

REPUBLIC OF SOUTH AFRICA

INTELLIGENCE SERVICES CONTROL AMENDMENT BILL

(As amended by the Ad Hoc Joint Committee on Intelligence Services Control Amendment Bill) (The English text is the official text of the Bill)

(MINISTER FOR INTELLIGENCE)

[B 46B—99]

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP BEHEER OOR INTELLIGENSIEDIENSTE

(Soos gewysig deur die Ad hoc- Gesamentlike Komitee oor Wysigingswetsontwerp op Beheer oor Intelligensiedienste) (Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)

(MINISTER VIR INTELLIGENSIE)

[W 46B—99]

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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 Intelligence Services Control Act, 1994, so as to amend certain definitions; to alter the procedure for the appointment of members of the Joint Standing Committee on Intelligence; to make further provision for the appointment and conditions of service of the Inspectors-General; to delete certain obsolete references; and to make further provision for reports to the Joint Standing Committee on Intelligence; 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 40 of 1994, as amended by section 1 of Act 31 of 1995

- 1.** Section 1 of the Intelligence Services Control Act, 1994 (hereinafter referred to as the principal Act), is hereby amended—
- (a) by the substitution for the definition of “Auditor-General” of the following definition:

“ ‘Auditor-General’ means the Auditor-General referred to in section [191] 188 of the Constitution;”;
 - (b) 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);”;
 - (c) by the substitution for the definition of “Speaker” of the following definition:

“ ‘Speaker’ means the Speaker of the National Assembly contemplated in section [41] 52 of the Constitution.”.

Amendment of section 2 of Act 40 of 1994, as amended by section 2 of Act 31 of 1995

- 2.** Section 2 of the principal Act is hereby amended—
- (a) by the substitution for subsection (2) of the following subsection:

“(2) (a) The Committee shall consist of [— (a) **nine**] 15 members of [the **Majority Party in**] Parliament [;] appointed on the basis of proportional representation determined according to the formula in paragraph (c): Provided that—

- (i) if the total number of seats on the Committee allocated to the political parties in terms of paragraph (c) is less than 15, the unfilled seats shall not be allocated to any political party, but the Committee shall nevertheless be deemed to be properly constituted; and
- (ii) if one political party has been allocated more than eight seats in terms of paragraph (c) and more than five political parties are represented in Parliament, the five minority parties with the largest representation in Parliament are entitled to at least one member each on the Committee, and the Committee so constituted shall be deemed to be properly constituted regardless of whether the total number of seats so allocated on the Committee is more or less than 15; and
- (iii) if any political party is unwilling to serve or to continue to serve on the Committee, the seats of such political party on the Committee shall not be allocated to any other political party but the Committee shall nevertheless be deemed to be properly constituted.
- (b) No member of Parliament shall be appointed as a member of the Committee before a security clearance has been issued 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) Political parties shall be entitled to designate a member or members to the Committee in accordance with the principle of proportional representation and as determined according to the following formula: By dividing the number of seats held by the party in the National Assembly by the total number of seats in the National Assembly, multiplying the result by 15 and discarding all decimals.
- [(b) three members of the Largest Minority Party in Parliament;
(c) one member of the Second Largest Minority Party in Parliament;
(d) one member of each other political party represented in Parliament:
Provided that if any political party is unwilling to serve or to continue to serve on the Committee, the membership of such political party shall not be allocated to any other political party and the Committee shall nevertheless be deemed to be properly constituted]”;**
- (b) by the substitution in subsection (3) for paragraph (a) of the following paragraph:
- “(a) a member referred to in subsection (2) shall be appointed by the Speaker or the **[President of the Senate] Chairperson of the National Council of Provinces**, depending upon the House of Parliament from which the member is appointed, acting with the concurrence of the President, who shall act with the concurrence of the leader of the political party concerned.”;
- (c) by the substitution in subsection (3) for paragraph (b) of the following paragraph:
- “(b) In the event that agreement is not reached in respect of the appointment of a particular member, the matter shall be referred for determination to a committee consisting of the President, the Speaker, the **[President of the Senate] Chairperson of the National Council of Provinces** and the leader of the political party concerned, and the decision of the committee shall be final.”;
- (d) by the substitution for subsection (4) of the following subsection:
- “(4) The Speaker and the **[President of the Senate] 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.”;
- (e) by the substitution in subsection (5)(b) for subparagraph (ii) of the following subparagraph:
- “(ii) if he or she has conducted himself or herself in a manner which constitutes a threat to national security in the opinion of the Speaker or the **[President of the Senate] Chairperson of the National Council of Provinces**, as the case may be, with the concurrence of the Committee and the President, acting after consultation with the leader of the party concerned;”;
- (f) by the substitution in subsection (5) for paragraph (c) of the following paragraph:
- “(c) may resign by notice in writing to the Speaker or the **[President of the**

- Senate]** Chairperson of the National Council of Provinces, as the case may be, in which event a substitute shall be appointed in accordance with paragraph (b) and subsection (3) or (4), as the case may be.”;
- (g) by the substitution in subsection (6) for paragraph (a) of the following paragraph: 5
 “(a) the Committee shall meet at such times and follow such procedures as may be prescribed by the rules and orders contemplated in section [58] 45 of the Constitution.”; and
- (h) by the substitution in subsection (8) for paragraphs (a) and (b) of the following paragraphs, respectively: 10
 “(a) officers of Parliament designated for that purpose by the Speaker and the **[President of the Senate]** Chairperson of the National Council of Provinces; and
 (b) persons designated for that purpose by the Minister, after consultation with the Speaker, the **[President of the Senate]** Chairperson of the National Council of Provinces, the chairperson and the Heads of the Services.”. 15

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

3. Section 3 of the principal Act is hereby amended—
- (a) by the substitution in paragraph (a) for subparagraph (i) of the following subparagraph: 20
 “(i) the Auditor-General **[subject to the provisions of the Auditor-General Act, 1989 (Act No. 52 of 1989),]** an audit report compiled in accordance with section 4(6) of the Auditor-General Act, 1995 (Act No. 12 of 1995); [regarding the accounts and financial statements of the accounting officer regarding money expended on the administration and functions of a Service and regarding the money invested in terms of section 5 of the Security Services Special Account Act, 1969 (Act No. 81 of 1969)]”; 25
- (b) by the substitution for paragraph (d) of the following paragraph: 30
 “(d) to review and make recommendations on regulations made under section 6 of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994), and regulations regarding the intelligence and counter-intelligence functions of a Service, made under section 29 of the Intelligence Services Act, 1994 (Act No. 38 of 1994), section 87 of the Defence Act, 1957 (Act No. 44 of 1957), or section **[33 of the Police Act, 1958 (Act No. 7 of 1958)]** 24 of the South African Police Service Act, 1995 (Act No. 68 of 1995)”; and 35
- (c) by the substitution for paragraph (g) of the following paragraph: 40
 “(g) to refer any matter in relation to a Service or intelligence activity which comes to its attention and which it regards as relevant to the promotion of, respect for, and protection of the rights entrenched in Chapter **[3]** 2 of the Constitution to the South African Human Rights Commission [established by] referred to in section **[115]** 184 of the Constitution, and to receive a report from such Commission concerning the matter;”. 45

Amendment of section 5 of Act 40 of 1994

4. Section 5 of the principal Act is hereby amended by the deletion of subsection (3).

Amendment of section 7 of Act 40 of 1994, as amended by section 5 of Act 31 of 1995

5. Section 7 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection: 50
 “(1) The President shall appoint **[for each Service an Inspector-General]** one or more Inspectors-General of Intelligence—

- (a) nominated by the Committee; and
 (b) approved by the National Assembly **[and the Senate]** by a resolution **[adopted]** supported by **[a majority of at least 75 per cent]** at least two thirds of **[the members present and voting at a joint meeting]** its members:

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Provided that—

- (i) **[the same]** 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 nomination is not approved as required in paragraph (b), the Committee shall nominate another person.”;
- (b) by the addition to subsection (3) of the following proviso:
 “: 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).”;
- (c) by the substitution in subsection (7) for paragraphs (a) and (c) of the following paragraphs, respectively:
 “(a) to monitor compliance by the Service with **[its]** the Constitution, applicable laws and policies;
 (c) to perform all functions designated to him or her by the President or the Minister concerned;”;
- (d) by the insertion in subsection (7) after paragraph (c) of the following paragraph:
 “(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 laws and policies referred to in paragraph (a), corruption and the improper enrichment of any person through an act or omission of any member;”;
- (e) by the substitution for subsection (8) of the following subsection:
 “(8) Notwithstanding anything to the contrary contained in this or any other law or the common law, an Inspector-General—
 (a) shall have access to any intelligence, information or premises under the control of the 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 and its employees such intelligence, information, reports and explanations as the Inspector-General may deem necessary for the performance of **[such]** his or her functions;
 (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; 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;
 (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—

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- (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; 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.”; and
- (f) by the substitution for subsection (9) of the following subsection:
 “(9) No access to intelligence, information or premises contemplated in subsection [(3)] (8)(a) may be withheld from an Inspector-General on any ground.”.

Insertion of section 7A in Act 40 of 1994

6. The following section is hereby inserted after section 7 of the principal Act:

“Offences and penalties

7A. Any person who—

- (a) contravenes section 5(2) or 7(9); or
- (b) fails to comply with section 7(8),

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.”.

Amendment of section 8 of Act 40 of 1994, as amended by section 6 of Act 31 of 1995

7. Section 8 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
 “(1) A Minister, acting with the concurrence of the President and the Committee, may make regulations as to **[all]** any matters which are necessary or expedient for the achievement of the purposes of this Act, including but not limited to—”;
 - (b) by the deletion in subsection (1) of paragraph (a);
 - (c) by the substitution in subsection (1) for paragraph (c) of the following paragraph:
 “(c) the reports to be submitted by **[Inspectors-General]** an Inspector-General and the Heads of the Services [;], as well as reports to be received by the Committee;”; and
 - (d) by the addition after subsection (2) of the following subsection:
 “(3) 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 shall be called the Intelligence Services Control Amendment Act, 1999, 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, 1999

SUMMARY

1.1 Section 210 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (“the Constitution”) provides that the appointment of the Inspector-General must be approved by a resolution adopted by the National Assembly with a supporting vote of two thirds of its members. This provision overrides the provision in the Intelligence Services Control Act, 1994 (Act No. 40 of 1994) (“the principal Act”), which provides that the appointment of the Inspector-General must be approved by a resolution adopted by the National Assembly and the Senate (permanent members of the National Council of Provinces), with a supporting vote of 75% of the members present at a joint sitting.

1.2 In its report to Parliament in 1998, the Joint Standing Committee on Intelligence expressed the need for aligning the conditions of employment of the Inspector-General with those of the Public Protector, as in its view, the Inspector-General will be the Public Protector for the Intelligence Services.

1.3 Section 3 of the principal Act only allows members of the public to have access to the Joint Standing Committee on Intelligence when they have complaints against the Services. This excludes the Inspector-General in so far as such complaints are concerned. In this regard, a proposal has been made to the Portfolio Committee on Justice to make provision in the Open Democracy Bill for the Inspector-General to be consulted by members of the public, and members of the Intelligence Services in cases of “whistle blowing” pertaining to the Intelligence Services.

1.4 In terms of the formula prescribed by section 2 of the principal Act, all political parties represented in Parliament are represented on the Committee. This formula works effectively in a situation where there are fewer political parties represented in Parliament (as in the previous Parliament), and, where there are therefore fewer members sitting on the Committee.

1.5 In the present Parliament, thirteen political parties are represented, which consequently increases the number of members sitting on the Committee. Section 199(8) of the Constitution provides for multiparty parliamentary committees to oversee all security services. Nevertheless, it was not the intention of the legislature to have an over-represented and over-crowded committee dealing with sensitive matters of national security. The intention of the legislature was to give effect to the principles of transparency and accountability (section 199(8) of the Constitution), and legislative sanction, accountability and parliamentary control (White Paper on Intelligence) of the Intelligence Services, by having more than one party represented in the Committee, in order to create checks and balances measures for the effective oversight of all Intelligence Services.

1.6 The exclusion of some minority parties from the Committee will therefore not defeat the purpose of multiplicity, transparency and accountability envisaged in the Constitution, and neither will this hamper the effective oversight of the Intelligence Services.

1.7 The principal Act was passed under the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993). The Bill seeks to amend provisions rendered obsolete by the coming into effect of the 1996 Constitution such as references to the Senate.

MAIN OBJECTS OF THE BILL

1. This Amendment Bill seeks to achieve the following main objectives:

1.1 To align the functions and conditions of service of the Inspector-General with those of the Public Protector;

1.2 to align the procedure for the appointment of the Inspector-General of Intelligence with the procedure stipulated in the Constitution.

1.3 to change the procedure for the appointment of members of Parliament to the Joint Standing Committee on Intelligence, and to provide for a security clearance for members.

CONSULTATION

The following bodies were consulted:

- * the Office of the President
- * the Joint Standing Committee on Intelligence.

FINANCIAL IMPLICATIONS

The appointment of one or more Inspectors-General provided for in clause 5 of the Amendment Bill has been budgeted for. Currently there is no intention to appoint more than one Inspector-General as is possible under the same section.

PARLIAMENTARY PROCEDURE

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 provisions to which the procedure set out in section 74 or 76 of the Constitution applies.