

REPUBLIC OF SOUTH AFRICA

**NATIONAL STRATEGIC
INTELLIGENCE AMENDMENT
BILL**

(As amended by the Joint Standing Committee on Intelligence)

(MINISTER OF JUSTICE)

[B 35B—98]

REPUBLIEK VAN SUID-AFRIKA

**WYSIGINGSWETSONTWERP OP
NASIONALE STRATEGIESE
INTELLIGENSIE**

(Soos gewysig deur die Gesamentlike Staande Komitee oor Intelligensie)

(MINISTER VAN JUSTISIE)

[W 35B—98]

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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.
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BILL

To amend the National Strategic Intelligence Act, 1994, so as to amend certain definitions; to define a certain expression; to substitute obsolete references; to provide for the transmitting of departmental intelligence to Nicoc and the institution by the South African Secret Service of counter-intelligence measures outside the Republic; to include the member of Cabinet responsible for intelligence services as a member of Nicoc and to redefine the functions of Nicoc and of the Co-ordinator for Intelligence in view of that new member; to define the functions of that member of Cabinet in relation to 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

1. Section 1 of the National Strategic Intelligence Act, 1994 (in this Act referred to as the principal Act), is hereby amended— 5
- (a) by the substitution for the definition of “Agency” of the following definition:
“ ‘Agency’ means the National Intelligence Agency established by section 3(1) of the Intelligence Services Act, 1994 (Act No. 38 of 1994);”
 - (b) by the substitution for the definition of “Cabinet” of the following definition: 10
“ ‘Cabinet’ means the Cabinet of the Republic of South Africa referred to in section [88] 91(1) of the Constitution;”;
 - (c) by the substitution for the definition of “Constitution” of the following definition:
‘Constitution’ means the Constitution of the Republic of South Africa, [1993 (Act No. 200 of 1993)] 1996 (Act No. 108 of 1996);” 15
 - (d) by the deletion of the definition of “Co-ordinator for Intelligence”;
 - (e) by the insertion after the definition of “foreign military intelligence” of the following definition:

- “ ‘Minister’ means the President or the member of Cabinet designated by the President to assume the responsibility for intelligence services as contemplated in section 209(2) of the Constitution;”;
- (f) by the substitution for paragraphs (b) and (c) of the definition of “National Intelligence Structures” of the following paragraphs: 5
- “ (b) the **[Intelligence Division]** intelligence division of the National Defence Force, established under the Defence Act, 1957 (Act No. 44 of 1957);
- (c) the **[National Investigation Service]** intelligence division of the South African Police Service;”;
- (g) by the substitution for the definition of “South African Police Service” of the following definition: 10
- “ ‘South African Police Service’ means the South African Police Service established by section 5(1) of the South African Police Service Act, 1995 (Act No. 68 of 1995);”. 15

Amendment of section 2 of Act 39 of 1994

2. Section 2 of the principal Act is hereby amended—
- (a) by the substitution for paragraph (c) of subsection (1) of the following paragraph:
- “ (c) to gather departmental intelligence at the request of any interested department of State, and, without delay to evaluate and transmit such intelligence and any other intelligence at the disposal of the Agency and which constitutes departmental intelligence, to the department concerned and to Nicoc.”; 20
- (b) by the substitution for subparagraph (ii) of paragraph (a) of subsection (2) of the following subparagraph: 25
- “ (ii) supply intelligence relating to **[national strategic intelligence]** any such threat to Nicoc;”;
- (c) by the substitution for paragraphs (b) and (c) of subsection (2) of the following paragraphs: 30
- “ (b) to institute—
- (i) counter-intelligence measures within the Service; and
- (ii) in consultation with the Agency, counter-intelligence measures outside the Republic; and
- (c) to gather departmental intelligence at the request of any interested department of State, and, without delay to evaluate and transmit such intelligence and any other intelligence at the disposal of the Service and which constitutes departmental intelligence, to the department concerned and to Nicoc.”; 35
- (d) by the substitution for paragraph (a) of subsection (3) of the following paragraph: 40
- “ (a) to gather, correlate, evaluate and use crime intelligence in support of the **[functions]** objects of the South African Police Service as contemplated in section **[215]** 205(3) of the Constitution; and”; and
- (e) by the substitution in paragraph (b) of subsection (4) for the words “referred to in section 227(1)(e)” of the words “as contemplated in section 201(2)(a)”. 45

Amendment of section 3 of Act 39 of 1994

3. Section 3 of the principal Act is hereby amended—
- (a) by the substitution for paragraph (a) of subsection (1) of the following paragraph: 50
- “ (a) other than the National Defence Force when employed for service **[referred to in section 227(1)(a), (b) or (e)]** as contemplated in section 201(2) of the Constitution or when discharging the counter-intelligence responsibilities entrusted to its **[Intelligence Division]** intelligence division; and”; 55
- (b) by the substitution in paragraph (i) of subsection (1) for the words “Intelligence Division” of the words “intelligence division”; and
- (c) by the substitution for subsection (2) of the following subsection:

“(2) Notwithstanding subsection (1), the National Defence Force through its **[Intelligence Division]** intelligence division may—

- (a) whenever the President on the advice of the Minister of Defence is of the opinion that conditions are such that the said Force has to prepare itself for possible employment for service **[referred to in section 227(1)(e)]** as contemplated in section 201(2)(a) of the Constitution; and
 - (b) upon having been authorised by **[the Co-ordinator for Intelligence]** Nicoc acting with the concurrence of **[Nicoc and]** the Cabinet,
- gather domestic military intelligence in a covert manner within the geographical area and the time-scales specified in such authorisation.”.

Substitution of section 4 of Act 39 of 1994

4. The following section is hereby substituted for section 4 of the principal Act:

“Establishment of National Intelligence Co-ordinating Committee

4. (1) There is hereby established a National Intelligence Co-ordinating Committee, which shall consist of—

- (a) the Minister;
 - (b) the Co-ordinator for Intelligence appointed under section 5(1), who shall be the chairperson;
 - (c) the Director-General of the Agency;
 - (d) the Director-General of the Service;
 - (e) the chief of the intelligence division of the National Defence Force; and
 - (f) the head of the service of the South African Police Service under which its intelligence division falls,
- or the alternates of the persons mentioned in paragraphs (b) to (f), and such members of departments of State who are co-opted by Nicoc on a permanent or an *ad hoc* basis.

(2) The functions of Nicoc shall be—

- (a) to co-ordinate the intelligence supplied by the members of the National Intelligence Structures to Nicoc and interpret such intelligence for use by the State and the Cabinet for the purposes of—
 - (i) the detection and identification of any threat or potential threat to the national security of the Republic;
 - (ii) the protection and promotion of the national interests of the Republic;
- (b) for the purposes of the functions contemplated in paragraph (a)—
 - (i) to co-ordinate and prioritise intelligence activities within the National Intelligence Structures;
 - (ii) to prepare and interpret intelligence estimates;
- (c) to produce and disseminate intelligence which may have an influence on any state policy with regard to matters referred to in paragraph (a) for consideration by the Cabinet;
- (d) after consultation with the departments of the State entrusted with the maintenance of the security of the Republic, to co-ordinate the flow of national strategic intelligence between such departments;
- (e) at the request of any Department of State, to co-ordinate the gathering of intelligence and without delay to evaluate and transmit such intelligence and any other intelligence at the disposal of the National Intelligence Structures and which constitutes departmental intelligence, to the department concerned; and
- (f) to make recommendations to the Cabinet on intelligence priorities.

(3) The Agency shall provide logistical, technical and administrative support to Nicoc.”.

Substitution of section 5 of Act 39 of 1994

5. The following section is hereby substituted for section 5 of the principal Act:

“Co-ordinator for Intelligence

5. (1) The President shall appoint a person as Co-ordinator for Intelligence, who shall, subject to the directions and supervision of the Minister— 5

(a) manage and administer the functions of Nicoc referred to in section 4(2); and

(b) establish such structures and committees as are necessary for the efficient functioning of Nicoc. 10

(2) The National Intelligence Structures shall, at the request of the Co-ordinator for Intelligence, render such assistance as is necessary for the performance of his or her functions contemplated in subsection (1).”.

Insertion of section 5A in Act 39 of 1994

6. The following section is hereby inserted after section 5 of the principal Act: 15

“Functions of Minister

5A. (1) The Minister shall, subject to subsection (2), do everything necessary for the efficient functioning, control and supervision of the co-ordination of intelligence supplied by the National Intelligence Structures. 20

(2) The Minister shall perform a function contemplated in subsection (1) which affects a function of the National Defence Force or the South African Police Service in consultation with the Minister responsible for that Force or Service, as the case may be.

(3) The Minister shall be responsible to Cabinet for the co-ordination of intelligence supplied by the National Intelligence Structures.”. 25

Substitution of section 6 of Act 39 of 1994

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

“Regulations

6. (1) The Minister may, subject to subsection (2), make such regulations as are necessary for the effective administration of this Act. 30

(2) Any such 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.”. 35

Short title and commencement

8. This Act is the National Strategic Intelligence Amendment Act, 1998, and takes effect on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE NATIONAL STRATEGIC INTELLIGENCE AMENDMENT BILL, 1998

EXPLANATION

- 1.1 The National Strategic Intelligence Act, 1994 (Act No. 39 of 1994), provides for the establishment of the National Intelligence Co-ordinating Committee (“Nicoc”). Nicoc is responsible for *inter alia* the co-ordination of intelligence supplied by the National Intelligence Structures, consisting of Nicoc, the intelligence division of the National Defence Force, the intelligence division of the South African Police Service, the National Intelligence Agency and the South African Secret Service. The Act further provides for the appointment of a Co-ordinator for Intelligence who is responsible for the functioning of Nicoc. The Co-ordinator is accountable to the President, and advises the Cabinet of the activities of Nicoc on matters pertaining to national strategic intelligence.
- 1.2 The current framework for the supervision and performance of functions within the National Intelligence Structures as set out in section 209 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996 — “the Constitution”), the Intelligence Services Act, 1994 (Act No. 38 of 1994), and the National Strategic Intelligence Act, 1994, provides that—
 - (a) the President performs those functions relating to the direction and establishment of the intelligence services;
 - (b) the Deputy President or a Minister designated by the President performs functions relating to the superintendence, control and functioning of the National Intelligence Agency and the South African Secret Service as set out in the Intelligence Services Act, 1994; and
 - (c) the Co-ordinator for Intelligence performs functions in regard to the co-ordination and direction of intelligence activities within the National Intelligence Structures as contemplated in the National Strategic Intelligence Act, 1994.
- 1.3 Thus, the President or the member of Cabinet designated by the President to assume the responsibility for intelligence services as contemplated in section 209(2) of the Constitution (“the designated Minister”) is largely excluded from access to information and the exercise of any substantive powers of direction, particularly as regards the co-ordination of intelligence activities. At present, most of these powers are vested in the Co-ordinator for Intelligence.
- 1.4 The advisory role to Cabinet on the activities of Nicoc is the responsibility of the Co-ordinator for Intelligence, who is not a member of Cabinet. Therefore the designated Minister does not have any advisory role to Cabinet in respect of these activities.
- 1.5 After the National Strategic Intelligence Act, 1994, had been adopted by Parliament, the President in 1995 proposed amendments to the Act for consideration in order to—
 - (a) separate the functions of the Co-ordinator for Intelligence from those of the designated Minister;
 - (b) more clearly define the functions of the designated Minister with regard to the co-ordination of intelligence;
 - (c) make the designated Minister politically responsible for the functioning of Nicoc; and
 - (d) accordingly redefine the accountability and functions of the Co-ordinator for Intelligence.

OBJECTS OF BILL

- 2.1 The principal objects of the proposed amendments in the Bill to the National Strategic Intelligence Act, 1994, are—

- (a) to define the functions of the designated Minister with regard to the co-ordination of intelligence;
- (b) to include the designated Minister as a member of Nicoc; and
- (c) to redefine the functions of Nicoc and of the Co-ordinator for Intelligence in view of such new membership.

(See clauses 1(e), and 4 to 7.)

2.2. The main features of the proposed amendments mentioned in paragraph 2.1 are as follows:

- (a) If the performance of functions by the designated Minister have an impact on the functions of the National Defence Force or the South African Police Service, the Minister must perform such functions in consultation with the relevant Minister. The purpose of this provision is to maintain the autonomy of the said Force and Service as envisaged in sections 200 and 205 of the Constitution, respectively.
- (b) The functions of the designated Minister have been drafted to focus on the co-ordination of intelligence by the National Intelligence Structures. This provision is compatible with the provisions of section 210(a) of the Constitution.
- (c) The designated Minister is responsible to Cabinet for the co-ordination of intelligence by the National Intelligence Structures.
- (d) The Co-ordinator for Intelligence must perform his or her functions under the superintendence of the designated Minister.

2.3 The Bill further provides for—

- (a) the transmitting of departmental intelligence to Nicoc; and
- (b) the institution of counter-intelligence measures outside the Republic by the South African Secret Service.

(See clause 2(a) and (c).)

2.4 The remainder of the proposed amendments aim to substitute obsolete references.

CONSULTATION

3. The following bodies were consulted:

- * Detective Service of the South African Police Service
- * Intelligence Division of the National Defence Force
- * South African Secret Service
- * National Intelligence Agency
- * Office of the President
- * Joint Standing Committee on Intelligence

PARLIAMENTARY PROCEDURE

4. The State Law Advisers are of the opinion that the Bill must be dealt with in accordance with the procedure prescribed 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.