;”;

- (e) by the substitution for paragraph (j) of the following paragraph:

“(j) to deliberate upon, hold hearings, subpoena witnesses and make recommendations on any aspect relating to intelligence and the national security, including administration and financial expenditure;”;

- (f) by the substitution for paragraph (l) of the following paragraph:

“(l) to consider and report on the appropriation of revenue or moneys for the functions of the **[Agency and the South African Secret Service]** Services, Academy and Comsec.”

Amendment of section 4 of Act 40 of 1994

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

- (a) by the substitution in subsection (2) for words following upon paragraph (b)(ii) of the following words:

“such dispute shall be referred for determination to a committee composed of the Inspector-General, **[responsible for a Service concerned]** the Head of **[that]** the Service in question, the chairperson of the Committee and the Minister responsible for that Service, which decision of the Committee shall be final.”;

- (b) by the substitution in subsection (3) for the words preceding the proviso of the following words:

“The Committee may, for the purposes of the performance of its functions, require **[a]** any Minister responsible for a Service, the Head of a Service, the CEO or the Inspector-General, [of a Service] to appear before it to give evidence, to produce any document or thing and answer questions put to him or her”; and

(c) by the substitution in subsection (3) for paragraph (c) of the following paragraph:

“(c) have the right to be assisted by members of that Service, the Academy or Comsec, as the case may be.”

Amendment of section 5 of Act 40 of 1994, as amended by section 4 of Act 42 of 1999 5

5. Section 5 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (c) of the following paragraph:

“(c) with the written permission of the chairperson, which permission may be given only with the concurrence of the Head of a Service and the Inspector-General **[concerned]**; or”.

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Amendment of section 6 of Act 40 of 1994, as substituted by section 4 of Act 31 of 1995

6. Section 6 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections, respectively:

“(1) The Committee shall, within five months after its first appointment, and thereafter within two months after 31 March in each year, table in Parliament a report on the activities of the Committee during the preceding year, together with the findings made by it and the recommendations it deems appropriate, and provide a copy thereof to the President and **[each] the Minister **[concerned]** responsible for each Service.**”

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(2) The Committee may at the request of Parliament, the President or the Minister **[concerned] responsible for each Service** or at any other time which the Committee deems necessary, furnish Parliament, the President or such Minister with a special report concerning any matter relating to the performance of its functions, and shall table a copy of such report in Parliament or furnish the President and the Minister concerned with copies, as the case may be.”.

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Substitution of section 7 of Act 40 of 1994, as amended by section 5 of Act 31 of 1995 and by section 5 of Act 42 of 1999

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

“Inspector-General

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7. (1) The President shall appoint **[one or more Inspectors-General] an Inspector-General of Intelligence—**

(a) nominated by the Committee; and

(b) approved by the National Assembly by a resolution supported by at least two thirds of its members:

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Provided that[—

(i) **one Inspector-General may be appointed with regard to some of or all the Services as long as the activities of all the Services are monitored by an Inspector-General; and**

(ii) if **[any] the nomination is not approved as required in paragraph (b),** the Committee shall nominate another person.

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(2) **[An] The Inspector-General shall be a South African citizen who is a fit and proper person to hold such office and who has knowledge of intelligence.**

(3) The remuneration and other conditions of employment of **[an] the Inspector-General shall be determined by the President with the concurrence of the Committee and such remuneration shall not be reduced, nor shall such conditions be adversely altered during his or her term of office[: Provided that such remuneration shall be the same as that of the Public Protector appointed in terms of section 1A of the Public Protector Act, 1994 (Act No. 23 of 1994)].**

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(4) **[An] The Inspector-General may be removed from office by the President, but only on the grounds of **[misbehaviour] misconduct, incapacity, withdrawal of his or her security clearance, poor performance or incompetence **[determined by the Committee]** as prescribed.****

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(5) [An] If the Inspector-General [who] is the subject of an investigation by the Committee in terms of subsection (4) he or she may be suspended by the President pending a decision in such investigation.

(6) [An] The Inspector-General shall be [responsible] accountable to the [President] Committee for the overall functioning of his or her office, and shall report on his or her activities and the performance of his or her functions to the committee at least once a year.

(7) The functions of [an] the Inspector-General are, in relation to the Service [in respect of which he or she is appointed]—

- (a) to monitor compliance by [the] any Service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence;
- (b) to review the intelligence and counter-intelligence activities of [the] any Service;
- (c) to perform all functions designated to him or her by the President or [the] any Minister [concerned] responsible for a Service;
- (cA) to receive and investigate complaints from members of the public and members of the Services on alleged maladministration, abuse of power, transgressions of the Constitution, laws and policies referred to in paragraph (a), corruption and [the] improper enrichment of any person through an act or omission of any member;
- (d) to submit certificates to [the] every Minister [concerned] responsible for a Service pursuant to subsection (11)(c); [and]
- (e) to submit reports to the Committee pursuant to section 3 (1) (f); and
- (f) to submit reports to every Minister responsible for a Service pursuant to the performance of functions contemplated in paragraphs (a), (b), (c) and (cA): Provided that where the Inspector-General performs functions designated to him or her by the President, he or she shall report to the President.

(7A) The reports of the Inspector-General contemplated in subsection (7)(f) in respect of monitoring and reviewing shall contain the findings and recommendations of the Inspector-General.

(8) Notwithstanding anything to the contrary contained in this or any other law or the common law, [an] the Inspector-General—

- (a) shall have access to any intelligence, information or premises under the control of [the] any Service [in respect of which he or she has been appointed,] if such access is required by the Inspector-General for the performance of his or her functions, and he or she shall be entitled to demand from the Head of the Service in question and its employees such intelligence, information, reports and explanations as the Inspector-General may deem necessary for the performance of his or her functions;
- (aA) shall inform the Head of a Service prior to his or her access to the premises of such Service in writing of his or her intention to have access to such premises: Provided that the notice shall specify the date and the nature of access to the premises;
- (b) may, if the intelligence or information received by him or her in terms of paragraph (a) is subject to any restriction in terms of any law, disclose it only—
 - (i) after consultation with the President and the Minister responsible for the Service in question; and
 - (ii) subject to appropriate restrictions placed on such intelligence or information by the Inspector-General, if necessary; and
 - (iii) to the extent that such disclosure is not detrimental to the national interest;
- (c) shall have access to any other intelligence, information or premises which is not under the control of any Service if such access is necessary for the performance of his or her functions in terms of subsection (7) and he or she shall be entitled to demand from any such person such intelligence, information, reports and explanations as he or she may deem necessary for the performance of his or her functions: Provided that the Inspector-General shall not have access if such intelligence or information is not necessary for the performance of his

or her functions: Provided further that the Inspector-General shall first obtain a warrant issued in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977): if such information, intelligence or premises are not under the control of the Services in question;

- (d) may, if the intelligence or information received by him or her in terms of paragraph (c) is subject to any privilege or restriction in terms of any law, disclose it only—
- (i) after he or she has given written notice of his or her intention to do so to the lawful possessor of such intelligence or information; and
 - (ii) after consultation with the President and the Minister responsible for the Service in question; and
 - (iii) subject to appropriate restrictions placed on such intelligence or information by the Inspector-General, if necessary; and
 - (iv) to the extent that such disclosure is not detrimental to the national interest.

(9) No access to intelligence, information or premises contemplated in subsection (8)(a) may be withheld from **[an] the Inspector-General** on any ground.

(10) **[An] The Inspector-General—**

- (a) shall comply with all security requirements applicable to the employees of the **[Service in respect of which he or she has been appointed]** intelligence services; and
- (b) shall serve impartially and independently and perform his or her functions in good faith and without fear, favour, bias or prejudice.

(11) (a) Each Head of a Service shall, in respect of every period of 12 months or such lesser period as is specified by the Minister **[concerned]** responsible for that Service, submit to that Minister, **[at such times as the Minister may specify,]** a report on the activities of that Service during that period, and shall cause a copy of such report to be submitted to the Inspector-General **[appointed for that Service]**.

(b) (i) Each Head of a Service shall report to the Inspector-General **[appointed for that Service]** regarding any unlawful intelligence activity or significant intelligence failure of that Service and any corrective action that has been taken or is intended to be taken in connection with such activity or failure.

(ii) **[A] Each** Head of a Service shall submit the report referred to in subparagraph (i) to the Inspector-General **[concerned]** within a reasonable period after such unlawful intelligence activity or significant intelligence failure came to his or her attention.

(c) As soon as practicable after receiving a copy of a report referred to in paragraph (a), **[an] the** Inspector-General shall submit to the Minister **[concerned]** responsible for the Service in question, a certificate stating the extent to which **[such] the** Inspector-General is satisfied with the report and whether anything done by that Service in the course of its activities during the period to which the report relates, in the opinion of **[such] the** Inspector-General—

- (i) is unlawful or contravenes any directions issued by **[that] the** Minister responsible for that Service; or
- (ii) involves an unreasonable or unnecessary exercise by that Service of any of its powers.

(d) As soon as practicable after receiving a report referred to in paragraph (a) and a certificate of the Inspector-General referred to in paragraph (c), the Minister **[concerned]** responsible for the Service in question shall, subject to section (4)(2), cause the report and certificate to be transmitted to the Committee.

(12) The Minister **[responsible for a Service]** may, after consultation with the Inspector-General **[concerned]**, appoint such number of persons to the office of the Inspector-General as may be necessary for the performance of the functions of that office, **[of the Inspector-General]** on such conditions of employment as are applicable to members of **[that Service] the** intelligence services.

(13) The budget of the office of the Inspector-General shall be appropriated by Parliament as part of the budget vote of the intelligence services, and shall be expended in accordance with the rules and procedures as set out in the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(14) The Inspector-General may, in writing, delegate any function contemplated in subsection (7) to any employee in his or her office, and any function performed in terms of such a delegation shall be deemed to have been performed by the Inspector-General.”

Amendment of section 8 of Act 40 of 1994, as substituted by section 6 of Act 31 of 1995 and amended by section 7 of Act 42 of 1999

8. Section 8 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections, respectively:

“(1) **[A] The Minister, acting with the concurrence of [the President, and] the Committee, may make regulations [as to any matters which are necessary or expedient for the achievement of the purposes of this Act, including but not limited to] regarding—**

(a) any matter that is required or permitted to be prescribed in terms of this Act;

(b) the [exercise of their the powers and the] performance of [their] his or her functions by [Inspectors-General] the Inspector-General;

(c) the reports to be submitted by [an] the Inspector-General and the Heads of the Services[, as well as reports to be received by the Committee];

(d) the suspension or removal from office of [Inspectors-General] the Inspector-General and the termination of employment of the Inspector-General;

(e) an oath or affirmation of secrecy to be subscribed to by the Inspector-General, members and staff of the Committee, the leaders of political parties represented or willing to serve on the Committee, and staff appointed in terms of section 7(12);

(f) **[anything which shall or may be prescribed by regulation under this Act] security clearance for the Inspector-General and members of the Committee;**

(g) the procedure for appointment of staff to the office of the Inspector-General;

(h) the conditions of employment applicable to the personnel appointed to the office of the Inspector-General; and

(i) the procedure for the lodging and investigation of complaints.

(2) A regulation made under this section need not be published in the *Gazette*, but shall be notified to any person affected thereby in such manner as the Minister **[concerned]** acting with the concurrence of the Committee may determine.”.

Substitution of section 9 of Act 40 of 1994, as substituted by section 7 of Act 31 of 1995

9. The following section is hereby substituted for section 9 of the principal Act:

“Short title

9. This Act shall be called the Intelligence Services **[Control] Oversight Act, 1994.”.**

Short title and commencement

10. This Act shall be called the Intelligence Services Control Amendment Act, 2002, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE INTELLIGENCE SERVICES CONTROL AMENDMENT BILL, 2002

1. BACKGROUND

The Intelligence Services Control Act, 1994 (Act No. 40 of 1994) ("the Act"), was amended in 1999 to provide for a new formula for the appointment of members of the Joint Standing Committee on Intelligence (the "JSCI") based on proportional representation and for the appointment of one or more Inspectors-General that would monitor the operational intelligence activities of Intelligence Services. The Act has, however, proved to be inadequate with regards to—

- * oversight of the financial activities of the Services;
- * the functioning of the office of the Inspectors-General in that—
 - (a) there are no clear lines of accountability;
 - (b) the functions of the Inspectors-General are vague; and
 - (c) the appointment of personnel is not adequately regulated.

2. CONTENTS OF BILL

The Bill seeks to—

- (a) change the name of the Act to "Intelligence Services Oversight Act, 1994";
- (b) give the JSCI sole responsibility for the financial oversight of the Intelligence Services;
- (c) provide security clearance for the Chairperson of the JSCI;
- (d) clearly define Minister as the Minister of Intelligence;
- (e) provide for the appointment of one Inspector-General for all the Services;
- (f) reregulate the termination of service and removal of office of the Inspector-General; and
- (g) reregulate the functions of the Inspector-General so that—
 - * the Inspector-General will only monitor the intelligence and counter-intelligence functions of the Services;
 - * the Inspector-General must notify the Head of a Service before he or she gains access to property belonging to a Service for the purposes of search and seizure of information;
 - * the Inspector-General must obtain a search warrant before he or she investigates premises not belonging to a Service; and
 - * the Inspector-General may delegate certain functions to employees in his or her office.

3. FINANCIAL IMPLICATIONS FOR STATE

The financial implications for the State arising from the Bill will be accommodated under the current budget of the Intelligence Services.

4. CONSULTATION

The following Committee and departments were consulted:

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

5. 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.