

CLAUSE 23 (as agreed)

23 (1) If a request is made for information and it is established that the information requested is classified, that request must be referred to the relevant head of the organ of state for a review of the classification status of the information requested.

(2) In conducting such a review the head of an organ of state must take into account the conditions for classification and declassification as set out in this chapter.

(3) The head of the organ of state concerned must declassify the classified information in accordance with section 19 and grant the request for information if that information reveals evidence of -

- (i) a substantial contravention of, or failure to comply with the law; or
- (ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the information clearly outweighs the harm that will arise from the disclosure.

(4) The head of the organ of state must -

- (a) within 14 days of receipt of the request contemplated in subsection 3(a) (ii)

grant the request for the declassification of classified information; or

- (b) within 30 days, of receipt of the request contemplated in subsection (3) (a) (i)

grant the request for the declassification of classified information.

(5) A Court may condone non-observance of the time-period referred to in section 23 (4) (a) on good cause shown where an urgent application is brought before court.

(6) If an application for a request referred to in subsection (1) is received, the head of the organ of state must within a reasonable time conduct a review of the classified information held by that organ of state relating to the request for declassification.

CLASSIFICATION REVIEW PANEL

Constitution and appointment of Classification Review Panel

xxx. (1) Due regard having been given to—

- (a) participation by the public in the nomination process;
 - (b) transparency and openness; and
 - (c) the publication of a shortlist of candidates for appointment.
- (2) The Joint Standing Committee on Intelligence must table a list of five persons for approval by the National Assembly.
- (3) The National Assembly must by a resolution with a support of a majority vote of its members upon approval submit the list of five persons to the Minister for appointment.
- (4) The Classification Review Panel is headed by a Chairperson who must either be an admitted attorney or advocate with at least ten years legal experience.
- (5) The other four members of the Classification Review Panel must be suitably qualified of whom **[at least one member]**—
- (a) at least one member must have expertise in the Constitution and the law;
 - (b) at least one member must have knowledge and experience of national security matters; and

- (c) at least one member must have knowledge and experience of archive related matters.
- (6) The members of the Classification Review Panel are appointed for a term of five years which term is renewable for one additional term only.
- (7) A person may not be appointed as a member of the Classification Review Panel unless that person has a valid security clearance certificate issued under the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994).

OFFENCES:

To amalgamate espionage and hostile activity offences

Espionage offences

For the purpose of this section "**the State**" means the Republic of South Africa.

32. (1) It is an offence punishable on conviction by imprisonment for a period not less than 15 years but not exceeding 25 years [, **subject to section 1(6)**]

- (a) to unlawfully communicate, deliver or make available state information classified top secret which the person knows or ought reasonably to have known or suspected would :
 - (i) directly or indirectly benefit another state; or
 - (ii) would directly or indirectly prejudice the state; or
- (b) to unlawfully make, obtain, collect, capture or copy a record containing state information classified top secret which the person knows or ought reasonably

to have known or suspected would;

- (i) directly or indirectly benefit another state; or
- (ii) would directly or indirectly prejudice the state.

(2) It is an offence punishable on conviction by imprisonment for a period not less than 10 years but not exceeding 15 years, **[subject to section 1(6)]**—

(a) to unlawfully communicate, deliver or make available state information classified secret which the person knows or ought reasonably to have known or suspected would;

- (i) directly or indirectly benefit another state; or
- (ii) would directly or indirectly prejudice the state; or

(b) to unlawfully make, obtain, collect, capture or copy a record containing state information classified secret which such a person knows or ought reasonably to have known or suspected **[will]** would :

- (i) directly benefit another state; or
- (ii) would directly or indirectly prejudice the state.

(3) It is an offence punishable on conviction by imprisonment for a period not less than three years but not exceeding five years, **[subject to section 1(6)]**—

(a) to unlawfully communicate, deliver or make available state information classified confidential which the person knows or ought reasonably to have known or suspected would ;

- (i) directly or indirectly benefit another state; or
- (ii) would directly or indirectly prejudice the state; or

(b) to unlawfully make, obtain, collect, capture or copy a record containing state

information classified confidential which the person knows or ought reasonably to have known or suspected would:

- (i) directly or indirectly benefit another state; or
- (ii) would directly or indirectly prejudice the state.

[Hostile activity offences]

33. (1)] It is an offence punishable on conviction by imprisonment for a period not less than 15 years but not exceeding 25 years,[subject to section 1(6)]—

- (a) to unlawfully communicate, deliver or make available state information classified top secret which the person knows or ought reasonably to have known or suspected would directly or indirectly prejudice the state; or
- (b) to unlawfully make, obtain, collect, capture or copy a record containing state information classified top secret which the person knows or ought reasonably to have known or suspected would directly or indirectly prejudice the state.

(2) It is an offence punishable on conviction by imprisonment for a period not less than 10 years but not exceeding 15 years, [subject to section 1(6)]—

- (a) to unlawfully communicate, deliver or make available state information classified secret which the person knows or ought reasonably to have known or suspected would directly or indirectly prejudice the state; or
- (b) to unlawfully make, obtain, collect, capture or copy a record containing

state information classified secret which the person knows or ought reasonably to have known or suspected would directly or indirectly prejudice the state.

(3) It is an offence punishable on conviction by imprisonment for a period not less than three years but not exceeding five years, [subject to section 1(6)]:

- (a) to unlawfully communicate, deliver or make available state information classified confidential which the person knows or ought reasonably to have known or suspected would directly or indirectly prejudice the state; or
- (b) to unlawfully make, obtain, collect, capture or copy a record containing state information classified confidential which the person knows or ought reasonably to have known or suspected would directly or indirectly prejudice the state.]

Harbouring or concealing persons

34. Any person who harbours or conceals a person whom he or she knows, or has reasonable grounds to believe or suspect, has committed, or is about to commit, an offence contemplated in section 32 or 33, is guilty of an offence and liable on conviction to imprisonment for a period [not less than five years but] not exceeding 10 years [, subject to section 1(6)].

In the Protection of Constitutional Democracy Against Terrorist and Related Activities Act,
2004 (Act No 33 of 2004):

Section 11

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Offences relating to harbouring or concealment of persons committing specified offences

Any person who harbours or conceals any person, whom he or she knows, or ought reasonably to have known or suspected, to be a person who has committed a specified offence, as referred to in paragraph (a) of the definition of "specified offence", or who is likely to commit such an offence, is guilty of an offence.

Specified for the purpose of section 11 is defined:

"specified offence", with reference to section 4, 14 (in so far as it relates to section 4), and 23, means—

- (a) the offence of terrorism referred to in section 2, an offence associated or connected with terrorist activities referred to in section 3, a Convention offence, or an offence referred to in section 13 or 14 (in so far as it relates to the aforementioned sections);

Interception of or interference with classified information

35. (1) Subject to the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 (Act No. 70 of 2002), a person who intentionally accesses or intercepts any classified information without authority or permission to do so, is guilty of an offence and liable to imprisonment for a period **[not less than five years but]** not exceeding 10 years, **[subject to section 1(6)]**.

(2) Any person who intentionally and without authority to do so, interferes with classified information in a way which causes such information to be modified, destroyed or otherwise rendered ineffective, is guilty of an offence and

liable on conviction to imprisonment for a period **[not less than five years but]** not exceeding 10 years, **[subject to section 1(6)]**.

(3) Any person who produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is specifically designed to overcome security measures for the protection of state information, for the purposes of contravening this section, is guilty of an offence and liable on conviction to imprisonment for a period **[not less than five years but]** not exceeding 10 years, **[subject to section 1(6)]**.

(4) Any person who intentionally or knowingly utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect state information, is guilty of an offence and liable on conviction to imprisonment for a period **[not less than five years but]** not exceeding 10 years, **[subject to section 1(6)]**.

(5) Any person who contravenes any provision of this section with the intent to interfere with access to an information system so as to constitute a denial, including a partial denial, of service to legitimate users commits an offence and is liable on conviction to imprisonment for a period **[not less than five years but]** not exceeding 10 years, **[subject to section 1(6)]**.

(6) (a) Without derogating from the generality of subsection (6)(b)—

"access to a computer" includes access by whatever means to any program or data contained in the random access memory of a computer or stored by any computer on any storage medium, whether such storage medium is physically attached to the computer or not, where such storage medium belongs to or is under

control of the State;

"content of any computer" includes the physical components of any computer as well as any programme or data contained in the random access memory of a computer or stored by any computer on any storage medium, whether such storage medium is physically attached to the computer or not, where such storage medium belongs to or is under the control of the State;

"modification" includes both a modification of a temporary or permanent nature; and

"unauthorised access" includes access by a person who is authorised to use the computer but is not authorised to gain access to a certain programme or to certain data held in such computer or is not authorised, at the time when the access is gained, to gain access to such computer, programme or data.

(b) Any person who wilfully gains unauthorised access to any computer which belongs to or is under the control of the State or to any programme or data held in such a computer, or in a computer to which only certain or all employees have restricted or unrestricted access in their capacity as employees of the State, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(c) Any person who wilfully causes a computer which belongs to or is under the control of the State or to which only certain or all employees have restricted or unrestricted access in their capacity as employees to perform a function while such person is not authorised to cause such computer to perform such function, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(d) Any person who wilfully performs an act which causes an

unauthorised modification of the contents of any computer which belongs to or is under the control of the State or to which only certain or all employees have restricted or unrestricted access in their capacity as employees of the State with the intention to—

- (i) impair the operation of any computer or of any programme in any computer or of the operating system of any computer the reliability of data held in such computer; or
- (ii) prevent or hinder access to any programme or data held in any computer,

is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not less than three years but not exceeding five years, **[subject to section 1(6)]**.

(e) Any act or event for which proof is required for a conviction of an offence in terms of this subsection which was committed or took place outside the Republic is deemed to have been committed or have taken place in the Republic: Provided that—

- (i) the accused was in the Republic at the time he or she performed the act or any part thereof by means of which he or she gained or attempted to gain unauthorised access to the computer, caused the computer to perform a function or modified or attempted to modify its content;
- (ii) the computer, by means of or with regard to which the offence was committed, was in the Republic at the time the accused performed the act or any part thereof by means of which he or she gained or attempted to gain unauthorised access to it, caused it to perform a function or modified or attempted to modify its contents; or
- (iii) the accused was a South African citizen at the time of the commission of the

offence.

PROPOSAL¹

(7) A court of the Republic has jurisdiction in respect of an offence contemplated by this section if:

(a) the offence was committed against a government facility of the Republic abroad, including an embassy or other diplomatic or consular premises' or any other property of the Republic;

(b) any act alleged to constitute an offence under this section and which is committed outside the Republic by a person other than a citizen of the Republic or a person ordinarily resident if the Republic, must, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic if that—

(i) act affects or is intended to affect a public body, any person or business in the Republic;

(ii) person is found to be in the Republic; and

(iii) person is for one or other reason not extradited by the Republic or if there is no application to extradite that person.

(c) Any offence committed in a country outside the Republic as contemplated in subsection (1)(a) or (1)(b), is, for the purpose of determining the jurisdiction of a court to try the offence, deemed to have been committed—

(i) at the place where the person is ordinarily resident; or

(ii) at the person's principal place of business.

(8) The provisions of this section must be exercised subject to the provisions of the Extradition Act, 1962 (Act No. 67 of 1962).

CLAUSE 40:

Provision of false information to national intelligence structure

¹ Question posed as to what will happen if a non SA person gains unlawful access to a SA computer in foreign state

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40. Any person who unlawfully provides information to a national intelligence structure that is false or fabricated, knowing that it is false or has been fabricated is guilty of an offence and liable on conviction to imprisonment for a period [not less than three years but]not exceeding five years, [subject to section 1(6)].

CLAUSE 41²

Destruction or alteration of valuable information

41. Any person who unlawfully destroys or alters valuable information, except where such destruction or alteration is for a purpose and in a manner authorised by law, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

Clause 16 of National Archives Act

Offences and penalties³

(1) Any person who—

- (a) wilfully damages any public or non-public record in the control of a governmental body; or
 - (b) otherwise than in accordance with this Act or any other law, removes, destroys or erases such record,
- shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years or both such fine and imprisonment.

(2) Any person who fails to comply with—

- (a) a request mentioned in section 14 (3); or
 - (b)
- shall be guilty of an offence and liable on conviction—
- (i) in the case of an offence contemplated in paragraph (a) of this subsection, to a fine not exceeding R5 000;
 - (ii) in the case of an offence contemplated in paragraph (b) of this subsection, to a fine not exceeding R10 000.

² to consider the National Archives Act regarding offence and penalty

³ NATIONAL ARCHIVES AND RECORD SERVICE OF SOUTH AFRICA ACT
NO. 43 OF 1996

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(3) The National Archivist may refuse to allow any person convicted of an offence in terms of subsection (1) access to an archives repository for such period as he or she may deem fit, subject to an appeal to the Minister.

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The National Archives Act provides that where a person wilfully damages or otherwise that in accordance with the National Archives Act, or any other law removes, destroys or erases...

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Is guilty of an offence and liable period not exceeding two years.

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The clause in Protection of Information and the section in the National Archives Act provide for an offence and create a defence. However the period in the National Archives Act is less than the period of imprisonment provided for in the Protection of Information Bill.

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Clause 42

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To determine different levels and to consider the penalties:

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Improper Classification

42. (1) Any person who knowingly classifies information as

(a) top secret;

(b) secret; or

(c) confidential,

in order to achieve any purpose ulterior to this Act, including the classification of information in order to—

[(a)] (i) conceal breaches of the law;

[(b)] (ii) promote or further an unlawful act, inefficiency, or administrative error;

[(c) (iii)] prevent embarrassment to a person, organisation, or agency, or

[(d) (iv)] give undue advantage to anyone within a competitive bidding process,

(2) (a) In the event of subsection (1)(a) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding **three years**

(b) In the event of subsection (1)(b) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding **three years**

(c) In the event of subsection (1)(c) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding **three years**

Extra-territorial application of Act

44. Any act constituting an offence under this Act and which is committed outside the Republic by any South African citizen or any person domiciled in the Republic must be regarded as having been committed in the Republic.

See document attached as annexure "A"

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Clause 17 and 21

PROPOSED AMALGAMATION OF CLAUSES 17 AND 21

[Directions] Conditions for classification and declassification

17. (1) [For the purpose of classification, classification decisions

must be guided by section 21 and the following:] The decision to classify information must be based solely on the guidelines and criteria set out in this Act and the regulations.

[(1)] (2) [For the purposes of classification, classification] Classification decisions must be guided by the following:

(a) Secrecy **[exists]** is justifiable only when necessary to protect **[the]** national **[interest]** security; justifiable

Limitation on classification

- (b) classification of information may not under any circumstances be used to—
- (i) conceal an unlawful act or omission, incompetence, inefficiency, or administrative error;
 - (ii) restrict access to information in order to limit scrutiny and thereby avoid criticism;
 - (iii) prevent embarrassment to a person, organisation, or organ of state or agency;
 - (iv) unlawfully restrain or lessen competition; or
 - (v) prevent, delay or obstruct the release of information that does not require protection under this Act;

Compliance with classification levels

(c) the classification of information is an exceptional measure and should be conducted strictly in accordance with **[sections 11 and]** section 15;

Instances when classification of information may occur

- (d) information is classified only when there is—
- (i) a clear, justifiable and legitimate need to do so; and
 - (ii) a demonstrable need to protect the information in the interest of national **[interest]** security;

Referral in event of uncertainty

(e) if there is significant doubt as to whether information requires protection, the matter must be referred to the Minister for a decision;

[(f)] [the decision to classify information must be based solely on the guidelines and criteria set out in this Act, the policies and regulations made in terms of this statutory framework]

State information not meeting conditions

(g) State information that does not meet the criteria set out in this Act, the

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regulations and applicable policies may not be classified;

Requirements for decisions

- (h) the decision to classify may not be based on any extraneous or irrelevant reason;
- (i) classification decisions **[ought to]** must **[be assessed and weighed]** balance openness against **[the benefits of]** secrecy taking into account the following factors:

Factors to be taken into account

- (i) The vulnerability of the information;
- (ii) the threat of damage from its disclosure;
- (iii) the risk of loss of the information;
- (iv) the value of the information to the adversaries of the Republic;
- (v) the cost of protecting the information; and
- (vi) the public benefit to be derived from the release of the information;

Regulation of classification

- (j) scientific and research information not clearly related to **[the] national security [and the national interest]** may not be classified;
- (k) information may not be reclassified after it has been declassified and released to the public under proper authority;
- (l) classification must be in place only for as long as the protection is actually necessary; and
- (m) where there is still a need for classification it may be that the information in question no longer requires high level classification and should be downgraded.

[(2) The application of the classification [principles] conditions may not in any way inhibit or prevent officials from informing authorised officials of such information in order to fulfil law enforcement or intelligence functions authorised or prescribed by law.

Continued classification of information

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- 21. (1) In taking a decision whether or not to continue the

classification of information, the head of an organ of state must consider whether the declassification of classified information is likely or could reasonably be expected to cause [significant and] demonstrable harm to the national [interest] security of the Republic.

Specific conditions

2] (3) Specific considerations with regard to the decision whether to classify information may include whether the disclosure may—

- (a) expose the identity of a confidential source, or reveal information about the application of an intelligence or law enforcement investigative method, or reveal the identity of an intelligence or police source when the unlawful disclosure of that source would clearly and demonstrably damage the national security of the Republic or the interests of the source or his or her family;
- (b) clearly and demonstrably impair the ability of government to protect officials or persons for whom protection services, in the interest of national security, are authorised;
- (c) seriously and substantially impair national security, defence or intelligence systems, plans or activities;
- (d) seriously and demonstrably impair relations between South Africa and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the Republic;
- (e) violate a statute, treaty, or international agreement, including an agreement between the South African government and another government or international institution; or
- [(f) cause financial loss to a non-state institution or will cause substantial prejudice to such an institution in its relations with its clients, competitors, contractors and suppliers; or]**
- (g) cause life threatening or other physical harm to a person or persons.

[(3) The Minister may after taking into consideration all aspects as indicated in subsection (2), sections 11 and 17(1)(i) authorise the classification or declassification of any category or class of classified information.]

Performing official functions

[(2)] (4) The application of the classification [principles] conditions may not in any way inhibit or prevent officials from informing authorised officials of such information in order to fulfil law enforcement or intelligence functions authorised or

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prescribed by law.

declassification

(5) When the conditions for classification contemplated in this section no longer exist information must be declassified

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Or

NEW CLAUSE

Declassification of information

XXX. When the conditions for classification contemplated in section 17 no longer exist, information must be declassified.

PROPOSED BUSINESS PROCESS FOR CLASSIFICATION, DECLASSIFICATION AND RECLASSIFICATION OF STATE INFORMATION

CLASSIFICATION

Authority to classify - clause 16
Nature of Classified State Information - clause 13
Conditions for Classification - clause 17
Methods of Classification- clause 14
Levels of Classification- clause 15
Review of Classified Information- clause 23
Appeals against Classified information- clause 25
Report and return of classified information- clause 18
Protection of classified information before Courts- clause 46

DECLASSIFICATION

Authority to declassify- clause 19
Conditions for declassification- clause 17(5) or new clause

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Maximum period for classification - clause 20

Authority for reclassification - clause 21

Authority for reclassification - clause 22

Authority for reclassification - clause 23

Transfer of Public Information - clause 24

Release of declassified information to the Public - clause 25

Establishment of a National Information System - clause 26

Annexure "A"
to Proposal
dated 01/08/2011

Extra-territorial application of Act

44. Any act constituting an offence under this Act and which is committed outside the Republic by a citizen of the Republic or a person ordinarily resident in the Republic must be regarded as having been committed in the Republic.

Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004)

15. Jurisdiction in respect of offences.—(1) A court of the Republic has jurisdiction in respect of any specified offence as defined in paragraph (a) of the definition of "specified offence", if—

(a) the accused was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic; or

(b) the offence was committed—

(i) in the territory of the Republic;

(ii) on board a vessel, a ship, an off-shore installation, or a fixed platform, or an aircraft registered or required to be registered in the Republic at the time the offence was committed;

(iii) by a citizen of the Republic or a person ordinarily resident in the Republic;

(iv) against the Republic, a citizen of the Republic or a person ordinarily resident in the Republic;

(v) on board an aircraft in respect of which the operator is licensed in terms of the Air Services Licensing Act, 1990 (Act No. 115 of 1990), or the International Air Services Act, 1993 (Act No. 60 of 1993);

(vi) against a government facility of the Republic abroad, including an embassy or other diplomatic or consular premises, or any other property of the Republic;

(vii) when during its commission, a national of the Republic is seized, threatened, injured or killed;

(viii) in an attempt to compel the Republic to do or to abstain or to refrain from doing any act; or

(c) the evidence reveals any other basis recognised by law.

(2) Any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person other than a person contemplated in subsection (1), shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic if that—

- (a) act affects or is intended to affect a public body, any person or business in the Republic;
- (b) person is found to be in the Republic; and
- (c) person is for one or other reason not extradited by the Republic or if there is no

application to extradite that person.

(3) Any offence committed in a country outside the Republic as contemplated in subsection (1) or (2), is, for the purpose of determining the jurisdiction of a court to try the offence, deemed to have been committed—

- (a) at the place where the accused is ordinarily resident; or
- (b) at the accused person's principal place of business.

(4) Where a person is charged with conspiracy or incitement to commit an offence or as an accessory after that offence, the offence is deemed to have been committed not only at the place where the act was committed, but also at every place where the conspirator, inciter or accessory acted or, in case of an omission, should have acted.

(5) Whenever the National Commissioner receives information from an appropriate government body of a foreign State that a person who is alleged to have committed or is convicted of or is sentenced in respect of any Convention offence in respect of which—

- (a) a court in the Republic has jurisdiction as referred to in subsection (1); or
- (b) any court in a foreign State may have jurisdiction,

may be present in the Republic, the National Commissioner must cause such measures to be taken as he or she may deem necessary to investigate the matter.

(6) Where it appears on reasonable grounds from the investigation referred to in subsection (5) that extradition or criminal proceedings may be instituted against such person, that person may be arrested as contemplated in section 40 (1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), in order to ensure his or her presence at such proceedings.

(7) The National Director must, upon an arrest contemplated in subsection (6), promptly be notified thereof by the police official effecting such arrest.

(8) Upon being notified in terms of subsection (7), the National Director must promptly notify any foreign State that might have jurisdiction over the offence in question, either directly or through the Secretary General of the United Nations—

- (a) of the fact that the person is in custody;
- (b) of the circumstances that justify the person's detention; and

(c) whether he or she intends to prosecute the person,

with a view to the surrender of such person to a foreign State for prosecution by that State, should the National Director decline to prosecute.

(9) The provisions of this section must be exercised subject to the provisions of the Extradition Act, 1962 (Act No. 67 of 1962).