

***An Analysis of Parliamentary Intelligence  
Oversight in South Africa with specific  
reference to the Joint Standing Committee on  
Intelligence***

by

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**SUMMARY**

**An analysis of Parliamentary Intelligence Oversight  
in South Africa with specific reference to the Joint  
Standing Committee on Intelligence (JSCI)**

by

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This study analyses parliamentary intelligence oversight in South Africa by assessing the understanding of members of the JSCI of its core business, its mission and vision and powers and functions as are stipulated by law.

The study locates the JSCI within an international intelligence oversight milieu through a review and evaluation of selected countries' intelligence oversight mechanisms. Furthermore, international best practice is sought and applicable lessons are drawn for South Africa.

The study is based on a literature review and interviews with members of the JSCI to gather information and draw insights to evaluate and test the propositions in the context of international and national best practice.

The propositions, which are supported by the research, are that:

- Intelligence oversight in South Africa under the JSCI has hitherto been relatively effective although there is room for improvement.
- The JSCI has good relations with the other arms of the state that are responsible for the oversight of Intelligence in South Africa – making parliamentary intelligence oversight, overall, quite effective.

## OPSOMMING

### **‘n Analise van Parlementêre Intelligensie Oorsig in Suid-Afrika met spesifieke verwysing na die Gesamentlike Staande Komitee insake Intelligensie (GSKI)**

deur

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Hierdie studie behels ‘n evaluering van die begrip wat lede van die Gesamentlike Staande Komitee insake Intelligensie het met betrekking tot hul sleutelfunksies, missie, visie en magte soos deur wetgewing bepaal.

Dit is ook ‘n evaluering van gekose lande se meganismes van intelligensie oorsig. Sodoende word die beste internasionale praktyk ondersoek en relevante afleidings vir Suid-Afrika gemaak.

Die studie is gebaseer op ‘n literatuuoroorsig en onderhoude met lede van die GSKI om inligting in te win, en afleidings to maak, voordat dit binne die konteks van nasionale en internasionale beste praktyk geëvalueer en getoets kon word.

Die proposisies wat deur die navorsing ondersteun word, is die volgende:

- Intelligensie oorsig in Suid-Afrika onder the GSKI was tot dusver redelik effektief, hoewel daar ruimte is vir verbetering.
- The GSKI handhaaf 'n goeie verstandhouding met die ander instansies wat verantwoordelik is vir intelligensie oorsig in Suid-Afrika, wat beteken dat parlementêre intelligensie oorsig in geheel redelik effektief is.
- Ten spyte van hierdie effektiwiteit, is daar leemtes in die wetgewing en probleme rakende die *modus operandi* van die GSKI waaraan die Uitvoerende en Wetgewende gesag aandag behoort te skenk en wat deel kan vorm van ‘n pakket van wetswysigings.

Alhoewel die navorsing die proposisies ondersteun, is daar tot die gevolgtrekking gekom dat nuwe inisiatiewe nodig is. Hierdie inisiatiewe sluit in die verbreding van die omvang van verantwoordelikheid om sodoende ‘n kultuur van verantwoordelikheid te skep onder middel en senior bestuursposte in die intelligensie strukture. Tweedens is ‘n herwaardering van die wyse waarop die Parlement die GSKI befonds, nodig.

**SLEUTEL TERME:**

Verantwoordelikheid  
Openbare oorsig  
Konvensionele bedreigings  
Geheime optrede  
Opkomende bedreigings  
Uitvoerende oorsig  
Intelligensie bedrywighede  
Intelligensie oorsig  
Intelligensie produk  
Juridiese oorsig  
Wetgewende oorsig  
Nasionale veiligheid  
Onkonvensionele bedreigings  
Onpartydigheid  
Sekerheidsklaring

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## **INTRODUCTION**

### **1. CONTEXT OF THE STUDY**

The end of the Cold War has not heralded the birth of a peaceful and threat-free world.<sup>1</sup> Instead, threats have become numerous and diverse.

Consequently democracies need to be protected from a number of conventional and emerging threats that characterise the post-Cold War world.<sup>2</sup>

Conventional threats associated with governments are conventional or nuclear in nature. They are characterised by the presence of static orders of battle and are linear in development and deployment of capabilities. Nuclear and conventional war capacities are employed in accordance with well-understood doctrines and rules of engagement. These doctrines and rules make it relatively easy to detect their mobilisation and can be supported by generally recognisable intelligence assets.<sup>3</sup> In contrast to the conventional threats, emerging threats simply cannot be easily assessed, are not fixed and cannot be neutralised with traditional intelligence capabilities. They do not have orders of battle and are driven by the availability of opportunity. They call for creativity and innovation with adaptability and responsiveness as most crucial.

This innovation and creativity highlights the demands facing intelligence services the world over. Intelligence services have to warn, inform, advise and even predict the patterns of threats – conventional and non-conventional. To be effective they have to operate secretly to uncover the plans of adversaries, competitors and enemies. In addition, intelligence services have to identify emerging sources of power - in this regard the focus is on opportunities and areas of strength possessed by their country - and also emerging sources of instability. Based on the intelligence at hand they would then forecast to indicate the rate of change of sources of instability and power.<sup>4</sup>

In a democracy the legitimacy of the government is dependent on the extent to which it has the confidence of the people and is, indeed, trusted by the people.<sup>5</sup> The work of intelligence is crucial in the maintenance of democracy but is seen in some circles as antithetical with democracy as intelligence services operate in secrecy. What is confused here is the need for a secretive operational environment for secretive government. Secrecy is a precondition for an effective and successful intelligence service. This does not mean that government should govern in secrecy.

For democracy to flourish there is a need for transparency. This means that government must make information available on which people can base decisions affecting their daily lives. Secret government tends to lead to excesses and loss of confidence of the people and tends, in addition, to easily breed passivity and political apathy. “If most of the voters show distrust or political cynicism towards government – especially for an extended period – the legitimacy of the government may be challenged”.<sup>6</sup> To balance secrecy, the environment in which intelligence services operate, with transparency – a precondition for a thriving democracy – intelligence services are controlled and overseen by the executive, the legislature and the judiciary.

The oversight mechanisms are instituted as checks and balances to ensure that intelligence services do not exceed their constitutional and legal mandates. These are generally divided into the legislative, executive and judicial oversight mechanisms. They are informed in part by the doctrine of separation of powers within the state. In addition, an array of civilian monitoring, supervision and oversight mechanisms are put in place as additional external controls over the intelligence services. The checks and balances put in place are anchored on the understanding that in a democracy the voice of the people is the beginning and end. These structures, within a democratic form of government are not responsible only to the executive tier of government but to the legislature through elected representatives of the people and ultimately to the citizens at large.<sup>7</sup>

This link between the citizenry and the legislatures is the representative assemblies of representatives of people called differently in different nations, for example Congress in the case of the United States of America (USA) or Parliament in the case of the United Kingdom (UK), South Africa, Kenya, and Canada. These legislatures are charged with the responsibility of serving as a check on the executive. In some legislative systems they are also the generator of the executive as members of the executive are elected from members of the legislature. Legislatures have special committees or legislative structures<sup>8</sup> that conduct this oversight function as surrogates of the legislature and the public. One of their roles is to oversee the activities of government and its administration, inclusive of intelligence services.

In this regard Longley and Davidson<sup>9</sup> note that the main reason for the growing use of committees is to enhance their ability to oversee, or scrutinise the government and ministries. They argue that it is "perhaps even the central factor explaining the growing use of committees".<sup>10</sup> Despite periods of benign neglect, committees of the legislatures have emerged as vibrant and central institutions of democratic legislatures in today's world, and have begun to define new and changing roles for themselves evident in debates of democratic and democratising countries' legislatures.<sup>11</sup>

## **2. OBJECTIVES OF THE STUDY**

This study focuses on the parliamentary oversight of intelligence in South Africa and seeks to analyse how this has been conducted since the advent of the second democratic parliament in South Africa up until 2001. In this regard the study seeks to see how effective the JSCI and for that matter the legislature has been in the oversight of intelligence services during this period.

The study will also seek to analyse the extent to which members of the JSCI understand their role and function, mandate and if there exists an agreed upon *modus operandi* on the oversight of Intelligence Services in South Africa. It would seek to explore relationships the JSCI has with other

institutions of state that are involved in intelligence oversight such as the Inspector-General of Intelligence and Auditor-General, for example.

The question that arises is: “Is legislative intelligence oversight effective in South Africa?” The quest of this study is to find answers to this and other related issues raised herein above. This study contextualises South African developments on the role of intelligence oversight by the legislature using an analysis of legislative intelligence oversight in selected countries.<sup>12</sup> It highlights international and national best practice – covering the key success factors for effective intelligence oversight.

### **3. PROBLEM STATEMENT**

This study is necessitated by various reasons. One of this is that international trends indicate that whilst the existence of oversight measures is critical, their existence does not guarantee effective and efficient oversight. These international trends point out that oversight measures have not been effective at all times and in some instances these structures have failed to fulfil their mandates and missions.<sup>13</sup>

In other historical circumstances the lack of required resources, human, financial and capital have made it difficult for these mandates to be fulfilled. This is more so when structures are given mandates which end up being under-resourced due to the failure of the responsible authorities to take due regard of the existing national resource challenges and constraints.

Other than the above-mentioned problems, another difficulty that the study seeks to explore is the operating environment<sup>14</sup> of the JSCI. In other words the social, political, economic and cultural milieu within which this oversight work is undertaken. It has been determined that success in fulfilling a mandate is directly related to the amount of support and acceptability that an organ of state has from the stakeholders. This becomes the capital that it uses for building credibility and legitimacy. The above-mentioned factors need

to be explored in the case of the JSCI especially when it comes to being acceptable to opposition political parties that do not have a seat in its deliberations.

#### **4. PROPOSITIONS**

This study will argue that intelligence oversight in South Africa under the JSCI has hitherto been relatively effective although there is room for improvement.

Furthermore, the study will also argue that the JSCI has good relations with the other arms of state that are responsible for oversight of intelligence<sup>15</sup> in South Africa – making Parliamentary<sup>16</sup> intelligence oversight overall quite effective.

It will point out that despite this there are legislative gaps and problems pertaining to the *modus operandi* that need attention by both the executive and the legislature which could be part of a package of legislative reform.<sup>17</sup>

#### **5. RESEARCH METHODOLOGY**

There are three research methods that are used in this study namely, description, analyses and comparison.

To set the context, the main method used by the study is the descriptive method. The study seeks to describe the nature of the security environment and the challenges facing the intelligence services the world over. It also describes the South African legislative oversight environment of intelligence as well as the mandate of the JSCI and other legislative intelligence oversight structures in the selected countries.

Analysis is used in the critique of the selected countries intelligence oversight dispensation by their respective legislatures. It is also used in the review of

the perception of members of the JSCI. These perceptions are a subject of two chapters in this study.

Lastly, the study draws lessons from selected countries and international best practice through the use of the comparative analyses method. This method is used in several areas such as the review and critique of the selected countries *vis-à-vis* South Africa and in the discussion of the conceptual framework for the study.

## **6. Sources**

The research will rely on two main methods namely: a literature study and interviews.

### **6.1 Literature Study**

A literature study was used to extract international and national best practice in so far as intelligence monitoring, oversight, control and supervision are concerned. This best practice will provide a useful base of scrutiny and comparative analysis of the role and function of the JSCI in South Africa. To this end a close focus fell on the Canadian<sup>18</sup> Security Intelligence System due to its influence on the South African system. Further, there is a critical review of the UK, Australian and USA intelligence systems as they too were studied extensively in the setting up of the South African dispensation. In addition, the study of these systems seeks to extract key principles that inform their operations and to identify those that are relevant for the South African situation but are not yet part thereof.

The literature study also provided a background to the interviews that were conducted with members of the Joint Standing Committee on Intelligence. To mirror consistency, the proceedings of the Intelligence Review Agencies Conferences will be used as a control mechanism in validating some of the views of Committee members.

## 6.2 Interviews

The main aim of the interviews was to distil the thinking of members of the Joint Standing Committee on Intelligence on the strengths, weaknesses, opportunities and threats facing the Committee in South Africa. Secondly, the interviews are used to evaluate the impact that members of the JSCI think the Committee has had on the intelligence culture and operations of the Intelligence Services. Thirdly, interviews serve to expose lessons derived from their international official visits and how they think the system of legislative intelligence oversight could be improved.

Fourthly, the interviews sought to identify what the Committee members think of the other components of the intelligence dispensation and what their expectations are of them. The interviews are not used for quantitative assessments but rather for qualitative assessment supported by analyses.

The choice of qualitative research methods is largely informed by the kind of questions that are to be posed to the interviewees. Quantitative methods may help to highlight the prevalence of certain ideas amongst Committee members but may not be an adequate explanation of why those views, attitudes, approaches and styles are adopted.

The qualitative method reveals the underlying reasons of what members believe. The study seeks to uncover these underlying reasons, hence the choice of the qualitative method.

## 7. STRUCTURE OF THE STUDY

The study is structured as follows:

- **The introductory chapter**  
Sets out the context, objectives, problem statement, propositions, research methodology and structure of the study.

- **Chapter 1**

Proposes to deal with the conceptual framework adopted in relation to the study. This chapter seeks to address concepts such as intelligence, intelligence oversight, national security, non-partisanship as a manifestation of consensus in the oversight of intelligence activities, and explains the use of these concepts in practice. It proposes to create a foundation for a common understanding of the concepts used in the study.

- **Chapter 2**

Seeks to discuss intelligence oversight systems of selected countries – Australia, Belgium, Canada, the UK and the USA – explaining how these intelligence oversight systems are connected to their legislatures. The study seeks to explore and review existing models of legislative oversight. The chapter explains the roles and functions of legislative structures in general terms and focuses on the role and functions of these structures in the respective systems of selected countries.

The Canadian, UK and US systems influenced the crafting of the South African intelligence dispensation in the 1990s. However, recent changes to the South African intelligence legislation took into account the Intelligence Services' and oversight structures such as the Inspectors-General's mandates in these selected countries. Since South African legislators studied these countries' intelligence dispensations thoroughly and they are thus important contributors to the way the South African dispensation is crafted. These selected countries continue to serve as a useful reference point in the discussions of the JSCI in South Africa.

- **Chapter 3**

Proposes to deal with the Parliamentary JSCI in South Africa. The chapter locates the JSCI in the context of the role of Parliament in the oversight of Intelligence Services. It then seeks to broadly outline the South African Parliamentary System with a focus on the JSCI. It proposes to discuss the

role and function of the JSCI, its structure and staffing. In the main this chapter is descriptive.

- **Chapters 4 and 5**

Proposes to discuss the views of members of the JSCI with regard to parliamentary oversight of intelligence in South Africa based on interviews with Committee members. The focus of this study is on the second post-1994 parliamentary oversight period which commenced in 1999 and which will end in 2004. The interviews were conducted in 2001 in Cape Town and cleared with members of the JSCI in January 2003 during the JSCI orientation seminar. During the seminar, members of the JSCI who were not interviewed and new members of the Committee made invaluable comments and influenced the way this chapter is now structured.

- **Chapter 4**

Focuses on the JSCI internal issues namely; the understanding of the JSCI members of the Committee's core business as captured in the legislation and in its vision and mission; the role of the chairperson; and the underlying philosophy of non-partisanship otherwise referred to as national consensus.

- **Chapter 5**

Proposes to deal with the relationship that the JSCI has with other bodies such as the public through the media; the Inspector-General of Intelligence (IGI); and other parliamentary committees. Furthermore it deals with JSCI relations with institutions supporting democracy and the Inspecting Judge responsible for interceptions and monitoring interception and covert intrusion warrants.

- **Chapter 6**

Seeks to summarise the main issues that are covered in the study and make some poignant points arising from the study. The chapter proposes to provide a critique of the perspectives of members of the JSCI dealt with

in chapters 4 and 5 and draws lessons from the case studies in chapter 2 to improve the operations of the JSCI and the Intelligence Services in South Africa. The chapter ends by highlighting legislative reform issues for consideration by members of the JSCI.

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## REFERENCES

- <sup>1</sup> This is informed by the finding of The Report of the Twentieth Century Fund Task Force on the Future of US Intelligence, which states: “The cold war may be over, but in many ways the world remains dangerous. Weapons of mass destruction – nuclear, biological and chemical – are spreading, as well as their kin, deadly conventional weaponry. Terrorism respects no boundaries. Nor do organized crime and drug trafficking...” The Report of the Twentieth Century Fund Task Force on the Future of US Intelligence, **In from the Cold**, The twentieth Century Fund Press, New York, 1996, p 3.
- <sup>2</sup> Lustgarten, L and Leigh, I **In from the Cold: National Security and Parliamentary Democracy**, Claredon Press, Oxford, 1994; Steele, RD, *Intelligence in the 1990s: Recasting National Security in a changing World*, **AIJ**, Summer/Fall, 1990; Shulsky, AN, **Silent warfare: Understanding the world of Intelligence**, (2<sup>nd</sup> ed.), Brassey’s (US) Inc. Washington DC, 1991 and Shulsky, AN and I Schmitt, **Silent Warfare: Understanding the world of Intelligence** (3<sup>rd</sup> ed.); Brassey’s (US) Inc., Washington DC, 2003.
- <sup>3</sup> Steele, RD, *op cit*, p. 29
- <sup>4</sup> *Ibid.*
- <sup>5</sup> Klandermans, B, Roefs, M and Olivier, J (eds.), **The state of the people: Citizens, Civil Society and Governance in South Africa, 1994-2000**, HSRC, Pretoria, 2001, p 137.
- <sup>6</sup> *Ibid.*
- <sup>7</sup> *Oversight and Accountability*, Internet:  
<http://www.access.gpo.gov/int/int018.html>
- <sup>8</sup> It should be noted that where there are no legislative committees special structures are mandated to conduct the oversight functions on behalf of the legislature. This is the case, for example, in Canada and Belgium.
- <sup>9</sup> Longley, LD and Davidson, RH, **The new Roles of Parliamentary Committees**, Frank Cass and Company, London, 1998, p 4.

- 10 *Ibid.*
- 11 Olson, DM, **The Legislative Process: A comparative approach**, Harper and Row, New York, 1980; Copeland, G. W; and SC Patterson, **Parliaments In a modern World: Changing Institutions**, University of Michigan Press, Michigan, 1997; Norton, P; **Does Parliament matter?**, Haverster Wheatsheaf, New York, 1993, and Longley, L and Davidson, I, *op cit.*
- 12 The selected countries are Australia, Belgium, Canada, United Kingdom and the United States of America.
- 13 Kaiser, FM, *Impact and Implications of the Iran-Contra Affair on Congressional Oversight for Covert Action*, **International Journal of Intelligence and Counter-Intelligence, Vol 7 No 2**, Summer 1994; Currie, JT, *Iran-Contra and Congressional Oversight of the CIA*, **International Journal of Intelligence and Counter-Intelligence; Vol 11 No 2**, 1991; <http://www.us.net/cip/job.htm> and <http://www.us.net/cip/proceed.htm>.
- 14 Bar-Joseph, U, **Intelligence Intervention in the Politics of Democratic States: The United States, Israel and Britain**, The Pennsylvania State University Press, Pennsylvania, 1995.
- 15 Intelligence in this section refers to Intelligence structures of South Africa or a country specific use and is not a generic use of the word – which use is applicable to any intelligence service. To distinguish the generic use from the specific South African or a country specific use, a capital letter “I” will be used and a small “i” for the generic use of the word.
- 16 It should be noted that when referring to the South African Parliament, the word is spelt with a capital letter “P” to distinguish it from its generic use. The latter is spelt with a small letter “p”.
- 17 When this study began, there were a number of issues that were identified as in need of attention. These were later changed as the study impacted on the work of the JSCI. The author has been requested to discuss issues pertaining to the role and functions of the JSCI with it and some of the shortcomings identified during the study were attended to by the JSCI. This has since limited issues for legislative reform.
- 18 Since the beginning of the new Intelligence dispensation, various delegations have been sent to study the Canadian system. This includes the very first Joint Standing Committee on Intelligence. The current and former Ministers and all the chairpersons of the JSCI have been on study tours to Canada and

the USA. The Canadian SIRC has also visited South Africa for information exchange.

## CHAPTER 1

# CONTROLLING INTELLIGENCE: A CONCEPTUAL FRAMEWORK

The beginning of wisdom is to call things by their right names.

Confucius

### 1. INTRODUCTION

To ensure a common understanding of the issues raised in this study, this chapter analyses concepts that are used in the intelligence oversight discourse. It will start with the main subject matter – intelligence – focusing on its need and role in a democracy. It points out how intelligence relates to the concept of national security. The concept of intelligence is treated holistically in its three dimensions<sup>1</sup> as an activity, an organisation and processed information.

The need for intelligence oversight and the attendant problems related thereto are also discussed and where necessary the terms are re-defined for precision for the purpose of this study. The main point of departure of this chapter and study is that intelligence is a critical and indispensable national resource for the advancement of national security in a democracy. The defence of the democratic system is dependent on an effective and efficient intelligence machinery, which should be supervised, guided and controlled by other arms of the state as an expression of popular will.

## 2. UNDERSTANDING INTELLIGENCE

Intelligence in the popular psyche triggers the most romantic and dangerous of images partly influenced by the film industry and by the novels dealing with intelligence officers. In some circumstances intelligence seems to represent secretive, wasteful and useless structures that are antithetical to democracy. In other views intelligence denotes an indispensable shield for democracy that no country worthy of its salt<sup>2</sup> can survive without.

### 2.1 The concept of intelligence

Intelligence is used to refer to an organisation, an activity and information. There is no unanimity on the definition of intelligence. According to Seaborn<sup>3</sup> "intelligence has come to mean, among other things, the acquisition and analysis of information relating to rivals, potential adversaries and enemies".<sup>4</sup> In this definition intelligence refers to processed information.

The South African Intelligence Services Control Act, 1994 defines intelligence in the main as an activity. In this regard intelligence is "the process of gathering, evaluation, correlation and interpretation of security information, including activities related thereto, as performed by the Services".<sup>5</sup>

The Act further states that: "As an activity, intelligence comprises the collection and analysis of intelligence information – information relevant to the formulation and implementation of government national security policy. It also includes activities undertaken to counter the intelligence activities of adversaries, either by denying them access to information or by deceiving them about the facts or their significance".<sup>6</sup> This definition whilst used in South Africa, reflects a notion that is not uniquely South African as this notion of intelligence is the most dominant internationally.

Intelligence activity is mainly about the discovery and protection of secrets, which are critical for the advancement, defence and effective implementation

of national security using various types of operations that are essentially secret. Secrecy is the necessary condition<sup>7</sup> for proper functioning of intelligence and the success of intelligence action is to a large extent dependent on it being kept secret even after it has been carried out. Whilst this is so, not all intelligence is from secret sources. Intelligence can be derived from open, grey or of course secret sources. The edge is in not revealing intelligence sources as their discovery could lead to systematic disinformation and the employment of counter-measures by the target.

The three dimensions of intelligence create ambiguity. In this study the information aspect of intelligence will be referred to as the intelligence product. The structures that embark on intelligence activities; seeking and protecting secrets, opportunities and determining threats and weaknesses with regards to national security; and produce intelligence products, as their core business will be referred to as intelligence services. Thirdly, the core business activity of intelligence structures will be referred to as intelligence activity. These activities will include but are not limited to collection, evaluation, analysis, integration, interpretation and dissemination of intelligence products to the relevant clients.

In addition, two critical elements need to be noted about the activities: covert action and counter-intelligence, which are important arsenals at the disposal of the intelligence services in the pursuit of their mission and mandate – national security.

## **2.2 Rationale for intelligence**

In light of perceptions that intelligence is antithetical to a democracy, questions arise about its necessity and role. This section deals with this matter and argues that intelligence services are essential in the defence of democracy and that intelligence services are not sinister organs that are alien to democratic values and ethos.

The end of the Cold war has brought with it new challenges of cross-border and transnational problems. These are organised crime, the proliferation of weapons of mass destruction, environmental degradation and above all terrorism. These have all become international security challenges that respect neither borders nor sovereignty, and need no treaties or special cooperation agreements to thrive and prosper.<sup>8</sup> These threats are some of the reasons for the existence of intelligence services.

In view of the terrorist attack in the United States on 11 September 2001, terrorism has become an international security priority.<sup>9</sup> The wars waged in Afghanistan and in Iraq are testimony to the growing importance of countering some of the above-mentioned threats. Again, this justifies the need for intelligence services that can produce timely, accurate, relevant and user-friendly products to identify and help counter and/or neutralise these threats.

For countries in transition, the safeguarding of the democratisation process is critical as there are forces that seek to roll back advances made, thus posing a threat to democracy itself. In the democratising countries of Eastern Europe, it has brought with it the need to defend these newly found and hard won young democracies. Some of the notable threats to them are: *coup* plots; covert action aimed at undermining the stability of the democratising countries and regions; clandestine operations to undermine the new dispensation; organized crime and the stock-piling of weapons including weapons of mass destruction.

### **3. THE RATIONALE FOR INTELLIGENCE OVERSIGHT**

The intelligence operational environment – secrecy – and the tension that exists from the uneasy relationship between expertise and policymaking necessitate conceptually speaking, intelligence oversight. In addition, it is necessitated by the unfounded notion that intelligence is antithetical to democracy, an aspect dealt with already.

Shulsky and Schmitt attribute the problems caused by the operational environment to material conditions: the secrecy with which intelligence activities are necessarily conducted. The problem centres on the special difficulties that secrecy creates for the political supervisors whose task it is to oversee and control intelligence activities. The second set of problems arises from the uneasy relationship between expertise and policymaking. The issue being how the appropriate weight that the views of the experts (who claim special knowledge) should be given in governing the actions of the policymakers (who have the actual authority to make decisions) and of ensuring that the experts' views receive the attention they deserve.<sup>10</sup>

There is no magic wand to address the above tensions between policymakers and experts, except professionalism and unwavering commitment by both parties to keep cool heads, clean hands and clear consciences. This ensures that politicians do not interfere in intelligence by influencing the intelligence picture and that intelligence officers do not prepare estimates that seek to advance policy positions of the party in power in anticipation of being rewarded with promotions.

The cool heads, clean hands and clear consciences also help ensure that intelligence services operate within their mandates, the law and the Constitution. This makes intelligence oversight more focused in overseeing intelligence services. However, a study of various scandals concludes with a verdict against relying on the good of human kind. Political heads are willing to use intelligence services beyond their mandates and Intelligence Officers are also willing and indeed do cooperate in carrying out assignments beyond their brief. This negative cooperation is at the heart of the oversight challenge.<sup>11</sup>

This situation is complicated by plausible denial<sup>12</sup> whose elements are:

- The restriction of knowledge about an action to a small number of officials;
- lack of formal procedure for its approval;

- lack of paper work and records on the activity;
- minimal or no record-keeping when conducting the action; and
- destruction of any files that may be produced during the activity.

Oversight of intelligence is also concerned with the questions that the intelligence services are asking and pursuing. This is to determine whether the intelligence community is fulfilling its mandate and responding to the needs of policymakers. Further it is to check if the intelligence community is vigorous and rigorous in its analysis and that operationally speaking it has the required operational capacity (collection and covert action) and resources.<sup>13</sup>

The policymakers cannot only rely on intelligence officials to answer the questions they pose. Intelligence officials jointly with policy advisers answer questions posed by policymakers. Intelligence officers exert themselves in collecting and processing the answers while advisers seek to establish if the needs of policymakers are addressed – essentially assisting with overseeing and advising.

To be effective in their function, intelligence oversight authorities have levers at their disposal. They are, amongst others, the following:

- Budgets of the intelligence services that need approval;
- hearings that are held on the activities of the intelligence services especially when there is wrongdoing;
- nominations to certain positions, which are accompanied by public interviews before confirmation of applicants;
- provision of insights into treaties that are about to be entered into by countries;
- investigations and reports by oversight bodies;
- prior notice in the case of covert action by the executive; and
- hostages – refusal to approve certain programmes pending compliance with a related or an unrelated other activity.

Issues of oversight are in the main generic. They are:<sup>14</sup>

- The budgets of the intelligence services – alignment of plans, priority and resources to national security needs;
- control of operations – are they conducted within the legal and constitutional framework and are they professional, effective and efficient; and
- proprietorship of intelligence activities.

In this regard it should be noted “by having expertise in surveillance, eaves dropping, and other operations; and by operating behind the cloak of secrecy, the intelligence apparatus has the potential to threaten heads of government”.<sup>15</sup> This necessitates an effective, well-resourced and driven oversight mechanism.

The oversight responsibility is, in democratic societies, shared amongst the arms of the state – the executive, legislature and judiciary. In addition, other oversight structures are also established towards this end. Examples in this regard are the offices of Inspectors-General and judicial authorities that approve the use of intrusive intelligence gathering methods such as wiretapping.

#### **4. CONCLUSION**

To sum up this section, it is clear that no state can persist and prosper without maintaining, defending and promoting its national interest. This necessitates national security measures to defend, promote and protect the national interests and security. This is the brief of intelligence services whose essential operational environment is secrecy. In this environment they engage in intelligence activities and produce intelligence products to warn, inform, predict and advise on threats and potential threats to national security.

To ensure that there are no excesses and undemocratic and unauthorised intelligence activities, intelligence oversight mechanisms are set up by the legislature, the executive and the judiciary to review, monitor, guide and control intelligence services. In addition, focus is also placed on the creation of a professional work ethic and culture so as to ensure that these intelligence services are effective and their activities have propriety as their hallmark.

Oversight seeks to achieve this by being pro-active, serious and fully informed. It also advocates for the cause of intelligence services when they are deprived of resources and the space to exercise their tradecraft. When intelligence is in the wrong, the relationship is, indeed, adversarial. The overseers may mobilise public opinion against wrongdoing and inefficiency, poor tradecraft skills, wasteful expenditure, lack of focus and poor delivery. This public censure of intelligence is usually used as a last resort.

The next chapter discusses intelligence oversight models by focusing on the legislative mechanisms of the following countries:

- Australia;
- Belgium;
- Canada;
- UK; and
- USA.

The chapter also focuses on some of the main ingredients that constitute a successful and effective intelligence oversight system. This will locate the South African parliamentary oversight system on intelligence in an international context.

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## REFERENCES

- <sup>1</sup> Shulsky, AN, *op cit* for a discussion on the three dimensions.
- <sup>2</sup> Intelligence and democracy are like salt that it is in a stew to borrow from a song by Lizz Whitt entitled Salt. In Liz Whitt's words: "You can't separate the

two.”

3 Seaborn, B, *Intelligence and Policy: What is constant? What is changing?*,  
**Commentary 45**, June 1994, p 1.

4 *Ibid.*

5 RSA, Intelligence Services Control Act, 1994, (Act 40 of 1994) Section 1(xii).

6 *Ibid.*

7 Bar-Joseph argues this point eloquently in his book. See: Bar-Joseph, U, *op*  
*cit.*

8 RSA: Nhlanhla, JM, 24 May 2000 in Hough, M and A du Plessis, **Strategic**  
**Intelligence: Selected Official South African Perceptions: 1992- 2002**, Ad  
Hoc Publication 39, Institute for Strategic Studies, University of Pretoria,  
November 2002, p 151.

Daniels, RJ, Macklem, P and K Roach, **The Security of Freedom: Essays**  
**on Canada’s Anti-Terrorism Bill**, University of Toronto Press, Toronto,  
2001.

10 Shulsky, A and I Schmitt, *op cit*, p 129.

11 Bar-Joseph deals with this negative cooperation in detail using the  
intervention of the military as a reference point. He concludes by saying that  
the history of intelligence teaches that intelligence, just like its military  
counterparts has an affinity of intervening in politics and vice versa.

12 Bar-Joseph, U, *op cit*.

13 Lowenthal, NM, **Intelligence: From Secrets to Policy**, 2<sup>nd</sup> edition, QC  
Press, Washington D.C, 2003 for a detailed discussion on this issue.

14 These are adapted from Lowenthal, NM, *ibid.*

15 *Ibid.*

## CHAPTER 2

# A COMPARATIVE ANALYSIS OF SELECTED LEGISLATIVE OVERSIGHT SYSTEMS IN OTHER COUNTRIES

Every historical experience is unique. However, if you exceptionalise phenomena, you stop learning.

Mahmoud Mamdani

## 1. INTRODUCTION

The previous chapter dealt with the concepts that are relevant to the study of intelligence oversight. This chapter focuses on selected legislative oversight systems in Australia, Belgium, Canada, the UK and US.

It proposes to use the proceedings and documents distributed at the three conferences of Intelligence Review Agencies. The first was the International Meeting of Inspectors-General and Security (IGIS) held on 17-18 November 1997, in Canberra, Australia. The second was held in Canada as the Intelligence Review Agencies Conference on 27 – 29 June 1999 in Ottawa; and the third held in the UK was the International Intelligence Review Agencies Conference held on 12 – 15 May 2002 in London.

To appreciate the roles of legislative oversight structures in their respective countries and legislatures, it is important to understand that they are part of mutually supporting and interdependent institutions. In this study, the legislative oversight structures are isolated purely to enhance the understanding of their roles and interconnections with other oversight arms in the system.

This chapter seeks to provide a framework and assists in locating the intelligence oversight system of South Africa, which is the subject of the next chapter, within an international context. It commences by discussing the generic functions of legislatures – parliament or congress – in the context of their persisting influence and centrality in the process of democratisation.

## **2. THE OVERSIGHT FUNCTIONS OF LEGISLATURES**

The emergence of new democratic states following from the collapse of the Union of Soviet Socialist Republics and the emancipation of colonial peoples have been the main features of the closing years of the twentieth century. In these democratising states the centre of transformation and policy making has been and continues to be their legislatures. Whilst there were times when these institutions were thought to be losing their centrality and influence, this is being contradicted by their role in the reality of democratisation<sup>1</sup>.

The key functions of these resilient and persistent centres of legislative authority include the following:

- Selecting officials for the legislature and elsewhere;
- making law and policy;
- providing, sustaining and overseeing the executive; and
- linking citizens and the legislature<sup>2</sup>.

In view of these functions, a study by Longley and Davidson concludes that: “Parliaments are certainly not in decline in the new democratic or newly democratising political systems.”<sup>3</sup> They argue that legislatures have been the model and mother institutions of democratisation, and their committees have pioneered in the synthesis of democratic politics with effective policy making.

This trend is also evident in countries believed to be established democracies such as Australia, the Scandinavian countries and the USA. This subject will be discussed in detail herein below.

As the winds of change continue to blow, more and more countries are taking legislative oversight of intelligence more seriously. This trend is equally evident in the oldest democratic countries such as the Scandinavian countries. The direct supervision of PET [Danish Civil Security Service] by the Danish legislature is a recent development. An Act of Parliament set up a parliamentary commission in 1988 with a view to: 'supervise' the Danish Defense Intelligence Service and PET after years of debate that yielded no results.<sup>4</sup>

The trend towards parliamentary oversight is also extending to the Russian Federation. Due to the advantages derived by the intelligence services therefrom, Russian intelligence officers have made it their responsibility to establish, service and strengthen relations with legislative committees. In 1994 the Russian Services maintained close relations with the following committees of the Russian Supreme Soviet: human rights, international affairs, foreign economic relations, and defense and security. From the content side these committees exercised oversight of Intelligence. "In this way, an effective system for overseeing intelligence activities has been developed".<sup>5</sup>

Both the overseers and the overseen see the legislative oversight of intelligence as crucial. As part of the legislature's core business, legislatures are charged to guard against the danger of using the security services in favor of certain political parties or personal interests. In addition, the legislature should also guarantee that the services would not conduct activities outside their area of competence.<sup>6</sup>

In the case of South Africa, this trend has been evident too. The South African Parliament has gained legitimacy, influence and stature and was indeed, the cradle for the current political dispensation.

To do its work effectively, committees have become the main operational units for legislatures. Committees use formal and informal methods of control.

In addition, they are the forums, which increase and express parliamentary assertiveness. An example in this regard is the prior notice authorisation demand by the US Congress from the US Executive before covert action can be undertaken by the US intelligence agencies.<sup>7</sup> This is despite the fact that no constitutional provision exists for such notification demands.

It should be noted that whilst the general trend is towards more openness and accountability, the process is not without problems and challenges. In this regard Weller argues that while there is a general acceptance of the need for oversight, and better understanding thereof in the intelligence agencies, nevertheless there is still a tendency towards saying the correct thing and to resist the process whenever possible.<sup>8</sup> Hence the need for eternal vigilance. This problem is not unique to intelligence services rather is seen to be a problem of bureaucracy.<sup>9</sup>

To motivate this, Holt<sup>10</sup> argues that intelligence oversight problems are the same as those experienced by other Committees in the US Congress. These problems are:

- Bureaucratic obfuscation and rigidity;
- policy clashes with agencies they are overseeing; and
- poor access to information.

The operational environment of the intelligence services – secrecy – tends to magnify these problems of bureaucracy in the intelligence services compared to other bureaucracy.

The verdict on the effectiveness of legislative committees is largely in favour of committees in the context of the current process of democratisation although the history somewhat dulls the picture. In the case of 'established' democratic states, oversight has had its fair share of failures and scandals. It is these failures and scandals that have tended to propel intelligence oversight reform. This further gives impetus to the reform of oversight and accountability structures, levers and methods.

It is not everyone who shares this conclusion. Wagenen<sup>11</sup> argues that the changes made by the committees are cosmetic and really amount to nibbling at the margins. In addition, Wagenen laments the fact that oversight committees have not been at all reluctant to increase funding for programs and capabilities they perceive to be important. In short, Wagenen is against the advocacy role of oversight bodies. This opposition to the advocacy role whilst understandable is not substantive enough to warrant jettisoning it.

As argued in the previous chapter, the resourcing and support of intelligence services is driven by the acceptance that intelligence is indispensable in a democracy. Oversight is not about throttling intelligence services and denying them resources to fulfill their mandate and brief. It is about ensuring that they work within the legislative and constitutional framework of their respective countries. This ensures that people are free from fear and the country is able to adopt a foreign policy that advances national interest and security.

However, caution is well-advised on the need for a professional distance between intelligence services and their overseers. The cycle of lapses, which Wagenen points out, must be committed to memory. He argues that four notable periods are discernable in the USA's oversight history. These are:

- Benign neglect period;
- getting tough period which was marked by suspicion, doubt and micro-management;
- a period of cooperation, and
- a period of renewed tension.<sup>12</sup>

Weller<sup>13</sup> shares this view following a study, which revealed a similar tendency in the case of the Scandinavian oversight systems. Although not identical to the one described above, parallels are striking in similarities. In this regard he says that a period of inaction; followed by a scandal leading to a legislative inquiry; the implementation of some changes; followed by another period of inaction; followed by another scandal, has been the tendency in Scandinavian countries. These mirror developments in Australia and Canada too.<sup>14</sup>

To redress the above cycle of failures and weaknesses legislatures have had to rely on committees. Legislatures seek to communicate with, and hopefully exert influence over, the various executive agencies using these committees.<sup>15</sup> Committees are an expression of the legislature's wish to enhance its ability to oversee, or scrutinise, the government and ministries. The existence of a rigorous committee system has become the *sine qua non* of legislative work and oversight.

Committees are now the most active, most central and the main working units of legislative assemblies. "In short, parliamentary committees have emerged as vibrant and central institutions of democratic parliaments of today's world and have begun to define new and changing roles for themselves."<sup>16</sup>

The next section focuses on the oversight structures of selected countries.

### **3. SELECTED OVERSIGHT SYSTEMS**

The first case study to be discussed in this section is the legislative oversight system of Australia.

#### **3.1 Australia**

The legislative oversight mechanism in the Commonwealth of Australia is the Parliamentary Joint Committee on ASIO (Australian Security and Intelligence Organization), ASIS (Australian Secret Intelligence Service) and DSD (Defence Signals Directorate). The Committee is established in terms of the Australian Intelligence Services Act, 2001, which strengthens parliamentary scrutiny over intelligence agencies with widened powers compared to the former Parliamentary Joint Committee on ASIO.<sup>17</sup>

### 3.1.1 *Powers and Functions of the Joint Committee*

According to the Annual Report of the Joint Committee on ASIO, ASIS and DSD (August 2002) the functions of the Committee are to "review the administration and expenditure, including the annual financial statements of ASIO, ASIS and DSD. In addition, the Committee must review any matters in relation to the agencies referred by either the responsible Minister or a resolution of either House of Parliament. The Committee may request a responsible Minister to refer a matter to it for inquiry and report."<sup>18</sup>

In view of the foregoing, it will be noted that the current Committee has the initiative and is not dependent on a resolution of the House or referral by the responsible Ministers of matters requiring an inquiry. This is also in contrast to the powers of the previous Committee as the present Committee is required to review the administration and expenditure of the three agencies and report its findings to Parliament.<sup>19</sup> Although the brief of the Committee has been widened, the Committee's functions do not include the review of operational matters. This is irrespective of what the nature of the complaint is.

In fact the Australian Intelligence Services Act limits the functions of the Committee by providing that it may not review:

- The intelligence gathering priorities of ASIO, ASIS or DSD;
- the sources of information, other operational assistance or operational methods available to ASIO, ASIS or DSD;
- particular operations that have been, are being or proposed to be undertaken by ASIO, ASIS or DSD;
- information provided by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information;
- an aspect of the activities of ASIO, ASIS or DSD that does not affect the Australian person;
- the rules made under section 25 of the Act (to protect the privacy of Australians); or

- conducting inquiries into individual complaints about the activities of ASIO, ASIS or DSD.<sup>20</sup>

The present Committee has powers that enable it to conduct its functions with ease. In this regard the Committee can call and request a briefing from the Directors-General of ASIO and ASIS, the Director and the Inspector General of Intelligence and Security on matters falling within their jurisdiction.

In addition, the Committee is empowered to receive reports from the Minister responsible for ASIS on the directives the Minister may have given to ASIS pertaining to activities relating to the capabilities, intentions or activities of people or organisations outside Australia.<sup>21</sup> This function is modelled on the executive reporting obligation in the case of covert action in the USA.<sup>22</sup> The main aim of this function is to ensure that the legislature, in this case the Australian Parliament – through the Committee – is kept informed of any changes to the functions of ASIS. It is thus a crucial accountability measure.

The Australian Intelligence Services Act specifies the need for security arrangements that must be put in place by the Committee members and the staff. As a result of this, both Members of the Committee and Staff are particularly cognisant of the need to protect the safety and security of information on operational matters, which is supplied to the Committee.<sup>23</sup>

The Committee can request the Inspector General on Intelligence and Security<sup>24</sup> to brief the Committee on the content and effect of rules or the changes in the rules. The finding, following from this engagement with the Inspector General must then be included by the Committee in its annual report.

### *3.1.2 Modus Operandi of the Joint Committee*

The Committee uses a variety of approaches in conducting its inquiries. These vary from public inquiries, public submissions and closed hearings. In

addition, the Committee can receive expert advice and opinion, hold public hearings and receive support from the permanent Secretariat. When scrutinising certain matters relating to the agencies, however, the Committee sits in a closed session.

The primary objective of the Committee *modus operandi* is to scrutinise and hold government to account with due regard to national security. This includes the scrutiny and consideration policy relating to administration and expenditure, and proposed legislation. These objectives are broadly consistent with those of other legislative committees.

It is noteworthy that the Australian Intelligence Community has responded positively to the new Committee. The previous Committee did not, unfortunately, receive the same treatment. In this regard Weller<sup>25</sup> notes that the Joint Committee on ASIO had not established a very good reputation with the stakeholders in intelligence. He attributes this to the fact to the original sin theory namely, that the previous Committee was established by a Labour government, which was suspicious of the intelligence services, and especially ASIO. As a result there was mutual suspicion between the overseers and the overseen. There could be no mutual co-operation between the agencies that were and are intensely suspicious of legislative oversight in general, let alone close working relations with a committee set up by a political party clearly suspicious of them.<sup>26</sup>

### 3.1.3 *Oversight Developments in Australia*

The current committee is a major improvement on oversight affairs when compared to the JSCASIO as some of the problems raised by Senator MacGibbon, former Chair of JSCASIO, have been addressed although there still exist serious areas of concern.

MacGibbon argued that the JSCASIO was an ineffectual oversight and accountability mechanism as it “cannot deal with anything related to foreign

intelligence. We cannot deal with anything relating to complaints by the community or individual complaints about the activities of the organization. When you add to that the requirement that we cannot look at any operational matters, there is really very little the committee can do and I do not believe it fulfils the requirement of public accountability.”<sup>27</sup> Some of these concerns remain valid despite the recent improvements in the powers and functions of the Committee. However, the operations of the Committee reveal that this statement is poor in reflecting certain nuances that indicate that the Committee can cause itself to be tasked by the Minister to investigate and address issues as it did with the public reporting responsibilities of ASIO.

There was an effort by MacGibbon to legislate more powers and influence for the Committee. To this end the Chairperson of JSCASIO met with the Committee on Procedure of the House of Representatives to request that more powers be given to JSCASIO so that they could be more effective in their oversight of ASIO. Despite this there were views expressed by the Committee on Procedure that suggested that JSCASIO not be appointed in the 39<sup>th</sup> Parliament.

This was in total disregard of the Samuel-Codd Report<sup>28</sup> that recommended that the Australian Security Intelligence Service be put on a statutory footing. The same report recommended that the JSCASIO should be given an additional responsibility for reviewing its activities and the way it carried out the powers in the charter of its establishment. In addition, it also recommended that those functions of the Office of the Inspector General relating to ASIO and ASIS, be added to the Joint Committee brief.<sup>29</sup>

Clearly, the formation and constitution of the present Australian Committee is, to a large degree, in line with some of the recommendations and aspirations of the Samuel-Codd Report, and the calls by MacGibbon. It is a partial victory for the advocates of more effective oversight over the Australian Intelligence Community. More can be done and more may need to be done. The fear expressed by Weller<sup>30</sup> that there was a retreat from oversight, is clearly unfounded although it calls for cautious optimism, as retreat from oversight is

possible. It is however not probable. As the situation stands at the moment, intelligence oversight is getting stronger in Australia and there is still room for improvement.

### 3.2. Belgium

The oversight of the Belgian Intelligence Services is entrusted by the legislature to the Permanent Committee for the Control of the Intelligence Services (Permanent Committee I for short). Whilst the Senate appoints the Administrator and sets the broad operational guidelines for Committee I's functioning, the legislature has delegated this aspect of intelligence oversight responsibility.

The Committee is established in terms of a law passed by the Belgian Federal Parliament on 18 July 1991<sup>31</sup>. The Intelligence Services of Belgium are:

- The State Security Authority (Administration de la Surete de l'Etat), which is a civil intelligence, service which is answerable to the Minister of Justice.
- The General Intelligence and Security Service (*the Service General du Renseignement et de la Securite*, SGR for short), a military intelligence service which is answerable to the General Staff of the Armed Forces, itself under the Minister for National Defence.

#### 3.2.1 *Powers, Mission and Functions of the Permanent Committee I*

The goal of Permanent Committee I, as a mechanism of external control over the Belgian Intelligence Services, the State Security Authority and General Intelligence and Security Service, is to provide greater transparency in the functioning of these services. Through this Committee the general public, Members of Parliament and political leaders can also better assess the effectiveness of the intelligence services and the manner in which they apply the law. This is to avoid blind confidence in intelligence services without

derogating from their need for their existence and for them to perform certain indispensable functions in a democracy.

The mission of the Permanent Committee I is:

- To guarantee the protection of the rights which the Constitution and the law confer on persons;
- to ensure the coordination and efficiency of intelligence services; and
- to provide recourse where security clearances have been declined.

The Permanent Committee I, in its *modus operandi* gives equal importance to each of its missions as mentioned above. For this purpose, the Committee enquires into the activities and methods of the intelligence services of Belgium. In this regard an investigative staff assists the Committee. The Permanent Committee I also has a Clerk and administrative and logistical personnel.<sup>32</sup>

### 3.2.2 *The Composition and nature of Permanent Committee I*

Historically, the Committee comprised of five effective members including a chairman and vice-chairman. Five alternate members were also nominated. This is no longer the case, as since 1 April 1999 the Committee comprises of three members. The members of the Permanent Committee I are chosen from the ranks of magistrates, senior police officials or persons with long administrative or scientific experience. All Committee members' carry out their duties on a full time basis and are referred to as counsellor.<sup>33</sup>

The minimum term of appointment to the Committee is five years, renewable once. The maximum permissible period is ten years. It should be noted that historically certain members were given seven-year terms to ensure continuity. The Committee is created in this way to ensure political and linguistic balance as a replica of the composition of the Federal Parliament. As Belgium's quest for representative democracy, the main political groups,

from the majority and from the opposition, Flemish and French speaking parties, are represented on the Committee.<sup>34</sup>

The main task of the supervisory body is to verify whether there is a need for change in the management style employed by the political leaders over the services or changes in law. The quest is to observe and identify the occasional imperfections and dysfunctions in the system and to make proposals on how these can be remedied.

This supervision by the Committee does not in any way replace legislative supervision, or supervision by Ministers or by administrative and judicial authorities responsible. Similar to the Canadian Security Intelligence Review Committee, Permanent Committee I operates independent of, and in addition to, the existing parliamentary and hierarchical systems of supervision. It performs the external control function as a delegate of the legislature.

In this regard the legislature would, in theory at least, be able to summons any of the Intelligence Services to account for their activities. This is unprecedented as this function is delegated to Permanent Committee I. The appropriation of funds for the Intelligence Services and the passing of legislation continue to be the responsibilities of the legislature. They are used, indeed, for oversight purposes.

### 3.2.3 *Modus Operandi of the Permanent Committee I*

The Committee can be approached by the five federal authorities for enquiries to be made into the activities of the Intelligence Services. These agencies are:

- The Minister for National Defence, where the SGR is concerned;
- the Minister of Justice, where the State Security Authority is concerned;
- the Chamber of Representatives; and
- the Senate.<sup>35</sup>

Permanent Committee I has a self-tasking mandate as well. It can exercise its discretion and take the initiative to enquire on a matter it deems fit to investigate.

The support committees of the Chamber and the Senate have, according to Permanent Committee I, referred requests for enquiries to the Committee. This is one of the ways in which they exercise their oversight function over the Intelligence Services.<sup>36</sup>

In addition to the federal authorities mentioned above, individuals who are concerned about the activities of an intelligence service can approach Permanent Committee I, including government officials. In this regard Permanent Committee I states that “any person carrying out a public function and any member of the armed forces directly concerned by instructions, or decisions of the intelligence services or implementing procedures for these, and by the methods or actions of these services may also lodge a complaint or make an accusation without having to ask permission from their chiefs or their superiors.”<sup>37</sup> In this regard a person may ask his or her identity to be protected outside the investigative staff.

The investigative staff operates under the guidance of the chairperson of the Committee who must come from the magistracy. The chairperson ensures the application of the internal regulations, the proper functioning of the Committee and the proper execution of its mission. By law the chairperson has the following responsibilities:

- Relations with judicial authorities;
- power related to certain particular measures of investigation (subpoenaing members of the intelligence services, seizure of classified data and materials); and
- relations with Parliament, (with the Permanent Monitoring Commission of the Chamber of Representatives).<sup>38</sup>

The investigative staff is bound to examine the complaints and accusations and to file reports. The exceptions to this rule are:

- When it is “manifestly without foundation”;
- when the person bringing the complaint or accusation cannot be found, refuses to lend his or her assistance or abandons his or her complaint; and
- when the complaint or accusation does not fall within the competence of Permanent Committee I.<sup>39</sup>

In each of the above-mentioned instances the investigative staff must notify the party who lodged the complaint or made the accusation, and furnish reasons for not pursuing the matter.

The staff of the Committee functions under the Administrator, whose mission is to assist the Committee and ensure the secretarial support for Committee meetings, drawing up the minutes and attending to the dispatch of documents and conservation of archives.<sup>40</sup>

Under the authority of the Committee, the Administrator exercises authority over administrative staff, manages the administrative infrastructure and the building, prepares its budget and is its accountant. The Senate appoints the Administrator for an indeterminate period. The Committee appoints the administrative and logistics staff whose employment it can also revoke<sup>41</sup>. Oversight in Belgium is developing.

#### 3.2.4 *Oversight developments in Belgium*

The most notable development in Belgium has been the reduction in the number of members of Permanent Committee I. The *modus operandi* of the Committee remains largely unchanged although there continues to be a quest for more effective intelligence oversight mechanisms and processes.

### 3.3. Canada

In Canada, the legislature does not, in the main, oversee the work of Intelligence Services directly. Whilst the Senate has a Select Committee that deals with Intelligence matters from time to time, the Canadian Security

Intelligence Review Committee (SIRC) conducts this function, which is a surrogate of Parliament.<sup>42</sup>

### **3.3.1      *The role and functions of SIRC***

SIRC is an independent body established to review the activities of the Canadian Security Intelligence Service commonly referred to as CSIS. The legislature, through its Committees, does address intelligence and security matters from time to time. It has entrusted the day-to-day review brief to SIRC that tables a report to the legislature.<sup>43</sup>

Gauthier<sup>44</sup> points out that SIRC has been given the power to investigate CSIS' activities so as to ensure that its powers are used legally and appropriately. In this role, "SIRC has the absolute authority to examine all information concerning CSIS' activities, no matter how highly classified that information may be".<sup>45</sup>

SIRC audits all CSIS activities including special audits when necessary and appropriate. In this regard SIRC publishes findings, criticisms and or plaudits in an annual report that is tabled in Parliament.<sup>46</sup> It should be noted that in addition to auditing and investigating complaints from the public about any action of CSIS, SIRC is also mandated to receive complaints from people denied:

- Security clearance;
- federal contracts on security grounds; and
- citizenship on the basis of negative security findings.<sup>47</sup>

In addition, SIRC periodically provides reports to the Solicitor-General<sup>48</sup> on matters of special importance that are distinct from, but related to, its normal audit or investigative functions.<sup>49</sup>

### **3.3.2        *Developments pertaining to Legislative Oversight in Canada***

During the Intelligence Review Agencies Conference (IRAC) held in Ottawa from 27-29 June 1999, the issue of the relationship between Parliament and SIRC came under the spotlight. At the Conference, Gauthier commented that “the relations between SIRC and Parliament have been acrimonious at times”.<sup>50</sup> She supported the proposal for the creation a permanent Parliamentary Committee to review Canada’s intelligence community, highlighting such a move as a significant step that could help address the acrimonious relations.

It should be noted that according to SIRC, the main challenge facing it is its relationship with Parliament and in particular, what information can or cannot be released to parliamentarians. The setting up of a permanent committee of the legislature can also define lines of accountability and the extent to which SIRC can disclose information received from the Intelligence Services to parliamentarians.

In this regard, Kelly<sup>51</sup> stated that: “Parliament does not need to know everything, but it does need to know that Ministerial accountability can be depended on. There is also the problem of having Parliamentarians security cleared for the purpose of the review”.<sup>52</sup>

The two oversight mechanisms are not contradictory and can be synergised. Firstly, SIRC can be obliged to present briefings on oversight work to a parliamentary committee or committees. To this end a regulatory framework is needed to serve as a guide on what can or cannot be disclosed. Parliament can set limits on what SIRC can or cannot report on to the parliamentary committee(s) to ensure that the security, operational effectiveness and confidence of fraternal intelligence services is neither compromised nor undermined.

In the main, the mission of legislative oversight would be to ensure that SIRC is accountable for the implementation of its legislated mandate, powers and functions. In addition, it will legitimise the work of SIRC, as the legislature will provide a link of accountability to the electorate through parliamentarians. After all, SIRC and the Intelligence Service that it reviews operate using public funds and must therefore account for the funds to public representatives and ultimately to the general public.

The concern raised by Kelly on security clearances is baseless as international best practice indicates that members of legislatures of many countries who are privy to state secrets are screened for security competence. Canada cannot be seen to be an exception to this rule. If indeed, there is commitment to the advancement of national security, then security competence screening as well as measures such as the oath of secrecy can further ensure that the intelligence services have faith in the public representatives who have to oversee their overseers and be privy to some sensitive information on their operations.

Historically, legislative control of the security and intelligence agencies has been minimal in Canada. Before the controversy surrounding the Security Service in the early 1980s, a general parliamentary debate on the purpose, policies, and activities of the security and intelligence agencies had never occurred in Canada, a source for concern and a sign of a *laissez faire* attitude towards intelligence oversight. All previous debates on security and intelligence matters were on restricted topics. The parliamentary question period had never been a particularly effective device for oversight and justifies the delegation of oversight matters to SIRC.

From the perspective of the leading members of this society, parliamentary oversight seems to be an idea whose time has come. The material conditions are conducive, if not indeed ripe for the setting up of a viable parliamentary oversight structure to provide that absent vital link to the electorate. After all democracy is government of the people by the people for the people.

SIRC has been and continues to be a positive factor in the indirect oversight of CSIS by the legislature. Although not able to disclose all the information to Members of Parliament, the work of SIRC is commendable.

Weller argues that SIRC has rapidly become a clearly needed watchdog over the Canadian Security Intelligence Service. “If it had not existed, CSIS might well have quickly become an agency that would have been just like the old Security Service with all its known faults. The structural changes intended to produce a more efficient and useful service would probably have been totally subverted, had it not been for SIRC.”<sup>53</sup>

### **3.4. The UK**

In the case of the UK’s the oversight committee comprises of nine Members of Parliament but is not a parliamentary committee. The Intelligence and Security Committee (ISC) is a body of senior parliamentarians set up under the UK Intelligence Services Act, 1994. Its functions are to examine the expenditure, administration and policy of the UK’s three security and intelligence agencies: the Secret Intelligence Service (SIS), the Government Communications Headquarters (GCHQ) and the Security Service.

#### **3.4.1 Composition of the ISC**

The ISC is a multi-party body, which operates in a non-partisan consensus-driven manner. The ISC is apolitical, for example, “the chair of the committee, a former Tory minister, was reappointed to that position by the incoming Labour government.”<sup>54</sup>

The ISC is drawn from both Houses of Parliament – House of Commons and House of Lords. Members are appointed by the Prime Minister in consultation with the Leader of the Opposition and are expected to present to him or her an annual report. The ISC can also table other reports to the Prime Minister

as the need arises. The Prime Minister lays the report before Parliament having excluded that information which s/he considers to be sensitive.<sup>55</sup>

### 3.4.2 *The role and functions of the ISC*

The ISC meets weekly and members visit the agencies they oversee from time to time. The ISC members have reviewed matters such as employment practices, security vetting, and access to and keeping of records. Beith<sup>56</sup> sees the Committee as forward-looking and dedicated to making a positive contribution to the strategic direction of the intelligence agencies.

Gill<sup>57</sup> expresses scepticism about the access that the ISC would have to classified information. It is on this issue, he believes, that a struggle between the members on the ISC and the heads of services and the Ministers will be fought. He believes that in the short term ISC members may lose the battle. The battles “will still be worth conducting as a form of democratic espionage in order to expose the reality that the Acts’ structures and rules were drawn up more with a view to public relations than to accountability.”<sup>58</sup>

Whilst there is growing openness in the UK Intelligence Services, this is seen as not far reaching enough when compared to other international examples. The Intelligence Services are still not yet subject to the kind of constraints found in the USA or Canada. Robertson argues that: “The legislation is designed to be permissive rather than restrictive – it is minimalist and can be viewed as an attempt to prevent anything drastic being imposed.”<sup>59</sup>

In pursuit of its mandate and in the quest for effectiveness, the ISC recommended the appointment of an investigator to government. This was to ensure that the ISC would access information without having to go to battle with the Intelligence Services heads and the responsible Ministers as was forewarned by Gill<sup>60</sup>.

In this regard it was proposed that the investigator would have access to the Agencies' staff and papers subject to considerations of sensitivity. In June 1999, John Morrison, was appointed as the first Investigator.<sup>61</sup>

It should be noted that whilst most systems under review have an Inspector General, in the case of the UK, they have an investigator. The post of the investigator effectively does that which in the case of Canada and South Africa an Inspector General does *albeit* in a limited manner. The powers of access to information of the Inspectors-General are unlimited in the case of Canada and South Africa.<sup>62</sup>

In the case of the UK, the heads of the agencies may withhold information from the ISC if it falls in certain categories. These categories are details of:

- Sources;
- operations;
- methods; and
- information provided in confidence by allied foreign services.

However, it should be noted that sensitive information might be made available to the Committee if the head of the Intelligence Service concerned considers that it would be safe to do so. The responsible Secretary has the power to order the release of such information if it is considered to be in the public interest and can overrule the decision of such the relevant head of Intelligence Service.

In terms of resources, time, and adequate skills (such as those possessed by the 'insiders' in the intelligence business), the ISC<sup>63</sup> reported that it did not have enough to make detailed examinations, considering the number and size of agencies it has to review. However, the Investigator<sup>64</sup> is extremely skilled and experienced and he will be in a good position to know what to look for although he will not have unlimited access.

During a conference, the First International Meeting of Inspectors-General of Intelligence and Security (IGIS) held in Canberra, Australia from 17-18 November 1997, Rogers explained that the ISC is not a statutory committee of Parliament. “This means that the ISC draws its three staff from the Cabinet Office rather than the Parliament, and that it acts in a sense as an adjunct of the executive rather than legislative branch of government”.<sup>65</sup>

According to the MI5 website the UK Parliament debated an ISC report for the first time in November 1998. The chief topics of the debate were accountability, changing threats and personnel management in the Intelligence Services of the United Kingdom. A number of speakers paid tribute to the work and members of the Intelligence Services.

### **3.4.3 Oversight developments in the UK**

A debate is being waged in the UK about the nature and extent of intelligence oversight. The recent allegations that government “sexed-up”<sup>66</sup> intelligence reports to justify the involvement of the UK in the war on Iraq. This has seen several Parliamentary investigations<sup>67</sup> and claims that continue about the exaggeration of intelligence. Again, the need to separate intelligence from policymaking has come under the scrutiny of the Hutton<sup>68</sup> enquirers.

The outcome of the Hutton Commission will determine the future political and intelligence oversight developments in the UK. It is likely to resuscitate arguments that the British Intelligence Services Act was indeed designed to be permissive<sup>69</sup> and could lead to calls for more parliamentary involvement in the oversight of British Intelligence Services. In this regard, it is noteworthy that the role of the ISC and its relationship with other parliamentary committees is raising serious concerns. The House of Commons Foreign Affairs Committee tried to access intelligence material and was refused on the grounds that “Parliamentary scrutiny of those agencies is carried out by the ISC”.<sup>70</sup> This is despite the fact that government promised in 1994 that the

setting up of the ISC would not “truncate in any way the existing responsibilities of existing committees”.<sup>71</sup>

### **3.5. The US**

The legislative oversight mechanism of the USA comprises two Committees, one from each of the two legislative Chambers – the House of Representatives and Senate – collectively referred to as Congress. These Committees are:

- The Senate Select Committee on Intelligence; and
- the House Permanent Select Committee on Intelligence.

#### **3.5.1 *Composition and membership of the US Legislative System***

The Senate Select Committee on Intelligence comprises the following:

- Two members from the Committee on Appropriation;
- two members from the Committee on Armed Services;
- two members from the Committee on Foreign Relations;
- two members from the Committee on Judiciary; and
- seven members to be appointed from the Senate at large.<sup>72</sup>

These members are divided between the two major parties in the Senate as recommended by the majority and minority leaders of the Senate. In the case of members representing Committees these are evenly divided between the two major parties. In the case of members appointed from the Senate at large the majority leader recommends four and the minority leader recommends three members. This gives the majority party a difference of one vote in the Committee.

In the case of the House Permanent Select Committee on Intelligence the Committee comprises of not more than nineteen members whose representation includes at least a member from:

- The Committee on Appropriations;
- the Committee on Armed Services;
- the Committee on Foreign Affairs; and
- the Committee on the Judiciary.<sup>73</sup>

The majority and minority party leaders are *ex officio* members as is the case in the Senate and are not counted for purposes of determining the quorum. Members of the House Permanent Select Committee have a term limitation of six years and in the case of the Senate Select Committee the limitation is eight years.

According to the Senate Select Committee on Intelligence most “committees of the US Senate and House of Representatives distribute their membership in proportion to each political party’s membership in that house of congress. Some House committees have been weighted even more strongly in favor of the majority party, however, and occasionally a committee is organized with nearly equal membership for the minority party in order to foster a more bipartisan ethic.”<sup>74</sup>

The leadership of the committees is equally shared as part of building consensus in the US Congress. The Senate Select Committee emphasises the need for this shared leadership and they place a high premium on it. For this reason they have a tradition of choosing the leadership of both the Senate and House Committees from the members of each party with the longest service on the committees. This serves to maximize the chairman’s and vice-chairman’s familiarity with intelligence oversight. As a result they do not need to have an intelligence background, as they are familiar with the mandates of the Intelligence Services and the requirements of the committees.<sup>75</sup>

### **3.5.2 Modus Operandi of the Committees**

It should be noted that there are cardinal principles that the Senate Select Committee on Intelligence recommends and emphasises as they determine

the success of the Committee and the seriousness with which the intelligence community treats the Committee.

These principles are:

- The need to have access to, and to handle properly, very sensitive information on intelligence capabilities and activities. Access to information is the lifeblood of intelligence oversight. Tight security is both an end unto itself and also a means to justify and maintain the committee's access to information.
- A second need, in many cases, is to limit the role of partisan politics in the operation of the Committee. In part, this is one more means of reducing the risk of security lapses that could affect the national security and/or the committee's access to information.<sup>76</sup>

The two Intelligence Committees work independent of each other. The Congressional Committees on Intelligence pursue their programmes and agendas in holding hearings, briefings, inquiries, or investigations on subjects of their choosing. Sometimes informal arrangements are made for both committees to be briefed or handle matters – hearings, inquiries, or investigations- as per agreement with one Committee taking responsibility as may be necessary. The Intelligence Committees have, however, to agree on legislation and the passage thereof is dependent on that.

The composition of the Intelligence Committees makes it easier for them to relate to other committees in the legislature (Congress). The Senate Select Committee is limited in its jurisdiction to intelligence activities. In this regard it has been stated that the practical effect is:

- (1) to leave the CIA and DCI structure within the sole jurisdiction of the intelligence committee;
- (2) to leave defense intelligence activities other than solely tactical activities to shared jurisdiction between intelligence and armed services committees; and

(3) to leave tactical military intelligence within the sole jurisdiction of the Committee on Armed Services.<sup>77</sup>

These committees are free to request matters in their sphere of responsibility to be referred to them by the Senate Select Committee on Intelligence for a 30-day period.

The brief of the House Permanent Select Committee on Intelligence is different as it includes both intelligence and intelligence-related activities of other departments and agencies. This then makes the brief of the House Permanent Select Committee on Intelligence wider than that of its Senate counterpart.

#### 4. CONCLUSION

From the foregoing discussion the following models for intelligence oversight can be surmised:

- **Indirect Legislative Oversight System:** where no direct control of the intelligence services is exercised by the legislature. Rather, a specialised body is established by the legislature to undertake such a responsibility. Two versions of this system are available namely:
  - Firstly, a committee of legislators which reports to parliament through the head of the executive as is the case in the UK ;and
  - secondly, a system of eminent persons (privy counselors or counselors) who are non-legislators as is the case in Canada and Belgium. This system is also being practised in Poland in a form of the College on Secret Service, which is chaired by the Prime Minister.
  
- **Direct Legislative Oversight System:** where legislators are chosen by the presiding officers of the legislature and have reporting responsibility to it. There are two versions of this system namely:
  - The Joint Committee Model; and
  - a Dual Committee Model.

The latter comprises two Committees for each of the legislative chambers. Examples in this regard are the Australian PJCAAD in the case of a joint committee. The USA House Permanent and Senate Select Committees on Intelligence, respectively discussed above, serve as examples of the dual committee model.

In the foregoing discussion it was pointed out what each of these Committees are empowered to do in their respective countries. The next chapter will focus on the Joint Standing Committee on Intelligence of the Republic of South Africa, which will be discussed with the foregoing as background.

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## REFERENCES

- <sup>1</sup> Longley, LD and RH Davidson, *op cit*.
- <sup>2</sup> Murray C and L Nijzink, **Building Representative Democracy: South Africa's Legislatures and the Constitution**, EU Parliamentary Support Programme, Cape Town, 2002, pp 5-6
- <sup>3</sup> Longley, LD and RH Davidson, *op cit*, p 16.
- <sup>4</sup> Ravnborg, F, **An International Perspective on Law and Ethics: The case of Denmark**; Denmark (unpublished and undated document supplied by the JSCI), pp 96-97.
- <sup>5</sup> General Kirpichenko is quoted from a document compiled by the Joint Standing Committee on Intelligence dealing with debates on the role of oversight structures. The conference in question was hosted to discuss the role of Intelligence Services in a Democracy in 1994.
- <sup>6</sup> Bayekenov is quoted from a document compiled by the Joint Standing Committee on Intelligence dealing with debates on the role of oversight structures cited above.
- <sup>7</sup> Knott, SF, *The Great Republican Transformation on Oversight*, **International Journal of Intelligence and Counter-Intelligence, Vol 13, No 1**, Taylor and Francis, Pennsylvania, Spring 2000, p 51.
- <sup>8</sup> Weller, GR, *Accountability in Canadian Intelligence Services*, **International Journal of Intelligence and Counter-Intelligence, Vol 2, No 3**, Intel Publishing Group Inc., Pennsylvania, Fall 1998.

- 9 Holt, P, **Secret Intelligence and Public Policy**, Congressional Quarterly Inc, New York, 1995.
- 10 *Ibid.*
- 11 Wagenen, JS, *Critics and Defenders: A review of Congressional Oversight*, **Studies in Intelligence, Vol. 1, No. 1, 1997**, pp 6-7.  
Internet: <http://www.odci.gov/csi/studies/97unclass/wagenen.html>
- 12 *Ibid.*
- 13 Weller, GR, *Political Scrutiny and control of Scandinavian's Security and Intelligence Services*; **International Journal of Intelligence and Counter-Intelligence, Vol 13, No 2**, Intel Publishing Group Inc, Pennsylvania, Summer 2000, p 184.
- 14 *Ibid.*
- 15 Longley, LD and RH Davidson, *op cit*, p 4.
- 16 *Ibid*, p 7.
- 17 See schedule for the Australian Intelligence Community.
- 18 Australia, **Annual Report of the Joint Standing Committee on ASIO, ASIS and DSD**, Canberra, August 2002, p 5.
- 19 *Ibid*, p 6.
- 20 UK, **International Intelligence Review Agencies Conference 12-15 May 2002**, UK Conference and Visits Group, Foreign and Commonwealth Office, London, 2002, p. 78.
- 21 Australia, Intelligence Services Act, 2001.
- 22 USA, Select Committee on Intelligence United States Senate One Hundred Third Congress, **Legislative Oversight of Intelligence Activities: The US Experience**, October 1994.
- 23 Australia, **Annual Report of the Joint Standing Committee on ASIO, ASIS and DSD**, *op cit*, p 6.
- 24 The formal title of the IG in Australia is the Inspector-General on Intelligence and Security.
- 25 Weller, GR, *Oversight of Australia's Intelligence Services*, **Annual Meeting of the International Studies Association: 14-21 February 1999**, Washington DC, 1999, p 496.
- 26 *Ibid.*

- 27 Weller, GR, *op cit*, pp 496-497.
- 28 This refers to a report of a Commission under the Chairpersonship  
Samuel-Codd. The report supported an increased oversight  
mechanism, which will focus on all the Intelligence Services of  
Australia.
- 29 Weller, GR, *op cit*, pp 498-499
- 30 *Ibid.*
- 31 **UK, International Intelligence Review Agencies Conference 12-15  
May 2002, *op cit*, p 79.**
- 32 **Belgium, Belgium’s Permanent Committee for the Control of the  
Intelligence Services, Presentation of the Committee: 1997  
Assessment: Four years of Oversight and Recommendations  
(sic), Brussels, unpublished document, p 2.**
- 33 *Ibid*, p 3.
- 34 *Ibid.*
- 35 *Ibid.*
- 36 *Ibid.*
- 37 *Ibid*, p 4.
- 38 **UK, International Intelligence Review Agencies Conference 12-15  
May 2002, *op cit*, p 83.**
- 39 Belgium, 1997, *op cit*, p 4.
- 40 *Ibid.*
- 41 *Ibid.*
- 42 Internet: <http://www.sirc-csars.gc.ca>
- 43 Weller, GR, *op cit*, pp 437.
- 44 Paule Gauthier is a privy councillor and the chairperson of the SIRC.
- 45 **UK, International Intelligence Review Agencies Conference 12-15  
May 2002, *op cit*, p 88.**
- 46 *Ibid* and *The Security Intelligence Review Committee on CSIS*,  
Internet, <http://www.sirc-csars.gc.ca>
- 47 *Ibid.*
- 48 The Solicitor-General exercises political control and is also accountable  
for the activities of CSIS. This position is similar to that of the South

- African Minister for Intelligence Services in so far as the Intelligence Service is concerned in Canada. Canada, *The Security Intelligence Review Committee on CSIS*, Internet, <http://www.sirc-csars.gc.ca>
- 49 Australia, **Draft Report on the Intelligence Review Agencies Conference (IRAC)**, Ottawa, 20 February 2000.
- 50 *Ibid.*
- 51 Senator WM Kelly is the Chairperson of the Special Senate Committee on Security and Intelligence in Canada.
- 52 Australia, **Draft Report on the Intelligence Review Agencies Conference (IRAC)**, *op cit*, p 7.
- 53 Weller, GR, *op cit*, pp 437.
- 54 Australia, **Draft Report on the Intelligence Review Agencies Conference (IRAC)**, *op cit*, p 8.
- 55 UK, **International Intelligence Review Agencies Conference 12-15 May 2002**, *op cit*, p 99.
- 56 Allan Beith is a member of the ISC who is the Deputy Leader of the Liberal Democrat Party in the UK.
- 57 Gill, P, *Re-Asserting Control: Recent Changes in Oversight of the UK Intelligence Community; Intelligence and National Security, Vol 11, No 2*, Frank Cass, London, April 1996, p 328.
- 58 *Ibid.*
- 59 Robertson, KG, *Recent Reforms of Intelligence in the UK: Democratization or Risk Management?*, **Intelligence and National Security, Vol 13, No 2**, Frank Cass, Summer 1998, p 155.
- 60 Gill, P, *op cit*.
- 61 UK, **International Intelligence Review Agencies Conference 12-15 May 2002**, *op cit*.
- 62 *Ibid.*
- 63 The report of the ISC was tabled at the Intelligence Review Agencies Conference in June 1999 and the written report on the Conference was published in 2000.
- 64 This is the view of the ISC, which is shared by many people who have had an opportunity of working closely with the investigator.

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- 65 Australia, Inspector General for Intelligence and Security, **Annual Report**, Canberra, 1998, p 8.
- 66 This is a term used by the British Broadcasting Corporation on the expose`, which alleged that Prime Minister Tony Blair's government was involved in exaggerating the case for war in Iraq thus distorting intelligence reports.
- 67 There are two investigations that have been set up to investigate these claims. First, the House of Commons Foreign Affairs Committee prepared a report entitled **The Decision to go to War, Ninth Report of Session 2002-2003, Vol 1**, The Stationery Office Ltd, London, 3 July 2003. This report was followed by the setting up of a Judicial Commission headed by Justice Hutton to enquire into the death of Dr Kelly.
- 68 This is a Commission set up in the UK to investigate the circumstances leading to the suicide of Dr Kelly a nuclear expert who leaked information to the BBC about the sexed-up intelligence.
- 69 Robertson, KG, *op cit*, p 155.
- 70 UK, House of Commons Foreign Affairs Committee, *op cit*, p 48.
- 71 This undertaking was made by Douglas Hurd during the introduction of the ISC. Hurd D in UK, **House of Commons Debate, 22 February 1994**, col. 164 as cited in UK, **House of Commons Foreign Affairs Committee**, *op cit*, p 48.
- 72 USA, Select Committee on Intelligence United States Senate One Hundred Third Congress; **Legislative Oversight of Intelligence Activities: The US Experience**, October 1994, p 27.
- 73 *Ibid*, p 36
- 74 *Ibid*, pp 6-7.
- 75 *Ibid*, pp 7-8.
- 76 *Ibid*, p 6.
- 77 *Ibid*, p 12.

## CHAPTER 3

# THE SOUTH AFRICAN PARLIAMENTARY OVERSIGHT SYSTEM OF INTELLIGENCE

## 1. INTRODUCTION

In the previous chapter a description of the role and functions of legislatures regarding intelligence oversight, using case studies of selected countries<sup>1</sup> that contributed to the crafting and evolution of the South African Intelligence dispensation, was provided. This chapter proposes to focus on parliamentary oversight of intelligence in South Africa, which will be briefly introduced through a description and discussion of the post-1994 parliamentary system. In this context, the chapter seeks to discuss the JSCI, its role, functions and structure.

## 2. THE NEW PARLIAMENT OF SOUTH AFRICA

Before 1994, no parliament could legitimately express the will and aspirations of all the people of South Africa. The 1996 Constitution<sup>2</sup> created a bi-cameral system of governance in the National Assembly (NA) and the National Council of Provinces (NCOP). The former is equivalent to the House of Commons and the latter to the House of Lords in the UK. This section will discuss the powers and functions of the National Assembly and the National Council of Provinces.

## 2.1 The National Assembly and the National Council of Provinces

The functions of the National Assembly are:

- To represent the people and to ensure government by the people under the Constitution;
- to choose the President;
- to provide a national forum for public consideration of issues;
- to pass legislation; and
- to scrutinise and oversee executive action.<sup>3</sup>

Ginwala<sup>4</sup> set a new ethos for the National Assembly in exercising the above functions imposed by the Constitution on members. In this regard she emphasises that responsibility to carry out these functions is not the prerogative of any one political party, but vests in all members of the National Assembly individually and collectively. She obliges members never to forget that they exercise their authority on behalf of those who elected them and that they must always be accountable to the electorate.<sup>5</sup>

This new ethos marks in essence the functioning of the National Assembly.

The functions of the National Council of Provinces are:

- To represent provincial interests when decisions are made in the national sphere;
- to participate in the national legislative process; and
- to provide a national forum for public consideration of issues affecting provinces.<sup>6</sup>

The Constitution confers national legislative authority to the National Assembly and to the National Council of Provinces. The National Assembly<sup>7</sup> has the legislative authority to:

- Amend the Constitution;
- pass legislation with regard to any matter, including a matter within a

functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional and listed in Schedule 5; and

- assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.

The Constitution confers on the National Council of Provinces the power to:

- Participate in amending the Constitution in accordance with Section 74;
- pass, in accordance with Section 76, legislation with regard to any matter within a functional area listed in Schedule 4, and any other matter required by the Constitution to be passed in accordance with Section 76; and
- consider in accordance with section 75, any other legislation passed by the National Assembly.<sup>8</sup>

It should be noted that Parliament is empowered to intervene by passing legislation on matters that fall under the provincial sphere of responsibility in order to:

- Maintain national security;
- maintain essential national standards;
- establish minimum standards required for the rendering of services; or
- prevent unreasonable action taken by a province which is prejudicial to the interests of another province or the country as a whole.<sup>9</sup>

The Constitution obliges the National Assembly and the National Council of Provinces to establish a joint rules committee. The Joint Rules Committee<sup>10</sup> makes rules and orders concerning the joint business of the Assembly and Council. The rules and orders include rules and orders to establish joint committees composed of representatives from both the Assembly and the Council to consider and report on Bills envisaged in Sections 74 and 75 that are referred to such a committee.

In addition, it obliges Parliament to issue rules and orders to regulate business pertaining to:

- The Joint Rules Committee;

- the Mediation Committee;
- the Constitutional Review Committee; and
- any joint committees established in terms of paragraph (b).<sup>11</sup>

It should be noted that the two Houses of Parliament operate on the basis of a committee system. In the National Assembly, committees are called Portfolio Committees and in the National Council of Provinces they are called Select Committees. Most of the Committees in these Houses are policy committees and tend to correspond with National Departments that they oversee.

“Because the NCOP has far fewer members than the National Assembly, policy areas have been grouped together and one select committee in the NCOP corresponds with several portfolio committees in the National Assembly”.<sup>12</sup>

In addition to policy committees, Parliament has standing and *ad hoc* committees. Standing committees are committees that deal with certain on-going business of the legislature and *ad hoc* committees are formed on a need basis and are task focused. Once an *ad hoc* committee fulfils its brief it is disbanded. Examples of these two types of Committees are the Standing Committee on Public Accounts and the *Ad Hoc* Committee on General Intelligence Law (National Assembly) respectively.<sup>13</sup>

## 2.2 The Intelligence Oversight Role of Parliament

Parliament does not only leave the oversight responsibility to members of the Joint Standing Committee on Intelligence, but members do take keen interest. In this regard, there are several questions that are directed to the President, the Deputy President and the Ministers of Safety and Security, Defence, Justice and Constitutional Development and for Intelligence Services pertaining to intelligence matters. Most of these questions seek to elicit information that is of an administrative and policy nature from the responsible Ministers. On occasion, members do ask operational questions. Sensitive questions are referred to the JSCI for attention and are not answered in

Parliament. These relate mainly to sources, methods, information received from fraternal foreign intelligence services, and that which may impact on a current or ongoing investigation.<sup>14</sup>

It needs to be noted that government Ministries have been clustered to ensure that there is systemic oversight of the interdependent sectors of government and their business by Parliament. Questions are asked by members of Parliament and responded to by Ministers in the cluster system. Members of Parliament and the President also initiate debates on various issues of national importance.

In addition, Ministers and Deputy Ministers also use the forum to make statements on national security matters. In this regard, statements have been made on the taxi violence in the Western Cape<sup>15</sup> and the security situation in Nongoma (KwaZulu-Natal)<sup>16</sup> to mention two examples. Most of these discussions are generally constructive although partisan political point scoring sometimes features especially in periods in the run up to national elections. It should be noted that endeavours are made to improve national security and to oppose in a responsible manner. This ethos serves as a basis for the operations of the JSCI.

It is important to emphasise that Parliament receives reports from the Auditor-General (AG) and other institutions supporting democracy. These reports are tabled in Parliament without alteration and serve as important oversight instruments of the Intelligence Services. In fact, a number of questions that were directed to successive Ministers of Intelligence Services were largely triggered by reports of the AG especially on matters pertaining to disciplinary cases. The media has also triggered a number of questions and debates in Parliament on national security matters.

### **2.3 The JSCI**

The JSCI is created by statute – the Intelligence Services Control Act, 1994<sup>17</sup>

– in keeping with the Constitutional powers vested in Parliament. This Act establishes the Committee, prescribes the powers, role and functions of the Committee; its composition; the functions of the Chairperson and procedures related with the above-mentioned issues. It is on these issues that this section will focus.

### **2. 3.1.                    *The Composition of the JSCI***

The Committee would under normal circumstances be composed of 15 Members of Parliament. The Intelligence Services Control Act, 1994, provides that the Committee may have more or less members and still remain duly constituted. There are several reasons for this provision. The reasons are:

- To ensure that no crisis develops if the outcome of the proportional representation allocation of seats to parties yields a number more or less than fifteen;
- secondly, if the seats held by one party are more than eight, the Act seeks to spread representation to the biggest five political parties represented in Parliament, to ensure that there is multi-party representation in the Committee; and
- in addition, the Act provides for the Committee to remain duly constituted even if some of the parties that are represented in Parliament choose not to serve on the Committee.

The above formula was agreed upon following the 1999 general elections. The JSCI was reconstituted in keeping with the amendments of the Intelligence Services' Control Act, 1994. As a result of this the following political parties are represented on the Committee based on the support they received during the 1999 national election:<sup>18</sup>

- The African Christian Democratic Party (ACDP).
- the African National Congress (ANC).
- the Democratic Party (DP).<sup>19</sup>
- the Inkatha Freedom Party (IFP).
- the New National Party (NNP).

- the United Democratic Movement (UDM).<sup>20</sup>

It should be noted that there are a number of political parties that are represented in Parliament that are not part of the Committee. This has led to the setting up of *ad hoc* committees to consider legislation pertaining to Intelligence structures so as to accommodate their participation in the legislative programme.

### **2.3.2      *The Powers and Functions of the JSCI***

The JSCI is empowered by the Intelligence Services Control Act, 1994<sup>21</sup> to:

- Order investigations into intelligence and counterintelligence matters;
- refer matters for investigations pertaining to human rights abuses to the Human Rights Commission;
- consider any other matter referred to it by the President of the Republic of South Africa, Cabinet Ministers and Parliament;
- review and make recommendations regarding interdepartmental cooperation and rationalisation and demarcation of functions relating to intelligence and counterintelligence involving the National Intelligence Agency (NIA), South African Secret Service (SASS), the South African National Defence Force (SANDF) and the South African Police Service (SAPS);
- consult members of Cabinet regarding the oversight of their respective agencies;
- consider reports on the appropriation of funds for NIA and SASS;
- nominate the Inspector-General of Intelligence for whom the Committee has the additional responsibility of determining conditions of service in conjunction with the President of the Republic of South Africa;
- prepare and submit special reports to Parliament and the President of the Republic of South Africa; and
- initiate and recommend rules and orders for the functions of the Committee.

In addition, the Committee can receive reports from the following institutions:<sup>22</sup>

- The AG on the Secret Services Account;
- the Evaluation Committee on the review it has conducted on requests to establish a secret service in departments that do not have Intelligence structures as their mandate. The report is submitted together with the Evaluation Committee's comments and recommendations;
- a report on the Interception and Monitoring Prohibition Act, 1992, Act 127 of 1992,<sup>23</sup>
- a report from each Minister regarding the budget for the Service for which he or she is responsible; and
- reports and certificates from the Inspector-General of Intelligence.

There are various levers that the Committee has at its disposal, which ensures that there is not just a moral obligation on the part of those institutions, and individuals they interact with, but a legal obligation whose violation is punishable by law.

These levers are:

- The power of subpoena to testify and disclose information that is relevant for their operations;
- access to information that is relevant to its core business;
- initiating legislation and considering legislation on intelligence and national security matters; and
- ordering investigations by the Inspector-General and Heads of the Intelligence structures.

It should be noted that there is a great deal of sensitivity concerning the legislative role of the Joint Committees. In this regard, it should be noted that Joint Rule 32 (2) provides that “no joint committee may consider legislation in the legislative process unless expressly empowered to do so”.<sup>24</sup> The JSCI is expressly empowered by law to do that amongst other functions. However, to date Parliament has seen it fit to set up *ad hoc* committees. The obstacles that make it impossible for the JSCI to fulfill this responsibility have not been

removed by Parliament. This is despite the fact that the JSCI is empowered by law to initiate and consider legislation.

There are two reasons that have been advanced to explain this state of affairs. The first is that there are no voting procedures that should govern voting in a Joint Committee, which would ensure that the process would not lead to the violation of the Constitution. A second reason is that the Constitution empowers public representatives to participate in the law-making process. Since some of the political parties do not have representation on the Committee, Parliament believes that *ad hoc* committees should be used to address intelligence legislation in consultation with the JSCI.

Parliament has seen it fit to empower the JSCI to oversee Intelligence structures, including giving the Committee the power to consider and initiate laws. It is incumbent on Parliament to ensure that mechanisms are put in place to facilitate the Committee's smooth and effective functioning. Above, all the composition of the JSCI was agreed to by Parliament. If indeed there is anything unconstitutional about its composition, Parliament is expected to take corrective measures in this regard. In this regard the adoption of the bi-committee system seems to be in order and the most constitutionally viable route.

It is therefore incumbent on Parliament that the constitution of the Committee will enable it to undertake and fulfill all powers granted to it by legislation and by extension, by Parliament itself. This situation needs a remedy as it has the potential, down the line, of forcing a discussion on legislation whose motivation is sensitive and cannot be provided in an open forum and to members of Parliament who are not cleared. A discussion on matters pertaining to counterintelligence especially may fall in that category. The *ad hoc* committee model will, in that circumstance, be woefully inadequate.

What assistance does the Committee receive in carrying out its mandate?  
This question is the subject of the next section.

### **2. 3. 3 The Staffing of the JSCI**

The Committee is assisted by a team led by an Office Manager, who is the Chief of Staff and is responsible for the coordination and overall management of the work of the Committee. The Office Manager is an employee of Parliament and has the same responsibilities as the Director of SIRC in Canada or the Administrator of the ISC in the UK or the Clerk of the Parliamentary Joint Committee on ASIO, ASIS and DSD of Australia. The Office Manager, obviously, has a varying span of responsibilities given the needs of the different committees although the posts are essentially similar. (In this regard the title Office Manager is misleading and needs to be reconsidered by the Committee).

The next senior officer is the Researcher<sup>25</sup> who is responsible for the research programme of the Committee and leads the preparation of documents in support of the Committee. In this regard the Researcher prepares draft reports for the Committee and initial work on behalf of the Committee. This would include visiting some of the Intelligence structures; evaluating cooperation of the services at provincial level; and interacting with the Ministry for Intelligence Services in conjunction with the Office Manager and or under his/her supervision.

At the time of writing the Committee had a post of investigator, which was vacant. The Committee found this post to be necessary when there were allegations that the South African Police Service (SAPS) was bugged by the National Intelligence Agency (NIA) which led to an investigation. At the time there was no Inspector-General in office and the Committee needed assistance. This need led to the creation of the post of Investigator. The Committee has since agreed that it needs to be abolished.

This decision was prompted by the lack of clarity, in legal terms, of the powers that the incumbent of such a post could exercise in the name of the

Committee when these powers are, legally speaking, the responsibility of the Inspector-General. In the meantime, the office of the Inspector-General or the Heads of the Intelligence structures, whom the JSCI can task to conduct investigations if and when so required, conduct the investigations for the Committee.

There is also a Committee Clerk<sup>26</sup> that is responsible for the logistical support of the Committee regarding its meetings, minutes, agendas, documents, venues for meetings and other related work. This function is essential for the proper recording of Committee proceedings, ensuring the keeping of an accurate record and basically, effective exercise of the powers and functions of the Committee when in session. The incumbent of this post is employed by Parliament.

The last post in the Committee Staff structure is that of the Personal Assistant to the Chairperson and Administrator. As the title suggests, the incumbent manages the diary of the Chairperson of the Committee, sets appointments and helps the Chairperson manage his or her time accordingly. In addition, the incumbent is responsible for administrative matters in the office under the guidance and direction of the Office Manager. The incumbent in this post is seconded from the Ministry for Intelligence Services.

It should be noted that the staff members of the Committee are employed by Parliament and the Ministry for Intelligence Services seconds others. The Presiding Officers of Parliament, the Minister and the Heads of the Services approve the seconded staff members. This is provided for in the Intelligence Services Control Act, 1994. The evaluation of staff performance is done jointly by the Head: Ministerial Services and Office Manager. Their day-to-day management and direction, as pointed out above, is the responsibility of the Office Manager. The Ministry for Intelligence Services renders support to the Committee on a need basis in the spirit of cooperative governance.

### 3. CONCLUSION

In this chapter the role and function of the South African Parliament was discussed with specific reference to the intelligence oversight function. In this regard it was noted that a new ethos – national consensus and accountability – characterises the operations of the JSCI.<sup>27</sup> Furthermore, Parliament, in keeping with international trends and best practice, has created a vibrant committee system. It is here that most of the work of Parliament is done. This Parliament is still transforming itself and seeking to provide a better service to members so that they can spend more time on policy-related issues. In addition, it is also honing the skills and expertise of both staff and members of Parliament so that they can better fulfill their respective missions – making it a truly representative Parliament of the people.

The JSCI is one of the agents of Parliament, and is the only parliamentary committee that is established by statute. Others are created by Joint Rules of the Parliament. The foregoing discussion dealt with the role and functions, composition, as well as support structure of the JSCI.

It was noted that despite the fact that the JSCI has a statutory responsibility to initiate legislation, it has not been permitted to do so as *ad hoc* committees have been set up to consider legislation, *albeit* in consultation with the JSCI. This is viewed as a weakness that stems from inadequacies in the Joint Rules and should be easily remedied provided there is the political will and positive predisposition to do so. The perceptions of members of the JSCI regarding its functioning, and its relationship with Parliament, institutions supporting democracy, and the Intelligence structures, will be discussed in the next two chapters.

## REFERENCES

- 1 The selected countries are Australia, Belgium, Canada, United Kingdom and the United States.
- 2 The Constitution of the Republic of South Africa was drawn up by the Constituent Assembly and was adopted in 1996. Before this Constitution was adopted South Africa had an Interim Constitution adopted in 1993 following negotiations in the Conference for a Democratic South Africa. The citation of the Constitution is: RSA, The Constitution of the Republic of South Africa Act, 1996, (Act 109 of 1996).
- 3 RSA, The Constitution of the Republic of South Africa Act, 1996, (Act 109 of 1996).
- 4 Dr. Frene Ginwala is the Speaker of the National Assembly in the Parliament of the Republic of South Africa.
- 5 RSA Hansard, **Debates of the National Assembly, First Session – Second Parliament, No. 1**, Government Printers, Cape Town, 14-30 June 1999, p 7.
- 6 RSA, Section 42 (4) of the Constitution of the Republic of South Africa Act, 1996.
- 7 *Ibid.*
- 8 *Ibid*, section 44 (2) (e).
- 9 *Ibid.*
- 10 *Ibid*, section 45(1)(b).
- 11 *Ibid*, section 45(1)(d).
- 12 Murray, C and L Nijzink, **Building Representative Democracy: South Africa’s Legislatures and the Constitution**, EU Parliamentary Support Programme, Cape Town, 2002, p 67.
- 13 RSA Parliament of South Africa, **Annual Report 2000/2001(Including Financial Statements and Auditor’s General’s Report)**, Government Printers, Cape Town, 2001, p 12; and Murray, C and L Nijzink, *op cit*, p 67.
- 14 This information is protected from disclosure by internal directives of

the Services, which are in keeping with the provisions in the Intelligence Services Acts of 1994 and of 2002.

15 RSA, **Debates of the National Assembly, Second Session – Second Parliament, No 11**, Government Printers, Cape Town, 6-9 June 2000, col. 4148-4190.

16 RSA, **Debates of the National Assembly, Second Session – Second Parliament, No 13**, Government Printers, Cape Town, 19-22 June 2000, col. 5324-5352.

17 The Act has been renamed and is now the Intelligence Oversight Act, 1994, Act 40 of 1994.

18 The representatives of the various political parties are known to the author whose work entails interacting with them on issues affecting the Ministry for Intelligence Services. The formula is available in the Intelligence Services Control Act, 1994, (Act 40 of 1994).

19 It should be noted that following the window period provided by the Floor Crossing Legislation, the Democratic Party has ceased to exist in the RSA Parliament. Members of Parliament who were representing the Democratic Party have crossed the floor to join the Democratic Alliance. However, at the time of writing the composition of the JSCI had not been formally changed to reflect the new parliamentary representation.

20 Mr S Abram has crossed the floor from the UDM to the ANC. For purposes of this research he will remain a representative of the UDM.

21 This section of the Act has been paraphrased to make it easy to understand. These are not direct quotes from the Act.

22 RSA: Intelligence Services Oversight Act, 1994.

23 A new Act, replacing Act 127 was enacted and now it is known as the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, (Act 70 of 2002). A summary of the Act has been written by Welch, J, *The Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, (Act 70 of 2002): The implications for Private and Public Security*, **ISSUP Bulletin 4/2003**, University of

Pretoria, Institute of Strategic Studies, Pretoria 2003.

24 RSA, **Joint Rules of the National Assembly and the National  
Council of Provinces**, Government Printers, Cape Town, 1999.

25 This denotes a post in the Joint Standing Committee on Intelligence  
and does not refer to a generic title. This use is specific to the post.

26 The information contained here is based on the discussions and  
interviews conducted with the Office Manager and the Researcher. No  
documents are available from the JSCI that details the information  
contained herein.

27 It should be noted that this spirit of the JSCI derives from a number of  
issues on which Parliament is in agreement as belonging to a non-  
partisan agenda of what needs to be pursued by all parties in  
Parliament. These issues include the constitutional principles, which  
are the values on which the new South Africa is founded, the issue of  
crime, and HIV/AIDS.

## CHAPTER 4

### PERCEPTIONS OF JSCI MEMBERS ON ITS STANDING

#### 1. INTRODUCTION

This chapter proposes to focus on the results of the interviews conducted with seven members of the JSCI on their work in the Committee.<sup>1</sup> Whilst all members of the JSCI were to be interviewed, a number could not due to their redeployment in 2001 and in some cases their subsequent transfer to other provinces. Attempts at organising interviews at their new areas of deployment were not successful owing to their busy schedules.

The members who were interviewed are:

- Mr L Landers, a Member of Parliament representing the African National Congress (ANC), and chairperson of the Ethics Committee in the National Assembly.
- Mr MI Scott,<sup>2</sup> a Member of Parliament representing the ANC who is a Whip and chairperson of the portfolio committee on Home Affairs in the National Assembly.
- Ms S van der Merwe, a Member of Parliament representing the ANC and the Parliamentary Counsellor to the President.
- Mr S Abram,<sup>3</sup> a Member of Parliament representing the United Democratic Movement (UDM). He is also a National Chairperson of the United Democratic Movement.
- Ms M Olckers, a Member of Parliament representing the New National Party (NNP) and the Provincial Deputy Leader of the New National Party in the Western Cape Province.
- Mr JL Mahlangu<sup>4</sup> is an ANC member who is a permanent Member in the National Council of Provinces representing the Mpumalanga Province and is Chairperson of the Security and Constitutional Affairs Select Committee.
- Rev L Green,<sup>5</sup> a Member of Parliament representing the African Christian

Democratic Party (ACDP) and Chief Whip of the ACDP in the National Assembly.

Two staff members were interviewed owing to their centrality in the programming of the JSCI activities, namely:

- Ms N Mnyaka, the Office Manager of the JSCI; and
- Mr D Nase, the Researcher of the JSCI.

It was also not possible to interview Goniwe owing again to his busy schedule. Goniwe is an ANC Whip in the National Assembly and Chairperson of the Portfolio Committee on Minerals and Energy. One interview could not be finalised owing to the pressure that was facing Green. Schalkwyk felt that he was still new in the Committee and could not make comments on a subject he is not yet quite familiar with. He was willing to be interviewed at a later stage.

Before interviews could be conducted with the following members they were re-deployed and interviews could not be held with them:

- Prof Ndabandaba<sup>6</sup> a Member of Parliament representing the Inkatha Freedom Party (IFP) now MEC for Education in KwaZulu-Natal;
- Mr Ebrahim Ebrahim,<sup>7</sup> ANC Member of Parliament and Chairperson of the Portfolio Committee on Foreign Affairs;
- Mr Thabang Makwetla a Member of Parliament representing the ANC and the former Chairperson of the ANC Caucus now the MEC for Safety and Security in Mpumalanga; and
- Ms N Mapisa-Nqakula a Member of Parliament representing the ANC, former Chairperson of the JSCI and Chief Whip of the ANC now Deputy Minister of Home Affairs.

The main aim of the study was to establish the understanding of the core business of the Committee by the members and to elicit their views on the performance of the Committee. The study sought to also determine the nature of the relationship of the Committee with other structures that are crucial in the oversight and control of Intelligence structures in South Africa. Further, the study assessed the impact of the Committee from the perspective of the JSCI members on the culture of Intelligence structures and its relationship with the

public. The interviews focus on the period 1994 to the end of 2001.

## **2. UNDERSTANDING OF THE CORE BUSINESS OF THE JSCI**

Generally members and staff of the JSCI understand the mission of the Committee as the oversight of Intelligence Services. Whilst satisfied by the manner in which the Committee has acquitted itself of its responsibility and mandate, they focused in the main on the areas of weakness and opportunities that need to be grasped to make the Committee more effective in fulfilling its mandate.

Cwele<sup>8</sup> says that the core business of the JSCI is the oversight of the Intelligence Services. He points out that the JSCI has been doing superbly in the oversight of the Civilian Intelligence Services, getting progress reports, reviewing budgets. “We are doing fairly well”.<sup>9</sup>

The Committee staff shares the view. In this regard Nase points out that the mission of the JSCI is to make sure that the Intelligence structures do not abuse powers vested in them. Nase<sup>10</sup> believes that the JSCI is there as a safeguard. Mnyaka<sup>11</sup> who points out that the Intelligence structures do not do, as they want, as there is parliamentary accountability to the JSCI, supports Nase in his view.

Nase<sup>12</sup> views the JSCI as successful and effective in its work. He cites the following as proof of their success:

- The contribution of the JSCI in changing the organisational culture of the Intelligence Services and overcoming the legacy of Apartheid;
- addressing inherited tendencies of lawlessness within the Intelligence Services; and
- making sure that the Intelligence Services are not left behind by the latest technological and trade craft developments.

Cwele supports this perspective of Nase. In addition he points out that the oversight of the Intelligence structures by the JSCI has increased although more can and needs to be done by the Committee. As proof he cites the participation of the JSCI in the Defence Budget Debate to deal with matters relating to Defence Intelligence. This was done for the first time in 2001 since the founding of the new Intelligence dispensation in South Africa.<sup>13</sup>

Landers<sup>14</sup> agrees and further says that the JSCI has focused primarily on NIA and SASS. The JSCI's oversight of the Intelligence structures<sup>15</sup> is very good but the JSCI has failed in exercising similar oversight of Defence and Crime Intelligence.<sup>16</sup> He sees this as a priority matter that needs to be addressed by the JSCI. Landers further regretted that the JSCI missed a speaking slot – where it could have dealt with Safety and Security issues during the Budget Debate of the Department of Safety and Security. He cautions that it is not enough to participate in the debates, rather the JSCI needs to get to grips with the two organisations. Landers adds that the JSCI has done very well in monitoring and overseeing the work of the Intelligence Services although they still need to do a much more.<sup>17</sup>

Abram,<sup>18</sup> of the UDM, believes that there is a need for programmes in fulfilment of its [the JSCI] mission. All the Intelligence structures would have to work closely together to make sure that the programmes of the JSCI work.

Olckers<sup>19</sup> shares this view and believes that the JSCI needs a strategic plan that identifies priorities that the JSCI should be focusing on. She cites as examples the need to focus on Defence and Crime Intelligence oversight. She notes that these Intelligence structures also reside within the line-functional sphere of two other Portfolio Committees of Parliament who cannot access classified information, as they are not authorised by law to access it. Olckers advocates a view that Parliament needs to revisit how this oversight function is conducted on Defence and Crime Intelligence. As a way of increasing control and oversight over these Intelligence structures she also prefers that Defence and Crime Intelligence should have stand-alone budgets, which the JSCI would take responsibility for approval and oversight.<sup>20</sup> This view is

shared by Van der Merwe<sup>21</sup> who sees the Public Finance Management Act, 1999 as a critical and crucial instrument for increasing oversight over the Intelligence structures.

Olckers views the lack of a coherent and consistent oversight over these two structures as a weak link within the oversight system of government. She believes that the budget process will provide an additional oversight and control mechanism, which will help shift the focus of the JSCI to these structures. She notes that the Portfolio Committees on Safety and Security and Defence together with the JSCI because of poor coordination leave an oversight vacuum that can be exploited by the Defence and Crime Intelligence in their operational conduct.<sup>22</sup>

Olckers strongly argues for the supervision of Defence and Crime Intelligence to be undertaken by the JSCI due to the expertise that they have developed in this regard. Olckers believes that the initiative should be left to the JSCI to lead in the oversight of these structures. This will include scrutinising and following up on the Auditor-General reports, which had been a source of concern in Parliament for sometime.<sup>23</sup>

The reasons advanced in support of the specialised oversight responsibility include: the lack of security clearances for members of other portfolio committees and consequential lack of access to classified information to avoid compromising national security matters in Defence and Crime Intelligence. The lack of a security clearance is also linked to not being sworn to secrecy.<sup>24</sup>

In addition, these portfolio committees hold their meetings in public. Matters of national security require protection and in this regard closed meetings have to be held to protect classified information whose disclosure could render the country vulnerable and compromise national security. These conditions in the other portfolio committees make it difficult for them to probe Defence and Crime Intelligence in detail in the full glare of the public. These reasons have been persuasive enough for the Standing Committee on Public Accounts and the JSCI to agree on leaving the oversight responsibility of Intelligence

Services to be led by the JSCI. This agreement has since been put in law through the Intelligence Services Control Amendment Act, 2002, (Act 66 of 2002).

Van der Merwe<sup>25</sup> believes that there is a need for the improvement of the operational aspects of the Committee. This improvement will focus the Committee more and fulfill its mission even better. She proposes that the JSCI should have a management committee to address the core business issues in fulfilling the mission of the JSCI. This management committee will ensure that the need to deal with agendas at a formal level is attended to so that members know what it is that they should expect from the meetings of the JSCI beforehand. In this regard she sees improving the operational infrastructure and support as a prerequisite for success.<sup>26</sup>

While much work that has been done by the JSCI, members of the JSCI were critical of the investigative function being undertaken by the JSCI and advocated the abolishment of this post. Van der Merwe saw the work of the JSCI being improved by the appointment of the Inspector General to whom the Committee is authorised to refer matters for investigation. The Inspector General would be able to follow up issues that the Committee is not able to address as part of the review process. Van der Merwe noted that the office of the Inspector General was still at a developmental stage and that the key approach would be to win the confidence of the Intelligence structures by the Inspector General. Van der Merwe believes that the JSCI needs to have a closer working relationship with the Inspector-General and the Intelligence structures so that the JSCI can know the ins-and-outs of the Intelligence structures.<sup>27</sup>

In addition to the Inspector General, Van der Merwe cites the Public Finance Management Act, 1999 (PFMA) as an important parliamentary control instrument that will help the JSCI with its mission. She argues that the PFMA is an important instrument, which needs to be linked to the oversight programme of the JSCI. Without this linkage, she notes, the JSCI oversight becomes somewhat *ad hoc*.<sup>28</sup>

She argued that this detailed knowledge of the business case and the management and utilisation of funds by the Intelligence structures would, for example, help the JSCI make a case for the funding of the Intelligence Services if and when it is necessary. She noted that, to date, the JSCI has not found in-depth solutions to the under-funding of the Intelligence structures.

The Committee members are generally happy with the way they have dealt with matters including the funding of the Intelligence structures. Van der Merwe notes that: “On the whole the JSCI has been able to maintain its integrity”.<sup>29</sup> She notes that the JSCI has engendered good relations with the various stakeholders in the oversight and control of Intelligence structures.

Scott shares this view and he also adds that the JSCI has a number of strengths. He believes that the JSCI is able to perform under extremely difficult conditions in a non-partisan manner. “We dealt with investigations, followed up issues referred to us by the President and Parliament and prepared reports on these issues”.<sup>30</sup>

Scott notes in this regard the so-called “Meiring Report” which was declared by Justice Mohammed as fantastic. This was due to, *inter alia*, the fact that the report was unverified and had not been processed through the National Intelligence Coordinating Committee which is charged with the responsibility of coordinating intelligence and preparing national intelligence estimates. Above all, the source of the report was a discredited former source of the SAPS. This report led to the resignation of General G Meiring as the Chief of the SANDF.

Whilst the above strengths of the Committee are noteworthy, Scott concedes in keeping with the observations of other members that more could have been done in fulfilling their mandate. In this regard he pointed out that the *modus operandi* of the Committee is at present problematic. He notes with concern that time available to the JSCI members is insufficient for the full realisation of the mission of the JSCI. Committee members do not work on a 24-hour basis

on the Committee and they have other tasks. This situation, Scott believes, needs review especially now as intelligence is going through a critical transformation period.<sup>31</sup> The JSCI as it is, is dealing with merged organisations that are in the process of developing a new culture – a process that needs to be nurtured and overseen by JSCI.<sup>32</sup> As a result of insufficient time, the JSCI has been uneven and unbalanced in the way it supervises the Intelligence structures, Scott contends with the support of Olckers.

This unevenness and lack of balance in the supervisory responsibility of the JSCI towards the different Intelligence structures has tended to manifest itself in the attention and focus given to the NIA, SASS and then Defence and Police respectively. In this regard Scott argues that the JSCI should give due attention to all these Intelligence structures because even within the (civilian) Intelligence Services, the focus has been on NIA. This was not a conscious strategic decision by the Committee but a direct result of the adverse reports of the AG. It further follows from the suspicion that characterized the lack of accountability of apartheid-era Intelligence Services' in relation to the management of the budget process – a problem that became the legacy of NIA as an instrument through which all amalgamating Intelligence Services were unified. The JSCI unwittingly ended up focusing on the NIA, Scott contends.<sup>33</sup>

Abram supports the perspective of the uneven focus of the Committee by highlighting that the JSCI has had the heads of NIA, DI and SASS at the meetings. He points out that the SAPS National Commissioner has never been to the JSCI meetings and when dealing with core matters the JSCI members have not seen the senior management from the SAPS. The Chief of the SANDF and the Secretary of Defence have also not attended meetings of the JSCI, an issue that worries Abram.<sup>34</sup>

Compared to other parliamentary committees, the JSCI has performed reasonably well, according to Green.<sup>35</sup> Often there is a problem with attendance of meetings and forming the necessary quorum. Green observes that although this problem has not affected the JSCI, he believes that the

JSCI members should be less involved with other parliamentary work and should focus on the Committee mission or that of the security cluster.

Scott shares this view, which is why he earlier pointed out that the Committee members do not work 24 hours for the Committee. This is a problem that affects the smaller parliamentary parties acutely as they seek to maximise their presence in parliament to represent the interests of their constituencies in parliamentary proceedings. Cwele<sup>36</sup> also supports this view and argues that this problem is made worse by the seniority of members of the JSCI. Not only are they senior members of their political parties, some are also chairpersons or whips of other committees in which they are active in providing strategic direction.

To remedy this problem, Green suggests that the membership of JSCI members should be restricted maximally to a total of four committees inclusive of the JSCI. This measure will help improve the performance on the core business of JSCI. This point is also supported by Olckers who argues that it would be best if members of the JSCI served fulltime in the Committee.<sup>37</sup> Van der Merwe supports this too and points out that time and capacity make it difficult for members to be involved in-depth with the mission of the JSCI. In this regard the Committee should always clarify its priorities in relation to the oversight of the JSCI.<sup>38</sup>

Generally all members of the JSCI felt that the Committee has had a positive impact on the Intelligence structures. The Intelligence structures seek the approval and support of the JSCI. Green notes that they want to be recognised and he further notes that the Intelligence structures want to hear that they are performing well and that is one of the reasons why they provide briefings to the JSCI.<sup>39</sup>

Green cites the increasing budget of the Intelligence structures as a sign of good work that is being done by the Committee. He also emphasises that the JSCI is not only there to highlight weaknesses but also to emphasise the positive and to remind the Intelligence structures of the important role they

play in promoting, defending and entrenching national security.<sup>40</sup>

In pursuit of the mission of the JSCI members noted that there are a number of issues that they have attended to. They cite the following key issues as examples of the quest to fulfil the mission:<sup>41</sup>

- Investigations;
- study tours;
- meetings;
- hearings; and
- piloting legislation in conjunction with *ad hoc* committees established to deal with Intelligence legislation.

In this regard members and staff noted that the JSCI had developed a programme of action for 2001 to avoid responding to crises in the main.

The JSCI members<sup>42</sup> are confident about their understanding of the mission of the Committee and are happy with its performance. The Intelligence structures rely on their advice and seek their approval and support. This leads the Intelligence structures to prepare and present briefings to the Committee regularly.

The Committee is itself pro-active in the process of engagement with the Intelligence structures although it has tended to be unbalanced and uneven in this function. The unintended consequence of this was the focus falling on the Intelligence Services, especially NIA. This is seen as an area of opportunity that needs to be explored further in future. In addition, the clarification of roles with the Defence and Safety and Security Portfolio Committees is seen as a priority that needs attention to ensure that there is no gap in the oversight of Defence and Crime Intelligence. The Committee members<sup>43</sup> believe that this responsibility should be borne mainly by the JSCI, which has security cleared members and a *modus operandi* that can respond effectively to the national security needs of the country.

### **3. JSCI MEMBERS' PERSPECTIVES ON THE ROLE OF THE CHAIRPERSON**

The Chairperson of the JSCI plays a key position in the day-to-day running of the Committee. At present the Chairperson provides leadership to the Committee and Committee Staff who he guides strategically with the support of the Office Manager. The Chairperson serves as a nodal point between the:

- Presidency;
- presiding Officers;
- ministers responsible for Intelligence Services, Defence and Safety and Security;
- Inspector General for Intelligence;
- judge responsible for the Interception and Monitoring Certificates; and
- institutions supporting democracy and with other parliamentary structures.

The Chairperson is the chief executive officer of the Committee and sets priorities to the powers and functions determined by the Intelligence Services Oversight Act, 1994. This section focuses on the views of the JSCI on the office of Chairperson.

All members of the JSCI interviewed hold the Chairperson in high regard. All interviewees expressed positive views regarding the leadership role that has been exercised by the Chairperson to date. "At the moment we have a Chairperson that is impartial and treats the opposition with respect and acknowledges its contribution".<sup>44</sup> Despite this support, members also identified areas in need of further attention regarding the position of the Chairperson. Two areas highlighted are the membership of the Chairperson of the JSCI and the need for security clearance and being sworn to secrecy.

### **3.1 Security clearance and Oath of Secrecy for the Chairperson**

Members<sup>45</sup> argued that there was a need for legal clarity about the Chairperson's membership of the JSCI. The way the Intelligence Services Control Act, 1994 is worded regarding the Chairperson is unclear and full of gaps.<sup>46</sup> In addition, they believe that the Chairperson must be sworn to secrecy and that the Act should clearly provide for such. This is especially crucial, as the Chairperson is privy to more national secrets than are other members of the Committee.<sup>47</sup>

Abram points out that the Chairperson has succeeded in making the JSCI function in the interest of national security and ensured the personal involvement of members of the JSCI. Further the Chairperson succeeded in welding the Committee together by creating a medium of interaction that does not exist in similar bodies in the South African Parliament.<sup>48</sup>

To make the function even more effective, some members suggest that the Chairperson be freed of other parliamentary duties. In addition, with the growing role of the JSCI, there was a need for personal security arrangements for the Chairperson.

### **3.2 Providing a support structure to the Chairperson**

With the increasing workload, members<sup>49</sup> believe that there is a need for personnel support to the Chairperson. To this end the following areas were identified as crucial:

- Personal assistance;
- research support; and
- an operational management team.

In the context of the operational management team, emphasis was placed on

the seniority of the staff in the JSCI with more support provided to the Committee by the Intelligence structures. In this regard an internship programme was suggested for members of the Intelligence structures to serve as staff members of the JSCI. “This will ensure that the bright people with experience and good ideas are placed at the JSCI”.<sup>50</sup>

Scott and Cwele emphasized the need for more focused supervision of the JSCI staff. The operational management team<sup>51</sup> would be able to do just that and give direction to the members of staff. Members<sup>52</sup> express a desire that the office of the JSCI serve as an effective and efficient nodal point, which is reliable and trusted in the interaction with the services and the offices of the responsible ministers.

Members noted that when there are urgent issues, there are times that the Chairperson does not have enough support from members of the JSCI hence the need for an operational management team of the JSCI. The operational management team can deal with problems that arise in-between meetings and parliamentary sessions and help assess, and process urgent issues where needed and collectively decide on the course of action to be undertaken. In addition to the above tasks, members felt that this operational management can decide on trips abroad, work out position papers for international *fora* where the JSCI is invited and establish a common framework on the working guidelines and procedures.

### **3.3 Improving security measures around the Chairperson**

Some members<sup>53</sup> of the Committee identified the need for a security plan to be prepared for the Chairperson. In this regard Olckers believes that the Chair of the JSCI needs much more protection than a Director-General would in light of his/her line of duty. In addition to personal security measures, members felt that there was a need for physical security measures at the JSCI office that would include:

- Secure telephones;

- improvement in the security measures;
- co-ordination with the services around counter-intelligence; and
- other members to be provided with security on a threat assessment basis.

All interviewed members endorsed the current position of the Chairperson being the intermediary with the media and the main spokesperson for the JSCI. At present the Chairperson can issue press statements, field questions and articulate the position of the JSCI on matters falling within its sphere of responsibility and consult with members on a need basis.

In keeping with the desire to set up an institutional framework, members<sup>54</sup> advocated the need for rules and guidelines in this regard. Scott and Landers believe that this working culture needs to be codified and formalised with the support of Parliament. This can then serve as a guideline for new committee members. “Formally, this is the way the Committee should function”.<sup>55</sup>

### **3.4 Improving relations with and participation by the public**

To ensure more public participation in intelligence oversight, it was suggested<sup>56</sup> that the public relations function needs to be scrutinised by the JSCI. To this end, the full time staff component should have an expert in communications and public relations and should deal generally with communication matters in support of the Chairperson. The communications staff would do basic research and provide national and international best practice to the Committee and the Chairperson. This would free the Chairperson from the task of fielding media inquiries, which an official can easily handle.

Members<sup>57</sup> felt that there is a need for briefings to be provided by the Chairperson of the JSCI to leaders of political parties in Parliament. These briefings should focus on intelligence oversight matters and the work done by the JSCI. The oversight briefings would be supplemented by intelligence briefings, which they believe should be presented by the Deputy President, as

the leader of government business.

When the Deputy President provides Intelligence Briefings on matters of national security, the Minister for Intelligence Services and the Intelligence Services will provide the necessary assistance. This members believe, should assist in building a non-partisan intelligence culture and rally political parties to the defence of national security when so required and contextually.

In view of the poor understanding of the role of the JSCI by members of Parliament and the little appreciation that exists of the JSCI activities and workload in Parliament, it was suggested that the Chairperson should find a way of improving the rate and nature of the interaction and engagement with the Parliamentary Presiding Officers and the Whipery. This would ensure the Presiding Officers' and the Whips buy-in in the activities and programmes of the JSCI.<sup>58</sup>

The Chairperson is viewed as the centre in the servicing and briefing of the Presiding Officers on the Committee work. Nase<sup>59</sup> indicated that this view is shared by a number of JSCI members who believe that such briefings would be positive in spreading a better understanding of the role of the JSCI amongst parliamentarians.

The role of the Chairperson is central to the work of the Committee. The Chairperson is:

- The main spokesperson;
- the chief executive officer of the Committee;
- the centre of interaction and programming of the activities of the Committee;
- the intermediary between the Committee and the President, responsible Ministers, Institutions supporting democracy, the Judicial oversight mechanism, and other Parliamentary structures inclusive of the Presiding Officers.<sup>60</sup>

To date this role has been performed to the satisfaction of members of the opposition parties who feel not just a part of, but also valuable and respected contributors in the Committee.<sup>61</sup>

#### **4. NON-PARTISANSHIP OTHERWISE KNOWN AS NATIONAL CONSENSUS**

In chapter 1 the concept of national security as well as non-partisanship were discussed. These concepts were further elaborated upon in looking at the ethos that underpins the current Parliament of South Africa. The concept of non-partisanship in the South African Parliament has been debated and accepted as a necessary and founding principle.

Non-partisanship refers to a commitment to the importance of a subject and the manifestation of its treatment above narrow partisan consideration when opportunities present themselves. In addition, it seeks to recognise a matter as a priority that needs national resources to be invested therein.

Nhlanhla<sup>62</sup> believed that intelligence should not be made the subject of party politics, as that would undermine national security. The operations of the Intelligence structures, the conduct of the members of the Intelligence structures, the quality of their services and product should all inspire confidence. This would, according to Nhlanhla, endear the Intelligence structures to policy makers. Intelligence should therefore not interfere in politics, and it should not be involved in social engineering and especially domestic covert action.

Non-partisanship is thus about making decisions that advance, enhance and protect the national interest and security of the country making it resilient and sustainable and prosperous. It is this concept that this section seeks to deal with and to discuss issues pertaining thereto as was discussed with members of the Committee.

Members of the Committee that were interviewed on this subject reported that

the Committee works on a basis of consensus. This consensus is based on the principle of non-partisanship.

As pointed out when dealing with the position of the Chairperson, the JSCI members felt that members of the opposition parties were respected in the Committee and that they were also seen as a strength. Consequently, members who answered the question, rated relations of political parties in the JSCI as good. This was closely connected with the spirit of non-partisanship that continues to characterise the workings of the JSCI.<sup>63</sup>

Of importance to note is that the JSCI has developed a special culture of treating oversight as of national importance and security. Scott notes that the JSCI has worked as one in the national interest.<sup>64</sup> In this regard, he remarks that Intelligence is no political football but something precious. This *modus operandi* is different from that adopted by most portfolio committees in which partisanship is more predominant, according to Scott and Van der Merwe.<sup>65</sup> Abram sees the role of members from the opposition parties as critical in the JSCI. He believes that the opposition parties have to function as a loyal opposition whilst presenting themselves, as an alternative. In doing this, Abram supports the view that the opposition parties can criticise the government on all areas of weakness, as long as the criticism is constructive. This is the way he sees opposition parties operate in general.<sup>66</sup>

Abram, however, cautions that when it concerns Intelligence structures “the opposition has to be careful and raise issues with the President, Minister and JSCI. This helps the national consensus [non-partisanship] and ... puts the national interest first”.<sup>67</sup>

Members of the JSCI, especially those from the opposition parties, believe that the notion of national consensus should not be used as a smoke screen behind which incompetence and poor performance and management is hidden. To this end, Abram calls for clear guidelines for releasing information that should reach the public domain on weaknesses and wrongdoing.

In the context of the need for JSCI operational guidelines, Abram questions the extent to, which the opposition can effectively oppose without a clear guide on dos and don'ts. "What are the limits that are placed on the opposition?"<sup>68</sup> In addition he points out that there have been cases in which the opposition has been counter-productive. In view of this, he calls for a clear process of role-definition for the opposition parties in the JSCI.<sup>69</sup>

Van der Merwe attributes part of the success to the make up of the Committee: the personalities. She notes that the JSCI is managed in such a way that there is consensus on what the JSCI is doing. She notes that the way the Committee is working is inclusive of the opposition. Scott points out that those members of the opposition parties who are of substance are valuable to the Committee.

Importantly, the work of the Committee is related to the Intelligence structures and does not easily lend itself to sectarianism according to Van der Merwe. She observes that the focus of the JSCI is on the work of the Intelligence structures without bad faith.<sup>70</sup>

It is argued that the JSCI should continue to have senior members from the opposition parties. Van der Merwe prefers that members serving on the JSCI should be shadow ministers in their parties. She believes that they would then have the respect and influence that is required for them to perform their work effectively in the JSCI.<sup>71</sup> These members would ensure that their parties are generally satisfied with the Intelligence Services. She adds that they can clarify issues without divulging national secrets in their parties and be listened to.<sup>72</sup>

Members<sup>73</sup> believe that it is not sufficient just to entrust this responsibility of clarifying national security matters to members of the opposition parties alone. Briefings to leaders of opposition parties were suggested for consideration especially by the Chairperson of the JSCI and the Deputy President, as leader of government business.<sup>74</sup>

Van der Merwe noted that at present much in relations with other parliamentary political parties depends on the dynamics of the day. This then makes briefings spasmodic – something that needs to change if non-partisanship and buy-in are to be achieved. In keeping with this trend of thought, Mahlangu believes that the provision of security information could change opposition party dealings with the JSCI.<sup>75</sup>

To this end, like other members of the Committee, Scott identified the need to develop rules, which will provide guidelines on how to deal with differences in a manner that does not threaten national security,<sup>76</sup> as a priority for the JSCI.

An important factor in the creation of non-partisanship is the multiparty composition of the Committee. Green shares the view that a partisan or one party JSCI would politicise the intelligence oversight by the Committee especially because the JSCI is not like any other parliamentary committee.<sup>77</sup>

Van der Merwe also feels strongly about this matter. In line with the views of Green she argues that the JSCI is different. The emphasis is, according to her on what the JSCI's contribution to national security is. She emphasises that South Africans at large are all responsible for national security. That is also the JSCI's approach.<sup>78</sup>

An area of concern is in the lack of common understanding on what is meant by national security and how to deal with strategic issues that affect the future of the country according to Landers. Despite the existence of a policy framework in this regard, there does not seem to exist a common and consistent approach in this regard in Parliament. Accordingly, this understanding should be linked to the way in which members of Parliament would respond when national security is under threat.<sup>79</sup>

Landers sees a close correlation between this issue and non-partisanship. In this regard, he believes that there is a need for an open and frank debate to arrive at a common approach and agreement. He believes that if South Africa is to succeed, the country's response to anything that affects the economy

and national security should be “to go into the *Laager*. That must be our approach as elsewhere abroad. The JSCI needs to market the committee [itself] and make the parliamentary members to realise this”.<sup>80</sup>

The avenues that are suggested by members of the JSCI for marketing the Committee and improving the basis for non-partisanship<sup>81</sup> are:

- Interaction by members of the majority and opposition parties with their parties on non-classified security matters; and
- briefings to the leaders of opposition political parties by the Deputy President and the Chairperson of the JSCI on core business and oversight matters respectively.

In addition to the above, Scott advocates two more avenues for this:

- Firstly, the asking of questions in Parliament by members of the JSCI, which are discussed to help educate the members of Parliament about the work of the JSCI, is a crucial underutilized avenue; and
- secondly, using constituency offices throughout the country by members of the JSCI for members of the public to report issues of concern to them. These can then be channelled through the JSCI for investigation by the relevant Intelligence structures.<sup>82</sup>

In both instances members of Parliament will serve as intermediaries with the public – their clients and employers.

## 5. CONCLUSION

To summarise, the above sections, it was noted that Abram, Scott and Landers noted several *lacunae* in the Intelligence Services Oversight Act, 1994 that need further attention such as the current legal position of the Chairperson. In this regard they pointed to the need to include as a pre-condition for the appointment of the Chairperson, the passing of a security competence test and being issued with a valid security clearance certificate and thereafter taking an oath of secrecy.<sup>83</sup> For the person holding such a

crucial position, the need for protection, and being provided with senior, qualified and competent support staff to run the office of the JSCI more efficiently and effectively, was seen by members of the JSCI as a priority. With an inclusive style and *modus operandi*, the current Chairperson of the JSCI is seen to have inculcated a manner of approach aimed at engendering national security.

Members of the JSCI are of the view that non-partisanship and a consensus-seeking approach are essential for the effective functioning of the JSCI. While this is indeed so, there is no agreed upon action plan to respond to contingencies that may test, as the Spaniards were tested on non-partisanship and consensus decision-making approach by the Iraq war led by the USA. For example, Landers argues that the response must be uniform and agreed upon: going back into the *Laager* and closing ranks. In the next chapter the focus will fall on the relationship between the Committee and the public through the media.

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## REFERENCES

- <sup>1</sup> The interviews with members of the Joint Standing Committee on Intelligence were conducted in June 2001 in Cape Town, The interviews were also conducted with two senior members of staff of the JSCI, Ms N Mnyaka and Mr. D Nase to provide a perspective on the experience of the people responsible for supporting the JSCI in its day-to-day activities.
- <sup>2</sup> Mr. MI Scott moved to the private sector in 2003 and is no longer a Member of Parliament.
- <sup>3</sup> Mr. S Abram has, following the coming into effect of the floor crossing legislation, joined the African National Congress and is no longer representing the United Democratic Movement in Parliament. This development will have an effect on the composition of the JSCI and its membership. The ANC has since appointed Abram to the JSCI.
- <sup>4</sup> Mr. JL Mahlangu has also been re-deployed to Mpumalanga Province where he is the Chief Whip of the ANC in the provincial legislature. Ms

L Jacobus, a permanent member in the National Council of Provinces, replaced him in the JSCI.

5 This interview was not finalised due to the tight schedule Mr. Green has. Attempts to re-schedule it were not successful.

6 Professor Ndabandaba has also availed himself of the opportunity provided by the floor crossing legislation to join the ANC. He no longer represents the Inkatha Freedom Party in the provincial legislature of KwaZulu-Natal.

7 Mr Ebrahim has now joined the Presidency where he is a Special Advisor to the Deputy President. He left Parliament at the beginning of 2003.

8 Dr S Cwele is now Chairperson of the JSCI following the appointment of Ms Mapisa-Nqakula as Chief Whip of the ANC in the National Assembly.

9 Cwele, S, **Interview**, Cape Town, June 2001.

10 Mr D Nase was, at the time of the interview, a Researcher in the JSCI. He is now re-deployed in the Ministry for Intelligence Services, where he is a specialist researcher on the Social and Economic Cluster. Ms N Mnyaka is the office manager and chief of staff in the JSCI. She was interviewed, like the members of the JSCI in June 2001 in Cape Town. She also provided the author with documents that were in the possession of the JSCI on the oversight systems of other countries cited in this study.

12 Nase, D, **Interview**, Cape Town, June 2001.

13 Nase, D and Cwele, S; **Interviews**, Cape Town, June 2001.

14 Mr L Landers was interviewed in June 2001 in Cape Town and the views contained here are from the said interview.

15 Please note that in this study Intelligence Services refers to the NIA and SASS. Intelligence structures refers to NIA, SASS, Defence and Crime Intelligence. Civilian Intelligence Community refers to the NIA, SASS, NICOC (civilian component), Ministry for Intelligence Services and the South African National Academy of Intelligence.

16 Landers, L, **Interview**, *op cit*.

- 17 *Ibid.*
- 18 Mr S Abram is now a Member of Parliament representing the ANC following the coming into effect of the floor crossing legislation in 2003. The views contained here were recorded during the 2001 interview and will be attributed to him and the political party he was representing at the time.
- 19 Ms M Olckers is a Member of Parliament representing the NNP. She was also interviewed in 2001 in Cape Town. The views contained here arise from the said **Interview**.
- 20 *Ibid.*
- 21 Ms S Van der Merwe is a Member of Parliament representing the ANC. She is also Parliamentary Counsellor to the President. She was interviewed in June 2001, in Cape Town.
- 22 Olckers, M, **Interview**, Cape Town, June 2001.
- 23 *Ibid.*
- 24 The views contained herein were derived from a discussion with members of the JSCI following a meeting of the JSCI and SCOPA in Cape Town, 2002.
- 25 Van der Merwe, S, **Interview**, *op cit.*
- 26 *Ibid.*
- 27 *Ibid.*
- 28 *Ibid.*
- 29 *Ibid.*
- 30 *Ibid.*
- 31 Scott, Ml, **Interview**; *op cit.*
- 32 *Ibid.*
- 33 *Ibid.*
- 34 Abram, S, **Interview**, Cape Town, June 2001.
- 35 Green, L, **Interview**, Cape Town, June 2001.
- 36 Cwele, S, **Interview**, Cape Town June 2001.
- 37 Olckers, M, **Interview**; Cape Town, June 2001.
- 38 Van der Merwe; *op cit.*
- 39 Green, L, *op cit.*

40 *Ibid.*

41 Landers, L, Scott, MI and Cwele, S in their respective **Interviews**,  
Cape Town, June 2001.

42 This is the impression gained from the interviews by the author and  
some members and staff members even said so. Scott, MI; Green; L  
and Olckers M; in their respective **Interviews**.

43 In 2002 the Chairpersons of the Select Committee on Public Accounts  
(SCOPA) and the JSCI initiated a discussion to seek agreement on  
how the financial oversight of the Intelligence Services was to be  
conducted. This led to the establishment of a technical committee,  
which analysed international case studies and presented a report to a  
subcommittee of these two Committees. The two Committees agreed  
that this task should be left with the JSCI. The views attributed to the  
JSCI members arise from **Interviews** and these **Interviews** were a  
forerunner to the above-mentioned agreement. They reflect a view that  
members of the JSCI held even before the discussions with SCOPA  
commenced.

44 Olckers, M, *op cit.*

45 Landers, L, Scott, MI, Abrams, S in their respective **Interviews**, Cape  
Town, June 2001.

46 This is a serious weakness for a statutory committee. Controversies  
have thus far been avoided by Parliamentary Committee rules that  
spell out the functions of chairpersons. This weakness should be  
addressed through a clear provision in the Act on what the powers and  
functions of the Chairperson are.

47 This situation has been partly remedied by the Intelligence Services  
Control Amendment Act, 2002, (Act 66 of 2002), which provides for the  
security clearance and membership of the Committee although no  
provision expressly exists for the oath of secrecy.

48 Abram, S, **Interview**, *op cit.*

49 Scott, Olckers, Van der Merwe, Abrams and Landers in their respective  
**Interviews**, Cape Town, June 2001.

50 Van der Merwe, S, *op cit.*

51 For clarity the concept of operational management team will be used in  
the study. Some members called this team an executive committee of  
the JSCI whilst others used operational management team. During the  
2003 Workshop where the outcome of the research was shared with  
members of the JSCI, there was confusion of this committee with the  
executive arm of government hence the need for clarity and the  
preferred use of the concept 'operational management team'.

52 Van der Merwe, S and Scott, MI in their respective **Interviews**, *op cit*.  
53 Olckers and Abram in their respective **Interviews**, *op cit*.  
54 Scott, MI and Landers, L in their respective **Interviews**, *op cit*.  
55 Scott, MI, **Interview**, *op cit*.  
56 Scott, MI and Landers, L in their respective **Interviews**, *op cit*.  
57 Scott, MI, Van der Merwe, S, and Cwele, S in their respective  
**Interviews**, *op cit*.

58 Mnyaka, N and Nase, D, in their respective **Interviews**, *op cit*, raised  
this point.

59 This view of Mr. D Nase was confirmed by this study as Mahlangu,  
Scott and Olckers supported the idea to mention a few proponents of  
briefings. The Committee also endorsed this view in the Workshop held  
to provide them with feedback on this study.

60 This derives from practice and decisions of closed meetings of the  
JSCI. Members covered these issues during their interviews, notably in  
the **Interview** with Scott, Cwele and Olckers.

61 During the review of the draft dissertation by members of the JSCI, this  
point was emphasized and is still held very strongly including new  
members of the Committee. They see this as a continuing strength of  
the JSCI chairpersons.

62 Nhlanhla, JM, ***The price of peace is eternal vigilance... 1998 Budget  
Speech of the Deputy Minister JN Nhlanhla***, Ministry for Intelligence  
Services, Pretoria, 1998.

63 This spirit of consensus is not uniquely South African. It should be  
noted that in Spain consensus is the main *modus operandi* of their  
Congress of Deputies' Foreign Affairs Committee. This consensus has

been broken once only in Spanish history and it was as a result of the Iraq War on which there was no unanimity. On this issue the Popular Party, the majority party, chose to side with the Bush and Blair-led Coalition of the willing.

64 Scott, MI, *op cit.*

65 Sourced from the **Interviews** of the two members of the JSCI, Cape Town, June 2001.

66 Abram, S, **Interview**, *op cit.*

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 Van der Merwe, S, *op. cit.*

71 *Ibid.*

72 *Ibid.*

73 Mahlangu and Van der Merwe in their respective **Interviews**.

74 *Ibid.*

75 Mahlangu, J, *op cit.*

76 Scott, MI, **Interview**, *op cit.*

77 Green, L, **Interview**, *op cit.*

78 Van der Merwe, S, *op cit.*

79 Landers, L, **Interview**, *op cit.*

80 *Ibid.*

81 Sen, A, in *Democracy as a value*, **Journal of Democracy**, Vol **10 No 3**, at <http://muse.jhu.edu/demo/jod/10.3sen.html> says: "the practice of democracy gives citizens an opportunity to learn from one another, and helps society to form its values and priorities". He indicates in the same article that political and civil rights especially open discussions, debate, criticism and dissent are central to the formation of values and priorities. The marketing strategy and availing of information to members of the public is key to the above process. Therefore it is extremely important that this aspect of the work of the JSCI be prioritized.

82 Scott, MI, **Interview**, *op cit.*

<sup>83</sup> This situation has been addressed in the Intelligence Services Control Amendment Act, 2002. The Act makes provision for the security clearance of the Chairperson and his/her being a member of the JSCI. No express provision exists for the oath of secrecy but it is understood that once cleared, a person must undertake not to disclose classified information.

## CHAPTER 5

# PERSPECTIVES OF THE JSCI MEMBERS ON THE RELATIONS WITH OTHER INSTITUTIONS

## 1. INTRODUCTION

In the previous chapter the focus fell on the perception of the JSCI members with regard to the core business of the Committee. This chapter will focus on the relationship of the JSCI and other institutions involved in the oversight of the Intelligence structures. It proposes to address perceptions of members of the JSCI in respect of their relationship with the:

- Public and the media;
- IGI;
- other parliamentary committees; and
- the judicial oversight component.

The starting point in this discussion is on the relationship of the JSCI with the general public, mainly through the media.

## 2. RELATIONS WITH THE PUBLIC AND THE MEDIA

Members of the JSCI appreciate the role of the media and believe that the media have raised a number of issues that have led to investigations and or inquiries by the Committee. They have noted that a number of investigations launched by the Committee were in response to media reports, finding the Committee ineffective in their oversight role.<sup>1</sup>

The Committee has identified this reality area as in need of attention and improvement. This section focuses on the results of the interviews on the role of the Committee and its relations with the public and media. It should be noted that the main vehicle of interaction with the public is through the media and constituency offices.<sup>2</sup> These avenues of contact with the public are

supplemented by community-based and non-governmental organisations (NGO's).

The Committee members felt that there is a need for closer relations with NGO's. The main aim of which is to create awareness; prepare the country's leaders from amongst members of NGO's in light of the process of globalisation; and do better marketing of the Intelligence structures to the public and the media according to Abrams.<sup>3</sup>

In addition, these interactions can also serve to demystify intelligence, according to Van der Merwe. She identifies the need for regular reports on issues resolved by the JSCI. She further notes that there is no relationship with the media except through press statements. She proposes a long-term programme on intelligence oversight and its public image.<sup>4</sup>

Scott argues that the Committee needs a person specialising in communication and public relations together with a proper management structure for the JSCI's office. He advocates more regular interaction with the public and more reports to be published by the JSCI on its work. Scott and Abram believe that better marketing of the JSCI is a priority.<sup>5</sup>

Green criticised the tendency in the Committee to be reactive. He noted that there are some matters that are brought to the attention of the JSCI by the media, for example, the violence in the Western Cape.<sup>6</sup>

Olckers notes that there is a limitation in the way the JSCI members can individually deal with the media and the public. This is owing to the security classification of the information the JSCI deals with. The oath of secrecy, according to Olckers, prevents a close relationship with the public. She believes that the same principle applies to dealings with the media. She notes that giving some information to the media could end up being too damaging and it is therefore not an option to exercise.<sup>7</sup> Mahlangu agrees that the interaction of the JSCI with the public is limited.

Landers is of the view that despite the problems stated above, relations with the public and the media are very good. The JSCI has attempted to get the public to understand what the JSCI is about. Landers believes that more regular workshops and seminars could be arranged for the public and the media to interact and engage the JSCI. The oath of secrecy determines what can or cannot be said and this is a constraining factor.

The experience has been that there has not been a vibrant interaction with the public due to lack of knowledge of the existence of the JSCI. This is also attributed, according to members of the JSCI, to the fact that the Intelligence Services have not abused their position of power necessitating the need for reparations and justice. The only issue that has arisen in this period is about the recruitment of journalists by Defence Intelligence.

The members of the Committee believe that there is a need for more regular interaction opportunities with the media. In view of the above, there is a need for a media plan and strategy to give prominence to the Intelligence structures and the work of the Committee. In addition, there is a need to review the influence of the media on the programme of action of the JSCI. This will ensure that the media do not set the programme of action for the JSCI, and will also ensure that the misconception regarding the role of the Committee and Committee members is cleared. Members highlighted that the media, members of Parliament and some members of the public, see JSCI members as intelligence operatives. "They think that we are operatives".<sup>8</sup> This lack of distinction and understanding of the role of the JSCI has been identified as a key weakness by Cwele. He believes that periodic briefings on the JSCI's work are needed to assure the public. For example, such briefings could report that bombings are down due to intelligence work.

The most obvious public affair pertaining to the Intelligence Services is the Budget Vote Debate, the public report of the JSCI, and intelligence legislation. Cwele agrees on the need for close relations with the media and for creating communication opportunities. However he cautions that there is a danger in this as the media does not understand nor appreciate what is in the national

security interest. He pointed out that the South African media is too dependent on other news agencies especially the printed media. “There is no research conducted into issues ... there is historical dependence on the wires and listening to the British Broadcasting Corporation in (sic) the SABC”.<sup>9</sup>

The need for public engagement is therefore quite necessary. In addition, there is a need for understanding how the media works and to agree with editors on the level of interaction. In this regard, Cwele sees professionalism as the cornerstone of improving relations with the media by responding on time; giving journalists a clear story line; and meeting deadlines for publications and returning calls.

Mnyaka raised concerns about old perceptions of intelligence. “There is a lot of work that needs to be done to inform the public about the JSCI and the services ... what intelligence services do. We need to have publications and set up a website for the JSCI”.<sup>10</sup>

### **3. RELATIONS WITH THE IGI**

The Constitution creates, as part of Chapter 11, an institution that will be responsible for civilian monitoring of intelligence, namely the office of the IGI. The IGI is appointed by the President following an endorsement of a two-thirds majority of members of the National Assembly. The conditions of service are determined by the JSCI in consultation with the President.

The actual process of appointment comprises<sup>11</sup> of:

- Public nominations of candidates;
- short-listing of candidates by the JSCI or a subcommittee thereof;
- public interviews of short-listed candidates;
- conferring by the Committee to decide on the successful candidate;
- the submission of the candidate for appointment to the National Assembly;
- voting by the National Assembly on the candidate to confirm the candidate for the post;

- submission of the candidate that has been endorsed by the National Assembly for consideration by the President who can confirm the candidate or oppose the candidate; and
- the confirmed candidate is sworn to secrecy to enable the candidate to assume office.

It should be noted that the above process could be terminated at any stage if the essential elements are not reached in each stage. For example, if there is no suitable candidate when short-listing is done, the process can be abandoned and started anew. Alternatively, if the candidate is rejected by the National Assembly and the required majority is not achieved, the candidate can be eliminated or the vote retaken if there is no objection to the candidate.

The office of the IGI was established with the onset of the new intelligence dispensation in 1994. In 1996 the first IGI, Advocate Louis Skweyiya was appointed but could not see his term of office to the end. He resigned for personal reasons although the media speculated that it was due to differences over his salary.

In 2000, the second IGI of Intelligence, Dr. Fazel Randera, was appointed. He later resigned in 2001 for personal reasons after serving a period of eighteen months. This has given rise to questions about whether the IGI office will have the support and capacity needed to control the Intelligence structures without any problems.<sup>12</sup> This is in addition to their being overseen and supervised by Parliament, the Executive and the Judiciary. This section focuses on the perspectives of the JSCI members on the office of IGI.

Van der Merwe notes the need to develop a sound relationship between the IGI and the JSCI. This relationship must be based on a common understanding of respective roles subject to the provisions of the Constitution and national legislation regarding these offices.<sup>13</sup>

Scott emphasises in the same vein that the mission of the IGI is to ensure that the Intelligence structures work within the law. That is, an office that could

deal with oversight effectively. He, like other members of the JSCI points out that the office is being developed so that it would be able to discharge its functions.<sup>14</sup>

Olickers also points out that there was no relationship between the JSCI with the IGI, yet she believes that this relationship is something that needs to be built on both sides by both structures. She emphasised that “the incumbent needs to be clear and accept what the intention of the act is [in establishing the office] and not question the JSCI as an arm of Parliament”.<sup>15</sup> She saw the need for a programmatic interaction by the JSCI with the IGI and not just on a need basis, which tends to be subjective. This perspective echoes the desire of the JSCI members to have a programme of action.

Responding to the question on whether the audit function needs be moved to the office of the IGI, Nase did not agree. In his view, the IGI is an integral part of the Intelligence Services. He prefers that the IGI should perform an internal audit function within the Services.<sup>16</sup> This will ensure that the IGI sends, where possible, early warning on expenditure patterns; deals with problems immediately and not wait for the AG. Nase sees the need for a mutually supporting role between the two offices. Mnyaka is also of the same view that with this arrangement there would be more regular interaction between the AG and the IGI.<sup>17</sup> The latter can field some of the enquiries of the former even before there is interaction with the Intelligence structures on budget matters.

Cwele is of the view that there is a need to review the functions of the IGI. He believes that the key function of the office is to correct something wrong. He points out that there is a need for the function to be focused. In addition, there is a need for trust as the two offices complement each other.<sup>18</sup>

Mnyaka sees prospects for mutual relations as good. This is owing to the fact that the JSCI has worked hard to establish the office of the IGI. The Committee continues to see to it that the JSCI and the IGI have open relations.<sup>19</sup>

#### **4. RELATIONS WITH OTHER PARLIAMENTARY COMMITTEES**

The JSCI has had joint sittings with the Joint Standing Committee on Defence during the so-called Meiring Report saga. The two Committees had to receive briefings on the matter and to share notes on how Parliament was to respond to it.

The JSCI has received matters referred to it by the Portfolio Committee on Justice, which tends to defer to the JSCI on matters affecting national security and intelligence. This section will focus on issues pertaining to the relationship with the Standing Committee on Public Accounts (SCOPA), which has been under the spotlight in relation to the financial oversight of Intelligence.

There exists an area of overlap of responsibility between the JSCI and SCOPA in relation to the financial oversight of the Intelligence Services. This overlap has had an unintended consequence for the way the Intelligence Services accounts to both committees. In this regard legislation states that the JSCI can receive audit reports from the Auditor-General but does not state what to do with them.

On the other hand, parliamentary rules provide for the Speaker to refer matters of this nature to SCOPA. However, due to the fact that members of SCOPA are not security cleared, they cannot receive in-depth information on the workings of the Intelligence structures. Such action could lead the Directors-General to violate the law as they are supposed to protect sources and methods of intelligence in terms of the Intelligence Services Act, 2002, (Act 65 of 2002).

Most members of the Committee prefer that the oversight function of the Intelligence structures be focused on the JSCI so that the JSCI can specialise in Intelligence oversight in Parliament. This specialisation has to be extended to some members of Defence and Crime Intelligence as pointed out when

discussing the core business of the Committee according to Olckers. She supports the shift of the financial oversight function from SCOPA to the JSCI.<sup>20</sup> Olckers argues that the AG should continue to audit the finances of the Intelligence structures. She believes that there is a need for a person outside of the intelligence dispensation to look into the spending patterns and also deal with the nitty-gritty of operational matters. The follow-up to the outcome of the investigations should be left to the JSCI.<sup>21</sup>

Mahlangu, the only member of the JSCI from the NCOP, supports this trend of thought. He believes that the function of financial oversight needs to shift to the JSCI and that it cannot be given to SCOPA as this will lead to a limited interaction between the two structures.<sup>22</sup>

Landers advocates the establishment of an overall understanding on how an integrated oversight programme would work. This understanding should include SCOPA, Safety and Security and Defence Portfolio Committees. Landers argues that Parliament should leave intelligence matters to the JSCI and that when these arise they should be sent to the JSCI by way of a resolution. He noted that this practice already exists, as the Justice Portfolio Committee tends to defer to the JSCI on these matters. In the case of the Scorpions, Landers points out that it is incumbent on the JSCI to call them in to ask questions about their role.<sup>23</sup>

Some members of the JSCI, such as Van der Merwe, point out that the JSCI tended to under-perform in the financial oversight role due to the contention with SCOPA. Some note the need to develop expertise and skills so that the JSCI can better carry out this function. (When the Intelligence Services Control Act, 2002 was debated by Parliament a claim was made that JSCI members lacked skills and expertise to oversee the financial affairs of the Intelligence structures. This claim was rejected by Olckers who felt that those parties might be reflecting the lack of confidence in their own members who serve in the JSCI).

Scott, in support of this viewpoint, argues that the JSCI needs to look at matters raised by the AG and develop a programme of reviewing the progress relating thereto in the Intelligence structures. He believes that there is a grave problem with the rules of Parliament that needs to be sorted out as part of the powers and privileges of Parliament. He notes that relations with SCOPA are cordial.<sup>24</sup>

The main issue arising from the above is the need for specialisation in Parliament within a national security framework. In this regard, the overwhelming view now also shared by members of SCOPA, is that the oversight of Intelligence structures should be the main focus of the JSCI. This, according to earlier sections, needs to be extended to the oversight of Defence and Crime Intelligence. The gap that currently exists would need to be closed by a decision of Parliament.

The seeds for such a consensus emerging are seen in the culture that has found root in the Portfolio Committee on Justice to defer to the JSCI on national security and Intelligence matters. This is necessary in the interest of an effective and durable parliamentary oversight of intelligence. In this responsibility, Parliament can depend on the support of Institutions supporting Democracy. The next section deals with these institutions and their relationship with the JSCI.

## **5. RELATIONS WITH INSTITUTIONS SUPPORTING DEMOCRACY**

In their wisdom, the founding members of the New South Africa sought to create a mechanism in the 1996 Constitution that will support open and democratic governance. These institutions are expected to operate on the basis of the following governing principles that are contained in Chapter 9 section 181 of the Constitution of South Africa Act, 1996, (Act 108 of 1996):

- (2) These institutions are independent, and are subject only to the Constitution and the law, and they must be impartial and must exercise

their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.<sup>25</sup>

These institutions are:

- The public protector;
- the Human Rights Commission;
- the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
- the Commission for Gender Equality; and
- the Electoral Commission.<sup>26</sup>

This section focuses on the views of members of the JSCI regarding their relationship with these institutions and mainly on those whose line function impacts on, and supports the intelligence oversight function.

Members generally feel this is an area that does not need special attention for improvement. The poor level of interaction was noted and attributed in the main to the lack of need for interaction to date, according to Landers.<sup>27</sup> This view was held and justified by the fact that the interaction with, for example, the Human Rights Commission is driven by reports of human rights abuses by the Intelligence Services. Since none have been found or were reported to date, such a need has not yet arisen. The nature of the relationship will be tested when allegations and reports appear.

To ensure that this eventuality is prepared for, the establishment of a framework for interaction by the JSCI was seen as a priority. A protocol was suggested as a possible guide for interaction with the institutions mentioned in the Constitution. Further, a joint session with the Portfolio Committee on Justice was proposed to ensure that there was a common approach from the legislature to the interaction of the JSCI and these structures.

Overall, the other institutions supporting democracy did not feature in the interviews except for the Auditor-General. This section will not address issues pertaining to the Auditor-General.

## **6. RELATIONS WITH THE JUDICIAL OVERSIGHT COMPONENT**

Relations with Judge Gordon<sup>28</sup> are generally characterised by members of the JSCI as positive. Of all the structures that support the work of the JSCI in intelligence oversight, the office of Judge Gordon has liaised with the JSCI in a manner that causes mixed feelings.

Most members felt that the interaction was adequate but that there was a need for clarity on the number of times the Judge would brief the Committee in a year. Others felt that the briefings and the intervals between them have to date been sufficient. All felt that regularity needed to be defined. Members reported that the JSCI and the Judge have agreed that there be a bi-annual meeting with the JSCI.

On policy issues there is a close alignment in approach between the JSCI and the Judge according to members of the JSCI. They share the concerns pertaining to the attitude of the service providers in the telecommunications' industry in relation to the interception of communications. "They believe that they are not supposed to help government [in security work]. The issue of national security is not part of their interests".<sup>29</sup> Cwele believes that Judge Gordon is in agreement with this view.

The JSCI has been quite satisfied with the reports of the Judge pertaining to the work related to the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002. Notable was the fact that the Judge had turned down a number of applications made by the Intelligence structures in this regard. They were also pleased with the fact that the Judge had made some important observation about how the function was being conducted by the Intelligence structures. To this end the following were noted:

- The low level of officials that approve requests for interceptions in the Intelligence structures;
- poor planning on the part of the Intelligence structures of the requests for interceptions;
- inadequate motivations for interception; and
- the furnishing of inaccurate reasons for the granting of interception warrants – a problem that is supported by case law.

Despite some of the negative findings, the Judge pointed out to the Committee that the quality of the applications of the Services was generally high and are of an international standard.

Landers, on the matter of relations, raised a cautious note. Without disagreeing on the positive state of relations to date, he cautions that there have been no developments that have tested these relations. In his words "The crunch will come when there are complaints of being bugged from members of the public...relations will be tested then".<sup>30</sup> He notes that Judge Gordon is happy with the way the function is conducted so far, but the relations have not been tested and it may be found that the nature of relations changes.

Mahlangu questioned the rationale for appointing a retired judge to conduct the oversight function. Olckers who suggested that a second understudy

should be appointed to learn from Judge Gordon echoed this view. This is to ensure continuity.<sup>31</sup>

Mahlangu felt that the penalty for violating the provisions of the Interception and Monitoring Prohibition Act, 1992<sup>32</sup> was too lenient. There was no deterrent in the possible sentences. This situation is made worse by the growing presence of foreign intelligence services in South Africa and the growing prominence and role of South Africa in international affairs. The *status quo* has seen an increase in the number of private security companies, risk management consultancies and research institutions that have become involved in intelligence work for foreign intelligence services. To deter this, penalties need to be substantial.<sup>33</sup>

Mahlangu points out that there was a need for the review of the legislation in this area in view of the reports of continued illegal wiretapping in the private sector. “We need to ensure that there are stiffer sentences for such violations”.<sup>34</sup>

The JSCI is concerned about the impact of advances in technology on the effective oversight of the Intelligence Services by Judge Gordon. Indeed, this concern is shared by the Canadian Inspector General as expressed in IIRAC. To this end, they have had to find technological solutions to ensure that they are able to supervise and oversee the Intelligence Services effectively. Electronic signatures have become one of the relevant solutions.

Members of the JSCI raised concerns about the proliferation of bodies tasked with the issuing of warrants for interception of communications. Notable amongst these concerns is arbitrariness, lack of a common standard, lack of consistency, and lack of predictability in view of differences that could result from the many authorities responsible for the function. Some members pointed out that Judge Gordon was not happy about the pressure to decentralise the function “there is no need for decentralisation... until there is a better solution”.<sup>35</sup>

## 7. CONCLUSION

Members of the JSCI seem to be of the common view that they understand the role and functions of the Committee. They believe that they are carrying these functions out to the best of their ability, although there is room for improvement. Amongst these is the general tendency to focus on the oversight of the (civilian) Intelligence Services and a lack of adequate focus on Crime Intelligence and Defence Intelligence. This area is seen as a priority for the future. The public relations function, the research support, and the writing of rules for the Committee are also seen as in need of attention and improvement.

The resourcing of the JSCI is seen as better compared to other committees of Parliament but inadequate for the work at hand. This perception that the JSCI is better resourced than other committees of Parliament, has an effect on the space for members, support for their work, security arrangements and even travel both domestically and abroad. The situation is exacerbated by the fact that unlike other parliamentary committees the JSCI cannot raise funds and receive sponsorship.

Further, members are of the view that there is a good relationship with Institutions supporting Democracy. Whilst in reality there has been no regular need for interaction with all the institutions, where the Committee has needed to interact with these institutions, there has been a positive and collegial response. However, this interaction, when there is outside pressure, may be different when a controversy is brewing. It is critical to note the caution from some of the members that the real test of the nature of the relationship would really be at that stage.

The JSCI has been able to weld itself into an effective and well-focused institution that respects national security and decides most issues on a consensus basis. In addition, it does its work in a way that respects and

involves the opposition parties. This is attributed to the role of the Chairperson, who has been a team builder and a unifier. This position is now seen by all as the mainstay of the Committee and critical for the Committee's success. The issue of non-partisanship is seen as still in need of further elaboration in the Committee specifically, and in Parliament generally. This is owing to the lack of understanding that members of Parliament have of the role of the JSCI and its members.

The next chapter will summarise the main issues that were covered in the study and draw certain conclusions. The chapter ends by highlighting legislative reform issues for consideration by the JSCI.

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## REFERENCES

- 1 There are several issues that have been brought to the fore by the media. Reports about one of the covert structures, the Special Projects Unit, started with a media *expose* by Max Du Preez in the SABC Programme, ***Special Assignment***. There are several of these *exposes* that have recently been in the media suggesting that the trend played by the media continues.
- 2 Scott, MI, **Interview**, *op cit*. It is notable that outside their constituency offices Members of Parliament interact with the public through their organisational infrastructure.
- 3 Abram, S, **Interview**, *op cit*.
- 4 Van der Merwe, S, **Interview**, *op cit*.
- 5 Scott, MI and Abram S, in their respective **Interviews**, *op cit*.
- 6 Green, L, **Interview**, *op cit*.
- 7 Olckers, M, **Interview**, *op cit*.
- 8 Cwele, S and Scott, MI in their respective **Interviews**, *op cit*.
- 9 *Ibid*.
- 10 Mnyaka, N, **Interview**, *op cit*.
- 11 This process was followed in the appointment of the second IGI, Dr F Randera. The JSCI may decide to vary the process but it will essentially be the same. This process has not yet been codified and

the author knows of it due to his role as Head: Ministerial Services.

12 There are some members of the Ministry for Intelligence Services who  
feel that the IGI is an institution that is an unnecessary layer in the  
oversight of Intelligence Services. They believe that it is an importation  
of structures of developed countries that is being imposed on  
developing countries shifting direly needed to resources away from  
where it can impact. The person cannot be identified.

13 Van der Merwe, S, **Interview**, *op cit*.

14 Scott, Ml, **Interview**, *op cit*.

15 Olckers, M, **Interview**, *op cit*.

16 Nase, D, **Interview**, *op cit*.

17 Mnyaka, N, **Interview**, *op cit*.

18 Cwele, S, **Interview**, *op cit*.

19 Mnyaka, N, **Interview**, *op cit*.

20 Olckers, M, **Interview**, *op cit*.

21 *Ibid*.

22 Mahlangu, JL, **Interview**, *op cit*.

23 Landers, L, **Interview**, *op cit*.

24 This has also been codified in law following the promulgation of the  
Intelligence Services' Control Act, 2002.

25 RSA, Constitution of the Republic of South Africa Act, 1996, (Act 109 of  
1996).

26 *Ibid*.

27 Landers, L, **Interview**, *op cit*.

28 Gordon is a retired judge currently responsible for the approval of  
interceptions as provided for in the Regulation of Interception of  
Communications and Provision of Communication-related Information  
Act, 2002 (Act 70 of 2002).

29 Cwele, S, **Interview**, *op cit*.

30 Landers, L, **Interview**, *op cit*.

31 Mahlangu, JL, **Interview**, *op cit*.

32 Please note that at the time of the interviews the applicable legislation  
was the Interception and Monitoring Prohibition Act, 1992.

<sup>33</sup> Mahlangu, JL, **Interview**, *op cit*.

<sup>34</sup> *Ibid*.

<sup>35</sup> Landers, L, **Interview**, *op cit*. This view has, however not been supported as Parliament has now agreed that the Judiciary will set up Committees in the various provinces that will perform this function, regulate it and ensure that there is uniformity. In the interim the single judge system serves as a guide until the new system comes into operation.

## CHAPTER 6

### EVALUATION

#### 1. INTRODUCTION

This chapter proposes to summarise and overview the study; tests the main propositions of the study; and conclude with some recommendations on how the South African parliamentary intelligence oversight dispensation may be strengthened.

#### 2. SUMMARY AND OVERVIEW OF THE STUDY

**Chapter 1** dealt with the conceptual framework adopted in relation to the study. The chapter addressed concepts such as intelligence, intelligence oversight, national security, non-partisanship as a manifestation of national consensus in the oversight of intelligence activities, and explains the use of these concepts in practice. It created a foundation for a common understanding of the concepts used in the study. Further, the chapter provided an overview of the approach adopted in the study.

**Chapter 2** discussed intelligence oversight systems of selected countries explaining how these intelligence oversight systems are connected to their legislatures. The chapter explored and reviewed existing models of legislative oversight. It explained the roles and functions of legislative structures in the respective systems of selected countries, namely Australia, Belgium, Canada, the UK and the USA.

The latter three countries' systems influenced the crafting of the South African intelligence dispensation in the 1990s. However, recent changes to the South African intelligence legislation took into account the mandates of all these selected countries. These countries' intelligence dispensations were analysed

thoroughly and are thus important contributors to the evolution of the South African Intelligence dispensation. These selected countries continue to serve as a reference point for the JSCI.

**Chapter 3** dealt with the parliamentary JSCI of South Africa. The chapter located the JSCI in the context of the role of Parliament in the oversight of Intelligence structures. It then broadly outlines the South African parliamentary system with specific reference to the JSCI. It discusses the role and function of the JSCI, its structure and staffing. In the main this chapter is descriptive.

**Chapters 4 and 5** discussed the views of members of the JSCI with regard to parliamentary oversight of Intelligence in South Africa based on interviews with Committee members. The focus period of this study is on the second post-1994 Parliament which commenced in 1999 and ends in 2004. The interviews were conducted in 2001 in Cape Town and cleared with members of the JSCI in January 2003 during the JSCI orientation seminar. During the seminar members of the JSCI who were not interviewed and new members participated in the briefing on the results of the interviews and made invaluable comments, which influenced the way this chapter is now structured.

**Chapter 4** focused on JSCI internal issues namely: the understanding of the JSCI members of the Committee's core business as captured in the legislation and in its vision and mission; the role of the Chairperson; and the underlying philosophy of non-partisanship otherwise referred to as national consensus.

**Chapter 5** dealt with the relationship that the JSCI has with other bodies such as the public through the media, the inspector-general, other parliamentary committees and relations with Institutions Supporting Democracy and the inspecting judge responsible for interceptions and monitoring applications.

**This chapter** focuses on a summary and overview of the study, tests the

main propositions of the study, evaluates the findings and provides a critical overview of, especially, the international comparative analysis and the perceptions of the JSCI members. It concludes by focusing on some recommendations on how to strengthen the parliamentary oversight of Intelligence.

### **3. TESTING OF PROPOSITIONS**

This section tests three proposition made in chapter 1 of this study. These propositions relate to the effectiveness of the JSCI in executing its mandate, the management of relations with various institutions on which it is dependent for the successful execution and conduct of its core business and mandate. Finally, the proposition highlights issues for attention as possible package of legislative reform for improving the intelligence oversight dispensation in South Africa.

#### **3.1 *Proposition One***

The first proposition made in the study is that:

...Intelligence in South Africa under the Joint Standing Committee on Intelligence (JSCI) has hitherto been relatively effective although there is room for improvement. In this regard it will point out that the logistical support (office space; security management and research) and resourcing (capital; financial and human resources) whilst better than that of other parliamentary committees is not adequate for the fulfilment of the Committee's legislative mandate.

There are a number of factors that are taken into account in evaluating the effectiveness of the JSCI. One of these factors is the understanding of the mandate by members of the JSCI. The study has confirmed that the JSCI has been able to better understand its brief and to start on its core business soon after its establishment compared to its counterparts. The US is an example here. The oversight system of the US Congress started slowly, according to a report by the US Committee, and with little interest by members.<sup>1</sup> Many

outside observers felt that this slow progress was a direct result of the resistance of the US Intelligence Community. Whilst this might have been one aspect of the explanation, the main factor however, as one observer highlighted, is that: “The mechanism for oversight clearly existed; what was missing was an interest in using it – or more properly speaking, a consensus that would legitimise its use”.<sup>2</sup> In South Africa the willingness and consensus exist.

The South African oversight experience is a product of the country’s history and its progress can be directly connected to the political milieu which was marked by the desire of building a non-sexist, democratic and non-racial nation and the quest for *sufficient consensus* were the main driving forces. For this reason it has been easy to forge a formidable intelligence oversight dispensation. In this regard, the bedrock of unity of the members of the JSCI was founded on this quest for consensus leading to their acceptance of the principle of non-partisanship. This shared perspective of members of the JSCI was confirmed by the study.

What has assisted the JSCI in moulding a coherent force is the continued core of the majority of its membership – a second factor in evaluating the effectiveness of the JSCI. This continuity has ensured the development and acceptance of a set of values that all serving political parties. It is therefore not by accident that the binding principles driving the JSCI are non-partisanship; non-sectarianism; consensus decision-making; placing a premium on the members of the opposition parties and ensuring the protection and advancing of national security and interest. The successive Chairpersons<sup>3</sup> of the Committee have sought to ensure that these values are preserved and deepened. Whilst of late the JSCI has seen a number of its members being re-deployed and given other more demanding responsibilities, continuity has, to a large extent, been preserved.<sup>4</sup>

This continuity is what other committees elsewhere in the world are yearning for. In this regard, it can be noted that the former Director of the CIA, Robert Gates, in his last speech in 1993 highlighted the negative impact of the

rotation of members of the Select Committee on Intelligence on core business delivery. He further argued: “Those in Congress who are selected for these Committees... should be expected to invest the time necessary to gain an understanding of the intricate and fragile system that they seek to change. Our national security depends on it”.<sup>5</sup> Rapid rotation affects this process and oversight itself.

The JSCI members are unanimous about the lack of balance in the supervisory work it is undertaking amongst South African Intelligence structures. This is unlike that of its Australian counterpart. The time spent is slanted in favour of rigorously focusing on the civilian Intelligence Community, the NIA especially, compared to the Crime and Defence Intelligence divisions. This is a weakness that JSCI members are aware of and have started addressing. More can and needs to be done if an unintended unevenness in the adaptation of the Intelligence structures to the new intelligence ethos of the country.

As a solution to this lack of balance some members of the JSCI advocate the setting up of stand-alone budgets for the Crime and Defence Intelligence divisions. This would then provide the JSCI with the administrative, intelligence and counter-intelligence mandate over these structures, which is currently exercised subject to the participation of the accounting officers of these two Departments. The establishment of stand-alone budgets is achievable but does not guarantee that the oversight task would be effectively executed. The JSCI has to develop a priority setting mechanism, which will guide their activities. The programme of action adopted in 2001 serves as a good foundation in this regard.

Whilst there is a need for improving the support infrastructure, the aim thereof should be to take away mundane administrative tasks that divert members of the JSCI from their core business. The members of the JSCI should exercise the oversight function themselves and not by proxy of the JSCI staff. Dependence on the JSCI staff must be avoided and the members must expend more time in their core business. This will keep them informed and will

clear whatever misconceptions they have of intelligence. This will ensure ownership and delivery in the identified areas of priority by the elected public representatives to avoid their powers, mandate and brief being usurped by non-elected, publicly non-accountable permanent staff in the JSCI office.

From the foregoing it is clear that the South African parliamentary oversight dispensation for intelligence is effective as it started on a sound footing with the willingness and legitimising consensus present among members. Further, JSCI members know their mandate and brief and understand what is expected of them. Whilst their focus is not balanced, problem areas are largely responsible for the slanted focus on NIA – a situation that is being addressed by the Committee. Furthermore, the JSCI logistical support needs improvement although it is better resourced than any other committee in Parliament. In the context of work at hand more resources would be required for the JSCI. This is in line with the first proposition, which is supported by the study.

### **3.2 Proposition Two**

A second proposition made in the study was with regard to relationships the JSCI has with other parliamentary oversight structures.

The JSCI has good relations with other arms of state that are responsible for oversight of intelligence in South Africa – making parliamentary intelligence oversight, overall quite effective.

The JSCI members are satisfied with the nature and quality of their relationship with other structures especially with the office of the IGI, the AG, and with other parliamentary Committees although they see a need for improvement. Whilst the quality of this relationship has not been tested, as Landers has correctly argued, the foundation is strong enough to accept that these structures can, indeed, ensure effective and cordial relations and meaningful cooperation. The way the JSCI in the first democratic Parliament

dealt with the so called Meiring Report referred to by Scott in Chapter 5, set a good precedent on which to base this conclusion.

Further, because the JSCI has accepted that Parliament is a single oversight business process, it makes it easier to cooperate, share responsibilities and specialise. This is not a uniquely South African experience as the USA Intelligence Oversight Act, 1980, cut Congressional oversight bodies from eight to two to ensure specialisation, focus and effectiveness in the oversight function. The setting up of one oversight committee in Australia and the UK is informed by, amongst other factors, the same need for specialisation.

The Portfolio Committee on Justice, which refers intelligence matters to the JSCI, has accepted and embraced this *modus operandi* of specialisation, focus and effectiveness. And it is bearing positive results. This same principle convinced members of SCOPA to share the areas of specialisation and focus with the JSCI. It was by no accident that the office of the Auditor-General remarked that this function is being better performed by the JSCI.<sup>6</sup>

Relations between the media and the JSCI are satisfactory and when the JSCI issues a statement, if judged to be newsworthy, the media publish it. What is lacking is a public affairs programme of the JSCI which will seek to reach out to the general public on what it is that the JSCI is doing, or should do and how it is doing it. Issues of public interest mainly drive this relationship as far as the media is concerned. The key challenge is for the JSCI members to develop a constituency-centred public affairs programme as was suggested by Scott.

Further, a media strategy as proposed by Cwele is needed to supplement the existing programme of action, which the JSCI has adopted. This will ensure that the JSCI leads by example in the quest to balance secrecy and openness. An impression has been created that all activities of the JSCI are closed to the media and the public. In fact, the JSCI has had a number of open activities but these are poorly marketed and the consequence is that the media and the general public do not attend or participate in open JSCI

activities.

It is critical that the JSCI develops a public programme covering hearings; public seminars on the role of the citizenry in national security; and supporting the activities of the security services with special reference to the intelligence community, to cite a few examples. This will give the JSCI a higher profile and publicise their programme of action.

The main aim is to ensure a higher public profile for the Committee and education for the general public. There is also a need for the JSCI members, as policymakers, to discuss with the media what the media's role is in national security matters and what it is they can do to advance national security. This has not come forward as an area of concern for the JSCI.

Members expressed good relations with the office of the then IGI. The office of the IGI has been marked by several false starts. However, despite these, the office remains important in supplementing the work of the JSCI. The IGI will serve as a key investigating capacity for the JSCI and the Executive. Complaints that are laid with the JSCI and require an investigation, are referred to the IGI for investigation and scrutiny. The relationship is one of interdependence between the IGI and the JSCI although the JSCI can cause the former to be employed or dismissed if there are sound grounds to do so.

The research has confirmed that the second aspect of the proposition, on the balance of probability, is sound. Indeed, "the JSCI has good relations with the other arms of state that are responsible for the oversight of Intelligence in South Africa making parliamentary intelligence oversight, overall, quite effective".

### **3.3 Proposition Three**

The third proposition stated that:

Despite this effectiveness there are legislative gaps and problems

pertaining to the *modus operandi* of the JSCI that need attention by both the Executive and the Legislature, which could be part of a package of legislative reform.

In relation to the above proposition, the study has been able to confirm certain weaknesses pertaining to the following areas:

- The lack of clearly stated powers and functions of the Chairperson of the JSCI is one notable *lacuna*. Whilst the House Rules of the National Assembly provide a guideline on the responsibilities of chairpersons, this is too serious an omission for a statutory committee. This suggests a need for an inclusion of such powers and functions in the Intelligence Oversight Act, 1994.
- The lack of a procedure regarding the security clearance and oath of secrecy for the Chairperson is another lacunae. This weakness has been addressed through the Intelligence Services' Control Amendment Act, 2002. However, the way it is written still makes it difficult to establish if the Chairperson is a member of the JSCI or not. This also needs attention for clarity and precision.
- The lack of clarity on the responsibility of the JSCI with regard to the role and functions of the Directorate of Special Operations (DSO), which uses intrusive techniques, is another weakness. In short, the JSCI oversees intelligence-related structures, while the DSO engages in some intelligence-related functions. These include surveillance, interception and monitoring of correspondence.

The JSCI oversight responsibility and role was agreed upon by the Inter-Ministerial Security Committee but not written into the National Prosecuting Act when the DSO was founded. This weakness requires attention. The experience of Australia has also led that country to set up an integrated intelligence oversight committee with a broadened mandate covering institutions that were previously excluded from the fold of parliamentary oversight. This is also the case in Belgium.

- The lack of parliamentary mechanisms that will enable the JSCI to fulfill all its legislative powers and functions such as the review and approval of sub-ordinate legislation, require attention by the presiding officers. In this regard, it has been argued that there is a need for the empowerment of the JSCI if it is to fulfill its lawmaking responsibility. The setting up of a voting procedure for the Joint Committees of the NA and the NCOP is a case in point. This can be done through an amendment to the joint rules.
- The lack of a legislative mandate in the National Strategic Intelligence Act, 1994 for the Directorate of Special Operations is another weakness, which disrupts the intelligence accountability regime. The law governs all other structures that participate in, and undertake intelligence-gathering activities involving the use of intrusive techniques. The responsibility for lawmaking in this regard lies with, amongst others, the JSCI. The JSCI needs to reflect on the matter and make recommendations to Parliament on this matter.

From the above points, it is clear that despite the JSCI's effectiveness there are legislative gaps and problems pertaining to the *modus operandi* of the JSCI that need attention by both the executive and the legislature which could be part of a package of legislative reform.

#### **4. SUGGESTIONS ON HOW TO IMPROVE INTELLIGENCE OVERSIGHT**

It is proposed that two areas be given priority focus by the JSCI. These areas are: Changing the accountability culture in the Intelligence structures and the review of the resources of the JSCI. These areas require less effort little effort and are likely to have a positive impact on the intelligence dispensation.

#### ***4.1 Changing the accountability culture of the Intelligence structures***

External regulation has its limits, but self-regulation goes a long way as it may be linked to intrinsic motivation. It is suggested that there is a need for a culture of accountability to be inculcated in intelligence officers through a system of education and training and exposure to the work of the JSCI and its deliberations.

The senior members of the Intelligence Community interact with the JSCI on a regular basis. However, there are some ranks in senior and middle management that do not get exposure to the JSCI and therefore cannot experience, first hand, the impact of being in the parliamentary boardroom and having to answer truthfully, candidly, fully and without prejudice to the JSCI.

This interaction with the JSCI has a far more enduring impact on the conduct, prioritization and awareness of consequences of decisions than the hearsay version. This changes the behaviour of individual managers and the collective that has to account to the JSCI at a later stage. The quest should be to expose the senior and middle management ranks of the Intelligence Community to the JSCI with the objective of making them appreciate the values being inculcated by the JSCI into the Intelligence structures. This can be achieved by extending invitations to Committee meetings to the targeted ranks or levels within the Intelligence structures. The impact on organisational culture would be extended in this way. Accountability impacts more effectively on conduct especially when it goes hand-in-hand with public censure.

#### ***4.2 Review the resourcing of the JSCI***

Following a visit to Australia, members of the JSCI realised that the infrastructure the Australians have for oversight was excellent and enabled

the Australian Joint Committee on ASIO, ASIS and DSD to work in a safe, secure and supportive environment. The Joint Committee of Australia has library facilities, offices for Committee members that are not allocated on a party basis, sufficient financial resources to run their programmes of oversight and have an aircraft. To ensure that the JSCI has the necessary support infrastructure is extremely important. Of equal significance is ensuring that the expertise that it has developed, in overseeing Intelligence structures, is further entrenched and retained.

To avoid problems experienced by other intelligence agencies in the world, this continuity and institutional memory must be seriously considered by the South African Parliament. In the case of the US, Gates observed “there are too many instances of members of our committees having important misunderstandings, misconceptions or just wrong facts about US intelligence, including their own legislation governing our activities”.<sup>7</sup> The view of some members of the JSCI that they need to be given more time to do intelligence oversight work is, indeed, supported in view of the US experience.

Whilst there is a need to improve the infrastructure, the aim thereof should be to take away mundane administrative tasks that divert members of the JSCI from their core business. The members of the JSCI should exercise the oversight function themselves and not by proxy of the JSCI staff. Dependence on the JSCI staff must be avoided and the members must allocate more time to their core business. This will keep them informed and will clear whatever misconceptions they have on intelligence.

Importantly, the JSCI must establish an operations management team that will supervise the staff so that they can do the kind of work that supplements the JSCI members' work. This will ensure ownership and delivery in the identified areas of priority by the selected public representatives.

With the above suggestions the JSCI can improve its oversight capacity and focus and create an environment conducive for the delivery of national security to all South Africans. Importantly, it can result in motivated

Intelligence structures making Gates observations on US intelligence even more applicable to South Africa. Gates says:

It would be difficult for any secret intelligence organization to be placed under this microscope of intense review. And yet, I believe, under these circumstances we not only remain effective and capable, we enjoy a legitimacy and an acknowledged role in our government not shared by any foreign intelligence service.<sup>8</sup>

Today, South Africa is part of a list of distinguished countries whose intelligence oversight dispensations are an exception to Gates observation, which was true when first penned.

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## REFERENCES

- 1 USA, Select Committee on Intelligence United States Congress 103 Congress Second Session, **Legislative Oversight of Intelligence Activities: The US Experience**, US Government Printing Office, Washington, October 1994, p 137.
- 2 *Ibid.*
- 3 Ms Lindiwe Sisulu, the first Chairperson, Ms Nosiviwe Mapisa-Nqakula, second and longest serving Chairperson to date and Dr Siyabonga Cwele, the current and third Chairperson have ensured continuity in the implementation of these principles in the business of the JSCI.
- 4 There are many members of the JSCI who have been redeployed during the course of the second democratic Parliament. These include Professor Ndabandaba, formerly of the IFP and now a member of the ANC; Mr Thabang Makwetla, now MEC for Safety and Security in Mpumalanga; Mr JL Mahlangu now Chief Whip of the ANC in Mpumalanga and Mr Ebrahim Ebrahim who is now a Special Advisor to the Deputy President, Mr Jacob Zuma. The former Chairperson, Ms Mapisa-Nqakula was also redeployed as a Chief Whip and later as a Deputy Minister of Home Affairs. Despite this, there are a number of members of the JSCI especially from both the Majority and Opposition parties who continue to provide continuity in the JSCI.
- 5 USA, Select Committee on Intelligence United States Congress 103

Congress Second Session, *op cit*, p 151.

<sup>6</sup> In 2003, as a result, the JSCI published results of their engagement with the Intelligence structures on matters affecting the financial oversight by the JSCI following their assumption of this oversight responsibility. This is the first such publication by the South African Parliament. Ms N Manning following a meeting between the JSCI, AG, and the Intelligence structures in Cape Town made this observation.

<sup>7</sup> USA, **Select Committee on Intelligence United States Congress 103 Congress Second Session**, *op cit*, p 147.

<sup>8</sup> *Ibid*, p 139.

## SOURCE LIST

### 1. PRIMARY SOURCES

#### 1.1 *Legislation*

- Canada, Canadian Security Intelligence Service Act, (157 of 1984).
- RSA, Intelligence Services Control Act, 1994, (Act 40 of 1994).
- RSA, Intelligence Services Oversight Act, 1994, (Act 40 of 1994).
- RSA, Intelligence Services Control Amendment Act, 2002, (Act 66 of 2002).
- RSA, Interception and Monitoring Prohibition Act, 1992, (Act 127 of 1992).
- RSA, The Constitution of the Republic of South Africa Act, 1996, (Act 109 of 1996).
- RSA, The Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, (Act 70 of 2002).
- UK, British Intelligence Services Act, 1994, (C: 13 of 1994).
- USA, National Security Act, 1947, (USC 402 of 1947).

#### 1.2 *Official Documents /Reports*

- Australia, **Draft Report on the Intelligence Review Agencies Conference (IRAC)**, Ottawa, 20 February 2000.
- Australia, Inspector-General for Intelligence and Security; **Annual Report**, Canberra, 1998.
- Australia, **Annual Report of the Joint Standing Committee on ASIO, ASIS and DSD**, Canberra, August 2002.
- Belgium, **Belgium's Permanent Committee for the Control of the Intelligence Services; Presentation of the Committee: 1997 Assessment: Four years of Oversight and Recommendations** (sic), Brussels, unpublished document.
- Denmark, Ravnborg, F, **An International Perspective on Law and Ethics: The case of Denmark**, Denmark (unpublished and

undated document supplied to the JSCI).

- RSA, Parliament of South Africa, **Annual Report 2000/2001(Including Financial Statements and Auditor's General's Report)**; Government Printers; Cape Town, 2001.
- RSA, **Debates of the National Assembly, Second Session – Second Parliament, No.13**; Government Printers, Cape Town, 19-22 June 2000.
- RSA, **Debates of the National Assembly, Second Session – Second Parliament, No.11**, Government Printers, Cape Town, 6-9 June 2000.
- RSA, **Debates of the National Assembly; First Session – Second Parliament, No. 1**, Government Printers, Cape Town, 14-30 June 1999.
- RSA, *White Paper on Intelligence*, Government Printers, Pretoria, 1994.
- RSA, *White Paper on National Defence of the Republic of South Africa*, 1996, Government Printers, Pretoria, 1996.
- RSA, *White Paper on Safety and Security*; Government Printers, Pretoria, 1998.
- USA, Select Committee on Intelligence United States Senate One Hundred Third Congress, **Legislative Oversight of Intelligence Activities: The US Experience**, Washington D.C, October 1994.

### **1.3 Official Speeches**

- RSA: Nhlanhla, JM, *The price of peace is eternal vigilance...1998 Budget Speech of the Deputy Minister JN Nhlanhla*, Ministry for Intelligence Services; Pretoria, 1998.

## **2. SECONDARY SOURCES**

### **2.1 Books and Monographs**

Bar-Joseph, U, **Intelligence Intervention in the Politics of Democratic States**, The United States, Israel and Britain, The Pennsylvania State University Press, Pennsylvania, 1995.

Boshoff, Botha, Schonteich, *Fear in the City: Urban Terrorism in South Africa*, **ISS Monograph Series, No 63**, September 2001.

Copeland, GW, and SC Patterson, **Parliaments In a modern World: Changing Institutions**, University of Michigan Press, Michigan, 1997.

Daniels, RJ, Macklem, P and K Roach, **The Security of Freedom: Essays on Canada's Anti-Terrorism Bill**, University of Toronto Press, Toronto, 2001.

Holt, P, **Secret Intelligence and Public Policy**, Congressional Quarterly Inc., New York, 1995.

Hough, M and Du Plessis, A, **Strategic Intelligence: Selected Official South African Perceptions: 1992-2002; Ad Hoc Publication 39**, Institute for Strategic Studies, University of Pretoria, November 2002.

Klandermans, B, Roefs, M and Olivier, J (eds.), **The state of the people: Citizens, Civil Society and Governance in South Africa, 1994-2000**, HSR, Pretoria, 2001.

Longley LD and RH Davidson, **The new Roles of Parliamentary Committees (The library of Legislative Studies)**, Franks Cass and Company, London, 1998.

Lustgarten, L and Leigh, 1 **In from the Cold: National Security and Parliamentary Democracy**, Claredon Press, Oxford, 1994.

Murray C and L Nijzink, **Building Representative Democracy: South Africa's Legislatures and the Constitution**, EU Parliamentary Support Programme, Cape Town, 2002.

Norton, P, **Does Parliament matter?**, Haverster Wheatsheaf, New York, 1993.

Olson, DM, **The Legislative Process: A comparative approach**, Harper and Row, New York, 1980.

Seaborn, B, *Intelligence and Policy: What is constant? What is changing?*, **Commentary 45**, June 1994.

Shulsky, AN and I Schmitt, **Silent Warfare: Understanding the world of Intelligence** (3<sup>rd</sup> ed.), Brassey's (US) Inc., Washington DC, 2003.

Shulsky, AN, **Silent warfare: Understanding the world of Intelligence**, (2<sup>nd</sup> ed.), Brassey's (US) Inc, Washington DC, 1991.

Solomon, H and M Schoeman, *Security Development and Gender in Africa*, **ISS Monograph Series**, No 27 August 1998.

Steele, RD, *Intelligence in the 1990s: Recasting National Security in a changing World*, **AIJ**, Summer/Fall, 1990.

The Report of the Twentieth Century Fund Task Force on the Future of US Intelligence, **In from the Cold**, The Twentieth Century Fund Press, New York, 1996.

## 2.2 Journals

Currie, JT, *Iran-Contra and Congressional Oversight of the CIA*, **International Journal on Intelligence and Counter-Intelligence**, Vol 11 No 2, 1991.

Gill, P, *Re-Asserting Control: Recent Changes in Oversight of the UK Intelligence Community*, **Intelligence and National Security**, Vol 11 No 2, April 1996.

Kaiser, FM, *Impact and Implications of the Iran-Contra Affair on Congressional Oversight for Covert Action*, **International Journal on Intelligence and Counter-Intelligence**, Vol 7 No 2, Summer 1994.

Knott, SF, *The Great Republican Transformation on Oversight*, **International Journal on Intelligence and Counter-Intelligence**, Vol 13 No 1, Spring 2000.

Robertson, KG, *Recent Reforms of Intelligence in the UK: Democratization or Risk Management?*, **Intelligence and National Security**, Vol 13 No 2, Summer 1998.

Steele, RD, *Intelligence in the 1990s: Recasting National Security in a changing World*, **AIJ**, Summer/Fall, 1990.

Van Aardt, M, *The Emerging Security Framework in Southern Africa: Regime or Community?*, **Strategic Review for Southern Africa**, Vol XIX No1, May 1997.

Welch, J, *The Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, (Act 70 of 2002): The implications for Private and Public Security*, **ISSUP Bulletin** 4/2003.

Weller, GR, *Accountability in Canadian Intelligence Services*, **International Journal of Intelligence and Counter-Intelligence**, Vol 2 No 3, Fall 1998.

Weller, GR, *Political Scrutiny and control of Scandinavian's Security and Intelligence Services*, **International Journal of Intelligence and Counter-Intelligence**, Vol 13 No 2, Summer 2000.

## 3. MEDIA

Du Preez, M; *The Special Projects Unit; SABC Special Assignment; Johannesburg, 1999.*

## 4. INTERVIEWS

Abram, S, **Interview**, Cape Town, June 2001.

Cwele, S, **Interview**, Cape Town, June 2001.

Green, L, **Interview**, Cape Town, June 2001.

Landers, L, **Interview**; Cape Town, June 2001.

Mahlangu, JL, **Interview**; Cape Town; June 2001.

Mnyaka, N, **Interview**, Cape Town, June 2001.

Nase, D, **Interview**; Cape Town, June 2001.

Olckers, M, **Interview**; Cape Town, June 2001.

Scott, MI, **Interview**, Cape Town, June 2001.

Van der Merwe, S, **Interview**, Cape Town, June 2001.

## 5. SEMINARS

Australia, **International Meeting of Inspectors-General and Security (IGIS), 17-18 November 1997**, Canberra, 1997.

Canada, **International Intelligence Review Agencies Conference 12-15 May 2002**, UK Conferences and Visits Group; Foreign and Commonwealth Office, London, 2002.

UK, **International Intelligence Review Agencies Conference 12-15 May 2002**, UK Conference and Visits Group: Foreign and Commonwealth Office, London, 2002.

Weller, GR, *Oversight of Australia's Intelligence Services*, **Annual Meeting of the International Studies Association**, Washington DC, 14-21 February 1999.

## 6. INTERNET SOURCES

Berkowitz, B, **Failing to Keep up with the Information Revolution**, Internet:  
<http://www.cia.gov/csi/studies/vol47no1/article07.html>

Bruce, JB, **Laws and Leaks of Classified Intelligence: The Consequences of Permissive Neglect**, Internet:  
<http://www.cia.gov/csi/studies/vol47no1/article04.html>

Canada, **SIRC: Security Intelligence Review Committee**; Internet:  
<http://www.sirc.csars.gc.ca>

Johnston, R, **Integrating Methodologists into Teams of Substantive Experts**; Internet: <http://www.cia.gov/csi/studies/95unclass/jon.html>

Jones, RV, *Enduring Principles: Some lessons in Intelligence*, **Studies in Intelligence**, Internet: <http://www.cia.gov/csi/studies/96unclass/jon.html>

Manget, FF, **Another System of Oversight: Intelligence and the rise of Judicial Intervention**, Internet:  
<http://www.cia.gov/csi/studies/95unclass/manget.html>

Petersen, M, **The Challenge for the Political Analyst**: Internet:  
<http://www.cia.gov/csi/studies/vol47no1/article05.html>

Sen, A, **Democracy as a value**, *Journal of Democracy*, Vol 10 No 3,  
Internet: <http://muse.jhu.edu/demo/jod/10.3sen.html>

Siegel, J, *Controlling Nuclear Anarchy: The role of the United States Intelligence Community in Monitoring Nuclear Non-proliferation in the Post-Cold War Era*; **Woodrow Wilson School Policy Conference 401A Intelligence Reform in the Post-Cold War Era**: Internet:  
<http://www.fas.org/irp/eprint/snyder/proliferation.html>

Stephens, M, *Global Organized Crime*, **Woodrow Wilson School Policy Conference 401A Intelligence Reform in the Post-Cold War Era**, Internet:  
<http://www.fas.org/irp/eprint/snyder/globalcrime.html>

USA, **Accountability and Oversight**, Internet:  
<http://www.access.gpo.gov/int/int108.html>

Van Wagenen, JS, *Critics and Defenders: A Review of Congressional Oversight*, **Studies in Intelligence**, Vol 1 No 1 1997, pp. 6-7, Internet:  
<http://www.odci.gov/csi/studies/97unclass/wagenen.html>