

No.	PROPOSED AMENDMENT	SSA RESPONSES	PARLIAMENT RESPONSES
1.	Monitor means to oversee, examine, evaluate and investigate compliance of the intelligence and counterintelligence activities of a Service with the Constitution, applicable laws and relevant policies	SSA supports the proposal. It is further proposes that the word "Service" be amended to "National Intelligence Structures". If the word "service" is used, it will suggest that only the activities of the South African Intelligence Service" would be monitored	Noted
2.	Review means to oversee, examine, evaluate and assess the conduct of intelligence and counter- intelligence activities of a Service	SSA supports the proposal	Noted
3.	Significant Intelligence Failure means, but is not limited to, an incident, act or omission, which has occurred within a Service's statutory mandate, which resulted in a failure by that Service to comply with any of its statutory functions and operational priorities and which impacted on a national security interest of the Republic	SSA further suggests that the word "comply" be replaced with the word "fulfil". If the word comply is used, this may result in a superficial exercise.	Noted
4.	Unlawful Intelligence Activity means an activity carried out by a Service that is in contravention of the Constitution and applicable laws on intelligence and counter-intelligence	It is suggested that the use the terms be expanded to include "illegal" so that it reads "Unlawful and illegal Intelligence Activity"	Unlawful means illegal

5.	Fair presentation means compliance with and including complete, accurate and reasoned representation of the intelligence and counter-intelligence activities of a Service in accordance with the Regulation on Certification	The proposal is supported	Noted
6.	The Oversight Act provides for a definition of intelligence that differs from the definition of intelligence contained in the National Strategic Intelligence Act 39 of 1994 (NSIA). It is suggested that definition of intelligence in either the Oversight Act or the NSIA be amended to reflect the same definition or a combination of both definitions	SSA supports that the definition of intelligence, as proposed in the GILAB will be used. The definition is consistent with the provision of the National Strategic Intelligence Act.	Noted
7.	Citation to be removed (108 of 1996)	SSA supports the proposal to remove citation	Noted
8.	Section 7 (7) to be amended as follows: 'The functions of the Inspector-General are, in relation to the Services and the Intelligence Services Entities'	The proposal is supported. However, it is proposed that the use of national intelligence structures should be used throughout the Bill.	Noted

9.	Section 7 (7A) should be amended to read: ‘The reports of the IG contemplated in subsection (f) shall contain the findings and recommendations of the IG, which shall be binding’	The proposal for binding recommendations of OIGI will expose the IGI process to legal challenge. It is proposed that where there is disagreement the Minister intervenes and if that fails the matter be referred to the JSCI for final adjudication.	The JSCI exercises oversight over the Services and is best placed to ensure the implementation of the recommendations/corrective measures of the IGI. Proposed that the section be amended in the manner that “the Services must show cause/ provide reasons as to why they have not complied with the findings and recommendations of the IGI”. The latter could even be time-bound to ensure that it is not open ended.
10.	Section 7 (7)(c) should be amended to include the JSCI	SSA will be guided by the JSCI on this proposal	Noted

11.	<p>It is recommended that there should be a new provision inserted in the Oversight Act to replace section 7 (12) which should read as follows:</p> <p>‘The Inspector-General may, subject to this Act, do and cause to be done all things necessary for the efficient superintendence, control and functioning of the OIGI including the appointment of persons to the office and the management of the budget, as prescribed’</p>	<p>The proposal by IGI suggest that a third scheduled entity be established. The HLRP recommended the establishment of the Foreign Service and Domestic Service. The impact on the budget might not allow implementation.</p> <p>The Executive authority exercises control and direction over the department to prevent the structures from being referee and player at the same time. Regulations will be drafted to ensure standardization of systems and processes and delegation of authority to both the OIGI and NICOC.</p>	<p>It was the finding of the HLRP that “ <i>the findings and recommendations of the 2006 and 2008 reviews related to the IGI are fundamentally correct</i>”.</p> <p>Furthermore, that “<i>it was a serious dereliction of duty on the part of the successive Ministers of State Security that the recommendations of the two reviews were not taken further and that the long-awaited regulations governing the functioning of the OIGI have still not been promulgated</i>”.</p> <p>“<i>The OIGI should be established as a separate entity, independent of the SSA or any successor service, with its own administration and budget</i>”</p> <p>Proposed that the Committee follow the 2006 and 2008 review report recommendations and the Findings of the HLRP in respect of the independence of the IGI.</p> <p><i>In Glenister II (Glenister v President of the Republic of South Africa). The Constitutional Court highlighted the importance of independence of the Civilian Oversight Bodies. Structural and operational independence, including the management of own funds are the key characteristics of an independent civilian oversight body.</i></p> <p>No legal reasons have been were proffered to support why the IGI must continue to operate as an extension of only one Service when it is constitutionally required to oversee all of the Services.</p>
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12.	New provision that replaces the current one in GILAB to read: 'The Inspector-General may determine the organisational structure and grading of posts for the functioning of the Office of the Inspector-General '	<p>The proposal by IGI suggest that a third scheduled entity be established. The HLRP recommended the establishment of the Foreign Service and Domestic Service. The impact on the budget might not allow implementation.</p> <p>The Executive authority exercises control and direction over the department to prevent the structures from being referee and player at the same time. Regulations will be drafted to ensure standardization of systems and processes and delegation of authority to both the OIGI and NICOC</p>	<p>The IGI is a constitutionally envisaged civilian oversight structure, which should function independently of the Services that he or she oversees. The IGI is not the extension of the Dept and should not be under the control and direction of the Executive.</p> <p>The IGI accounts to Parliament for all the exercise of his powers and the functions of his powers. This mechanism ensures that whilst the IGI functions independently, there is also accountability for his or her work</p>
13.	<p>Section 7 (11) (c) should be amended to read:</p> <p>'As soon as practicable after receiving a copy of a report referred to in paragraph (a), the Inspector-General shall submit to the Minister responsible for the Service in question, a certificate in which an opinion is expressed on the <u>fair presentation</u> of 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 the IGI</p>	SSA support the inclusion of "fair representation" in Section 7(11) (c)	Noted
14.	The current provision in section 8 (1) (b) must remain unchanged to enable the Minister and the JSCI to regulate the performance of all the functions of the IGI	SSA supports the proposal	Noted

15.	<p>Suggested amendment:</p> <p>'intelligence gathering' means the acquisition and dissemination of relevant and reliable information for the development of intelligence products related to any domestic or foreign opportunity or potential opportunity or threat or potential threat to national security or threats to the advancement or protection of national security'</p>	<p>SSA submits that according to the National Strategic Intelligence Act, 1994 "intelligence gathering" is the acquisition and processing of information which includes correlation, evaluation and analysis of such information into an intelligence product.</p> <p>The dissemination (as per IGI) or the supply (as per the Act) of such intelligence product to a client or NICOC is a process that follows the Intelligence gathering process.</p>	Noted
16.	<p>Apprehend confers the powers of arrest. It is therefore unclear whether intelligence members have now been given the powers of arrest. In the absence of an offences provision in the National Strategic Intelligence Act, it remains uncertain on how a contravention will take place</p>	<p>The word apprehend will be removed and replaced by "impede or "neutralize". "Impede" should be defined to include measures taken within the confines of the Constitution and the law to disrupt and prevent any threat to national security from manifesting, in a prescribed manner.</p>	<p>The open-ended words "opportunity or potential opportunity" in this proposed definition are ambiguous and might lead to confusion.</p> <p>The comment relating to the removal of "apprehend" is noted. The proposed definition of "impede and neutralize" is noted.</p>

17.	The scope of parties included and excluded in this provision needs to be reviewed	The purpose of this provision is to create a framework for the periodic briefing of the three (3) arms of the State (Legislature, Judiciary (on a needs basis) and the Executive) on National Security trends impacting the country.	<p>Separation of Powers concern. Section 165(2) of the Constitution provides that “<i>the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice</i>”. Section 165(3) of the Constitution provides that “<i>No person or organ of state may interfere with the functioning of the courts</i>”.</p> <p>The courts exercise a constitutional judicial function and receiving periodic intelligence briefings may be considered as interfering with the functioning of the courts. The Services already periodically brief the Executive (Minister) and the Legislature (JSCI) and to add the Judiciary might be considered to negatively impact the constitutionally sanctioned impartiality of the courts.</p>
18.	Civilian Intelligence Service not defined despite being referred to in GILAB	Clause 13 will be amended to make provision for any other entity established in terms of the Act.	Noted
19.	Suggested amendment 'No member of the Civilian Intelligence Service may strike or induce or conspire with any other member or person to strike <u>nor may the employer cause the lock- out of a member or person</u>	SSA supports the proposal	Noted

20.	<p>Suggested amendment</p> <p>‘The Minister must in the prescribed manner make provision for internal rules to deal with complaints, grievances, <u>alternate dispute resolution mechanisms</u> and consultation on conditions of service and human resources within the Civilian Intelligence Service.’.</p>	<p>The SSA has no objection to the proposals made in this regard.</p> <p>The existing Regulations will be reviewed to enhance consultation and dispute resolution mechanisms.</p>	Noted
21.	<p>NICOC proposes that “<i>The proposal is the insertion of (ii) supply intelligence regarding any such threat or opportunity to NICOC</i>”</p> <p>Section 2(b)(a) of the Bill</p>	<p>The Bill should make it obligatory for all the National Intelligence Structures to supply intelligence to NICOC.</p>	Noted
22.	<p>The proposal is the deletion of <i>members of Cabinet</i> in line with Section 4 (2) (a) of the Act which mandates NICOC to interact with Cabinet</p>	<p>Cabinet decided that there is a need for the Domestic Service to provide periodic national security briefings on Counter- Intelligence and Domestic Intelligence to the three (3) arms of the State being the Executive, Legislature and Judiciary (on a need basis). Members of Cabinet and Premiers are part of the Executive.</p> <p>SSA further submits that the conduct of counter intelligence is not coordinated by NICOC. Once priorities have been approved, it is the responsibility of the National Intelligence Structures to develop operational plans on which Cabinet would need to be appraised.</p>	Separation of Powers concern as explained above.

23.	The chief of the intelligence division of the National Intelligence Structures, or the alternates of the said persons, and such members of departments of State, <u>and other relevant stakeholders as and when the need arises</u> , who may be co-opted by NICOC on a permanent or an <i>ad hoc</i> basis	Intelligence structures are defined in the Bill and it is proposed that departments that have no mandate with regard to intelligence are not given the responsibility. Departments or any entity can be invited to provide relevant information to NICOC instead of being co-opted. The Regulations on Intelligence Coordination will further address the matter.	Noted.
24.	NICOC proposes that it must be the Coordinator, with the approval of the Minister, must appoint members of NICOC or the support staff referred to above	The responses provided on OIGI is also applicable to NICOC	HLPR recommended that NICOC should be relocated to the Presidency to give it the necessary authority to ensure compliance by the Services with the prescripts of intelligence coordination. The response by the Dept does not give effect to this recommendation.
25.	The proposal is the amended provision as follows: <u>The Coordinator may determine the organisational structure and grading of the posts in the Office of the Coordinator for the functioning of NICOC with the approval of the Minister Intelligence Services Act, 2002 (Act No. 65 of 2002);</u>		There is no legal justification proffered by the Dept as to why the organizational structure of NICOC must be determined by the Minister of one of the National Intelligence Structures.
26.	NICOC proposes that “(4) <u>The budget of the office of the Coordinator 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 set out in the Public Finance Management Act, 1999 (Act No. 1 of 1999).</u> ”	SSA does not have a budget vote. The budget of SSA is appropriated under National Treasury. It is proposed to ring- fence the NICOC budget similar to that of the IGI.	To enhance the operational efficiency of NICOC and ensure that it is independent from other National Intelligence Structures, its budget may be appropriated by Parliament.

27.	<p>Cybersecurity: The Bill proposes the insertion of a definition for “cybersecurity” in the National Strategic Intelligence Act, 1994, but the SAPS noted that it is unclear how this will impact on the Cybersecurity Bill that is to be promoted by the Department of Justice and Constitutional Development</p>	<p>The inclusion of the definition of the cybersecurity is in line with the definition that is in the draft Cyber Security Bill and alignment will be ensured in the process.</p> <p>The SSA, and not the department of Justice is drafting the Cybersecurity Bill.</p>	Noted
28.	<p>Definitional syntax: The syntax of the first two definitions below differ slightly.</p> <p>“domestic intelligence” means intelligence on any internal threat or opportunity or potential opportunity or threat or potential threat to national security;</p> <p>“foreign intelligence” means intelligence on any external threat or potential threat and opportunity or potential opportunity to national security”</p>	<p>The definitions of domestic and foreign intelligence will be amended in line with the 1994 National Strategic Intelligence Act.</p>	Retain the definitions in the Principal Acts.
29.	Security Competent Test	<p>Security competence assessment will be applied throughout the Bill</p>	Noted.
30.	<p>National Security</p> <p>“the protection of the Republic's interests, citizens, institutions, and sovereignty from internal and external threats, as governed by the principles set out in section 198 of the Constitution”.</p>	Proposal supported	Retain in the definition in the Principal Act.

31.	<p>The inclusion of “opportunity or potential opportunity” makes the definition of “national security” unconstitutional and open to abuse –</p> <p>which is arbitrary and contrary to the rule of law and could result in the unreasonable and unjustifiable limitation of various fundamental rights.</p> <p>Delete the definition of “opportunity or potential opportunity” from the Bill.</p>	<p>The SSA supports the definition in the Bill and proposes the deletion of the words “potential opportunity” and potential threat with the understanding that intelligence should forewarn and anticipate threats.</p>	<p>Proposed deletion of Opportunity or Potential Opportunity</p>
32.	<p>“any person or institution suspected of espionage”.</p>	<p>The Agency supports the proposal to narrow the definition by excluding the part dealing with section 198 of the Constitution and retaining the part dealing with “Threats to National Security”</p>	<p>Noted.</p>
33.	<p>The Bill does not define “threat”.</p> <p>Insert definition and define as “impending danger of serious harm to the Republic as one, sovereign, democratic state founded on the values set out in section 1 of the Constitution”.</p>	<p>The agency submits that the word “Threat” is used in the context of “Threat to National Security” which is defined in this Bill.</p>	<p>To be clarified in the Bill that all reference to threat means threat to national security.</p>
34.	<p>“administering a vetting investigation to determine the security competence of a person to determine whether such person is suitable to access classified information or critical infrastructure of the State. Such vetting investigation should consider whether the person is a security compromise because they are seen as vulnerable to blackmail, undue influence or manipulation”.</p>	<p>SSA support this proposal. The Bill should make reference to security competence assessment</p>	<p>Noted.</p>

35.	"intelligence on any internal threat to national security".	<p>SSA proposes to use the definition in the 1994 National Strategic Intelligence Act which reads "domestic intelligence means intelligence on any internal threat or potential threat or opportunity to national security"</p> <p>"Foreign intelligence means intelligence on any external threat or potential threat to the national interests of the Republic and its people, and intelligence regarding opportunities relevant to the protection and promotion of such national interests irrespective of whether or not it can be used in the formulation of foreign policy of the Republic".</p>	Retain definition in the Principal Act
36.	"intelligence on any internal threat to national security".	<p>SSA proposes to use the definition in the 1994 National Strategic Intelligence Act which reads "domestic intelligence means intelligence on any internal threat or potential threat or opportunity to national security"</p> <p>"Foreign intelligence means intelligence on any external threat or potential threat to the national interests of the Republic and its people, and intelligence regarding opportunities relevant to the protection and promotion of such national interests irrespective of whether or not it can be used in the formulation of foreign policy of the Republic".</p>	Retain definition in the Principal Act.
37.	"the acquiring and processing of relevant and reliable information into intelligence products related to any domestic or foreign threats to national security".	The Agency supports the definition in the Bill (GILAB, 2023)	The issue of the use of open-ended wording such as opportunity and potential opportunity is the issue with this definition.

38.	Remove this provision	The Agency proposes the removal of the word “apprehend” and replacing it with the words “impede and neutralize” and this proposal is consistent with definition of Counter-Intelligence in the Act.	Noted.
39.	Remove this provision Amend to clause 2(b) to read: “Conduct security competence test on categories of applicants and employees of organs of the State and Departments of State to issue or decline to issue a security clearance certificate”.	(xi) conduct security competence assessments on categories of persons or institutions referred to in section 2A of the Act in order to issue or decline a security clearance certificate or to detect threats to National Security”.	Noted and needs to be clarified in the Bill that vetting investigations will only apply to persons who are in the employ or applicants to an organ of state or institutions which render services to an organ of state as contemplated in section 2A of the Act.
40.	Amend to clause 3(b) – a reference to section 4(2)(a)(i) – to read: “(b) is seen as a threat or potential threat to the national security of the Republic.”	The Agency proposes that the definition of security vetting be broadened to include “or to identify and detect threats to National Security”.	This proposal is already implied in section 4(2)(a)(i) of the Act.

<p>41.</p>	<ul style="list-style-type: none"> • safeguard the independence of the specially designated judge issuing interception warrants (for instance, by having such a judge appointed by the judiciary instead of the minister); compensate for the fact that one cannot defend oneself when state intelligence agencies apply for a surveillance warrant, since that warrant is sought in secret; • create special protections when the surveillance subject is a lawyer or a journalist (two professions where confidentiality is key to upholding democracy); • better regulate the storage and deletion of the intercepted communications and data; and compel intelligence services to notify all surveillance targets – after the fact – that they were intercepted on (as long as that notification doesn't jeopardise any ongoing investigation) 	<p>The bulk interception function:</p> <p>In the initial presentation, bulk interception was conflated with targeted/legal interception.</p> <ul style="list-style-type: none"> • Is going to be limited, exclusively, to foreign jurisdiction; • The IGI will conduct continuous oversight and provide assurance to Minister and the JSCI that bulk interception activities are not directed at individuals or institutions in RSA and that activities are in compliance with the applicable laws and directives. • The Minister will introduce bill to address with Interception and Surveillance of Communications in South Africa. 	<p>Build safeguards in line with the Amabhungane judgement.</p> <p>Clause 2 in page 6 in line 8 provides for Bulk Interception. In line 9 it states that the NCC will intercept among others, communication subject to the submission of an application for authorization by a retired judge who will consider applications with two advisory interception experts. The NCC will then supply the relevant intelligence from bulk interception to the relevant Service.</p> <p>The abovementioned application for authorization is intended to be a checks and balances mechanism to avoid abuse of power and possibly infringing on the right to privacy of persons in terms of section 14(d) of the Constitution.</p> <p>It is contended that the detail of what the application will entail should be detailed in the Bill instead of the Regulations as proposed in order to ensure that the process is transparent and there are sufficient safeguards against abuse. The safeguards would include the provision for procedural constitutional rights, for those persons whose rights may have been adversely affected by the conduct of bulk surveillance.</p> <p><i>In Dawood v Min Home Affairs; Janse van Resburg v Min Trade & Industry the CC noted that "Legislature should provide the Exec with clear guidelines for the exercise of discretion.</i></p>
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42.	Amend the definition to read: “any person or institution suspected of espionage” The Bill defines “espionage” as “the unlawful and intentional communication, delivery, or making available of classified information directly or indirectly benefit a foreign state, person or institution.”	The Agency proposes the following definition in this regard: “any person or institution, identified by the Agency in the form and manner prescribed, that engages in activities that are defined as a threat to national security in terms of this Act”	Noted

43.	Delete “opportunity or potential opportunity” from Bill entirely. 2. Amend the definition of “national security” to read: “the protection of the Republic’s interests, citizens, institutions, and sovereignty from internal and external threats, as governed by the principles set out in section 198 of the Constitution”	Refer to paragraph’.....above	Support deletion
44.		Refer above	Propose deletion of opportunity or potential opportunity
45.	Relies on the definition of: “threat or opportunity or potential opportunity or threat or potential threat to national security”.	Refer above	Noted
46.	Relies on the definition of: “threat or opportunity or potential opportunity or threat or potential threat to national security”.	Refer above	Noted
47.	Relies on the definition of: “threat or opportunity or potential opportunity or threat or potential threat to national security”.	Refer above	Noted
48.	Relies on the definition of: “threat or opportunity or potential opportunity or threat or potential threat to national security”.	Refer above	Noted

49.	Disjunctive reading, resulting in clause failure to achieve its purpose, resulting in an arbitrary infringement of the affected constitutional rights – contrary to rule of law and section 36.	Refer above	Supported
50.	Clause 3(a) amends section 2A of the Act referred to in clause 2(b), to read: “(1) The relevant members of the National Intelligence Structures must conduct a vetting investigation in the prescribed manner to determine the security competence of a person, if such a person— (a) falls within a prescribed category of persons or institutions who must have a security clearance— (iv) if a person or the institution is of national security interest in terms of Section 4(2)(a)(i) of the Act”.	Refer above	Supported

The Constitutional Court decision against Parliament on the subsequent addition of provision by the Dept after the closure of the public participation process.

SOUTH AFRICAN IRON AND STEEL INSTITUTE v SPEAKER OF THE NATIONAL ASSEMBLY

In *casu*, the applicants sought the order declaring that the introduction of amendments to the definition of Waste, in June 2021 after the public participation process on the NEML AB (Waste Act) amendments was completed to be unconstitutional and invalid. The basis for unconstitutionality was that Parliament failed to comply with the constitutional obligations to facilitate public participation on significant amendments to legislation. The Court found in favour of the Applicants and held that Parliament failed to discharge its constitutional obligations in section 59 and 72 of the Constitution.

SOUTH AFRICAN VETERINARY ASSOCIATION v SPEAKER OF THE NATIONAL ASSEMBLY

The South African Veterinary Association (applicant) sought an order declaring that Parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing the Medicines and Related Substances Amendment Act. Specifically, the applicant contended that the inclusion of the word “veterinarian” in the Act had been done without facilitating the requisite public involvement in both the National Assembly and the National Council of Provinces.

It submitted that Parliament had failed in its constitutional duty to facilitate public participation in the law-making process because the National Assembly had held no public hearings about the version of the Bill that included veterinarians, and the public hearings held by National Council of Provinces had been procedurally and substantively flawed.

Court held that the only appropriate remedy was to declare the insertion of the word “veterinarian” constitutionally invalid, and sever it from the rest of the licensing section.