

# **A COMPARATIVE ANALYSIS OF THE ROLES AND FUNCTIONS OF THE INSPECTOR-GENERAL OF INTELLIGENCE WITH SPECIFIC REFERENCE TO SOUTH AFRICA**

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FUNCTIONS OF THE INSPECTOR-GENERAL OF  
INTELLIGENCE WITH SPECIFIC REFERENCE TO SOUTH  
AFRICA**

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## Foreword

The purpose of the dissertation is to promote an understanding of intelligence oversight in South Africa. I thank the staff of the library of the University of Pretoria, the staff of the library of the National Intelligence Agency, and everybody who encouraged me.

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# INTRODUCTION

## 1. BACKGROUND

The democratisation of South Africa brought about changes in the political system, which were informed by apartheid era policies. These changes also impacted on the Security Services and the principles governing these Services. The national security policy was revised to broaden threats to national security from military threats to soft security issues such as social threats, economic threats and political threats.

The Constitution of the Republic of South Africa, Act 108 of 1996 endorsed the principles adopted in 1994/5 by reiterating that national security must reflect the resolve of South Africans to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.

The conduct of the Security Services was also re-visited to ensure that the Services respect the laws of the country, and are subordinate to the Constitution. Members of these Services have to conduct themselves in a manner that does not prejudice the interests of any political party and should not execute unlawful orders. During the previous era, the activities of the Security Services were not effectively monitored and overseen by the Executive and Parliament. The Constitution expressly introduced parliamentary oversight of these Services by multi-party parliamentary committees and by a civilian inspector.

Oversight of the Services is done at three levels namely the Executive, Legislative and Judiciary. The aim is to ensure that the Services do not continue functioning without due regard to the law and accountability.

The Services would also be expected to account for their expenditure to ensure that the state resources allocated to them are used for the purpose

they are intended for. To this end, the laws governing these Services were gradually rewritten or amended to give effect to the new principles for the Security Services encapsulated in the Constitution.

## 2. STUDY OBJECTIVES

This dissertation describes the various security and intelligence control concepts and analyses the control of intelligence, in particular the monitoring of the activities of all the South African Intelligence Services inclusive of the intelligence divisions of the South African Police Service (SAPS) and the South African National Defence Force (SANDF), respectively, by an Inspector-General of Intelligence.

The objectives of the study are to analyse the various mechanisms of intelligence control with specific reference to oversight by an Inspector-General and to compare the South African Inspector-General with the Inspectors-General internationally. The dissertation will also deal with other forms of oversight, which function alongside the office of the Inspector-General or complement this office.

## 3. RESEARCH PROBLEM

The South African Parliament created the office of the Inspector-General through the Intelligence Services Control Act, 40 of 1994. The creation of this office formed part of the introduction of new oversight mechanisms over the Intelligence Services in South Africa in keeping with international best practice. Despite the establishment of this office by law, the office has not been fully functional since its creation. Since 1995, two Inspectors-general resigned after staying in office for less than a year. It can be argued that the lack of this oversight mechanism created a vacuum in the oversight of the Services. However, it is important to analyse the impact of the vacuum on the Services, and also the causes of this vacuum. Accordingly, the following propositions inform the research, namely the performance of the office of the Inspector-General since 1995 indicates that:

- (a) The legislation creating the Office of the Inspector-General was ambiguous with respect to the functioning, structure and lines of reporting of this office, and it can be argued that there was lack of common understanding on the role of the office by the various stakeholders.
- (b) There is still a need to test the impact of the office of the Inspector-General on the Services and the public.
- (c) The Inspector-General's office requires other oversight mechanisms to complement its functions.

The dissertation will analyse the propositions and present evidence to support or refute these propositions.

#### 4. SOURCES AND METHODOLOGY

Information gathered includes secondary sources, Internet sources, informal discussions and correspondence with some heads of the Intelligence Services, the Presidency, the office of the Inspector-General and certain members of the Joint Standing Committee on Intelligence.

A brief comparative analysis of the various monitoring and review institutions is done with specific emphasis on the office of the Inspector-General. The comparative method examines the appointment, role, functions, lines of accountability and the legal framework of the office of the Inspector-General in countries discussed in the paragraph 5 below. A brief comparative analysis of other institutions of democracy such as the Auditor-General or Comptroller-General and the Public Protector or Ombudsman is done to establish the relationship between the monitoring and review institutions.

#### 5. STRUCTURE OF THE RESEARCH

Chapter 1 of the dissertation deals with a description of the concepts of intelligence and national security, and comparative case studies of control of

intelligence. Chapter 2 briefly compares the other institutions such as the Ombudsman and the Auditor-General with the offices of the Inspectors-General internationally. This comparison will be brief, and the chapter will deal in detail with the office of the Inspector-General internationally from a structural and functional point of view. The comparative analysis includes countries such as Canada, New Zealand, the United Kingdom (UK), Australia and the United States of America (USA).

Chapter 3 deals with the office of the Inspector-General from a South African perspective. This Chapter will include legislation, parliamentary debates, newspaper comments, speeches and other relevant open material or classified material approved for disclosure by the Director-General of the National Intelligence Agency. The chapter will also look at the evolution of the office of the Inspector-General in South Africa.

Chapter 4 contains an analysis of failures and successes regarding the office of the Inspector-General in South Africa. The views of various stakeholders, namely members of the Joint Standing Committee on Intelligence, relevant Ministers, the heads of some of the Services and the heads of other monitoring and review institutions were solicited. Most respondents replied in writing. Some of the stakeholders could not respond due to non-availability and time constraints. This Chapter also outlines the perceptions of the respondents about the office of the Inspector-General; its relevance in a democracy, and the relevance of the other review and monitoring institutions. Finally, Chapter 5 analyses the propositions formulated in the research problem and contains the findings and conclusions of the research.

## CHAPTER 1

# INTELLIGENCE, NATIONAL SECURITY AND THE CONTROL OF INTELLIGENCE: A CONCEPTUAL FRAMEWORK

## 1. INTRODUCTION

This Chapter provides an analysis of the concepts that are relevant to the understanding of control of intelligence. The concept of Intelligence is analysed to identify its elements and importance in the preservation of national security. The elements of intelligence refer to intelligence as an activity and a process, which require proper management and control by the policy makers to assure the public of the importance of the intelligence function in government. Further, national security and the concept of control of intelligence are discussed.

## 2. THE CONCEPT OF INTELLIGENCE

Intelligence is defined as “the product resulting from the collection, evaluation, analysis, integration and interpretation of all available information, supportive of policy and decision making processes pertaining to the national goals of stability, security and development. Modern intelligence can thus be described as ‘organised policy related information’, including secret information”.<sup>1</sup>

Johnson defines intelligence as follows: “Intelligence commonly encompasses two broad meanings. The first one relates to the acquisition and interpretation of information by the secret agencies about threats and opportunities that confront the nation, in an attempt to reduce the gaps and ambiguities that plague open sources of knowledge about the world. A nation especially seeks secret information to help it prevail in times of war, with as few casualties as possible. The second is that, based on information derived from denied and open sources, policy makers call upon their intelligence agencies to shield the

nation against harm while advancing its interests through secret manipulation of foreign events and personalities." <sup>2</sup>

Intelligence should be distinguished from information. The latter is anything that can be known, regardless of how it may be discovered. All intelligence is information that has been processed through various stages, but not all information is intelligence. Intelligence refers to information relevant to a government's formulation and implementation of policy to further its national security interests and to deal with threats from actual or potential adversaries.<sup>3</sup> Intelligence information typically includes not only the 'raw data' collected by means of espionage or otherwise, but includes analyses and assessments based on it. The 'intelligence product' is of direct value to policy makers. Intelligence is different from other government functions. Much of what happens in intelligence is secret. Intelligence exists because governments seek to hide some information from other governments, which, in turn, seek to discover hidden information by means that they wish to keep secret.<sup>4</sup>

When the activities of the intelligence services are kept secret, this raises suspicions about the nature and role of these services. Further, the public becomes suspicious of the motives of government for establishing structures which have minimal public accountability.

In popular fiction and public perception, intelligence is synonymous with espionage and sexual blackmail. However, the concept of intelligence in the real world is more than that. Intelligence organisations engage in activities that create ambivalence in people: spying, eavesdropping and covert action, which is perceived to be immoral and unethical.<sup>5</sup> It is these activities that necessitate control and oversight in order to ensure that the public is at ease and human rights not violated.

There are various elements of intelligence: Collection, analysis, covert action and counter-intelligence.

**Collection** refers to collection of raw information through open sources, espionage, technical and other means.<sup>6</sup>

**Covert action** on the other hand refers to action taken to influence the political activities in another country. There is a school of thought, which states that covert action may not necessarily be an intelligence element as it is not concerned with collection of information, but influencing of policy. However, because of its secret and deceitful nature, covert action is often performed by intelligence organisations.<sup>7</sup>

**Counter- intelligence** deals with the protection of information and society from hostile activities including terrorism, sabotage, treason and subversion.<sup>8</sup>

**Analysis** refers to the correlation and interpretation of information to make judgements about the capabilities, intentions, and actions of another party. Raw information is analysed to ensure some degree of accuracy of the information.<sup>9</sup>

Intelligence in the state context is primarily aimed at maintaining and furthering national security. This concept therefore also has to be analysed.

### 3. NATIONAL SECURITY

Intelligence is viewed as an instrument of national security. National security has to do with "protecting the nation against threats, ultimately military, emanating from foreign nations. When a nation is being invaded or is about to be, its national security concerns clearly centre on defeating or preventing the invasion and securing itself against similar situations arising in the future".<sup>10</sup> This traditional definition used in the Cold War era puts emphasis on military threats to the state. This is because the main threat to security of the state during that era was perceived as primarily military in nature. After the Cold War, other threats such as disease, poverty, religion, terrorism, ethnic violence, and environmental issues began to be emphasised as threats to the well-being of many states.<sup>11</sup>

The Western concept of security is that security is based on two assumptions, namely: "That most threats to a state's security arise from outside its borders; and that these threats are primarily if not exclusively military in nature and usually require a military response if security on the target state is to be preserved"<sup>12</sup>. Lippman summarised these assumptions as follows: "A nation is secure to the extent to which it is not in danger of having to sacrifice core values, if it wishes to avoid war and is able if challenged to maintain them by victory in such war".<sup>13</sup>

There is a view that 'security' must first be understood in order to understand 'national security'. The dictionary definition of security refers to being protected from danger, feeling safe, and being free from doubt.<sup>14</sup> Although many people deny that security, whether individual, national, or international, is amongst the main issues such as being free from want or being free from disease, that face humanity, national security is central because the state dominates many of the conditions that determine security.<sup>15</sup> The intensity of national security problems vary dramatically over time. In the post-Cold War era, national security is defined as "the capacity of society to protect individuals, groups, and the nation from physical and socio-economic dangers and from the threat of such dangers created by both systematic and attributing conditions."<sup>16</sup>

Individuals and citizens also face threats, which emanate either directly or indirectly from the state. This could include those that arise from domestic law-making and enforcement; those arising from direct administrative or political action by the state against individuals or groups; those arising from struggles over control of state machinery; and those arising from the state's external policies.<sup>17</sup> Although the state is the main referent object of security, it is important to understand that states are varied despite their fundamental similarities. It is argued that all states are vulnerable to military and environmental threats. Almost all states are open to economic threats, and many are also susceptible to basic societal and political insecurities. The idea of a state, its institutions, and even its territory can be threatened as much by

the manipulation of ideas as by the wielding of military power. The degree of socio-political cohesion differs from state to state. In this instance, a distinction is made between weak and strong states. This distinction relates to the degree of socio-political cohesion which is a notable feature of weak or strong states, as opposed to the degree of military and economic capabilities which weak or strong powers have in relation to each other. Many, though not all, weak states are found in the Third World, and decolonisation can be regarded as one cause which created a European image in these states, but did not take into account existing cultural and ethnic boundaries, nor created new nations to fit with them.<sup>18</sup>

Thomas argues that the primary physical threats to the security of overwhelming number of Third World states are internal rather than external. They result from granting international legitimacy to states, which lack domestic legitimacy. The majority of the Third World states have fundamental problems: While enjoying international legitimacy, they lack internal legitimacy.<sup>19</sup> This has resulted in a crisis for many Third World states, which has profound implications for security domestically, regionally and globally. Thomas goes further to argue that provision of food is a vital element in the security of Third World states. Most depend on international charity for food supplies. Chronic disease like HIV/AIDS, tuberculosis is also rife in the Third World states, especially in Africa.<sup>20</sup> Debt worsens the problem of poverty, and gives a huge impetus to ecologically inappropriate land use. In this regard, co-operation within the industrialised world will be necessary, and then between the industrialised world and the Third World.<sup>21</sup>

Job's view on the security of Third World states is that the primary concern to political elite's and decision-makers in Third World countries is state making. These elite groups express this concern under the guise of the search for security. In this regard, security is determined by two major factors in the Third World namely, the history and process of state making; and the way in which the system of states impinged upon this process. There are competing foci of authority in these states, usually weaker than the state in terms of coercive capacity, but equal to or stronger than the state in terms of legitimacy

as perceived by the populations of the state. Deliberate colonial policies led to these diverse sources of authority. This included bringing together of diverse ethnic groups within one administrative boundary, which in most instances gave rise to ethnic divisions and tensions. This is true in African countries such as Rwanda and Ethiopia, and also in some Asian and Middle East countries. Secession and ethnic violence are common threats, which emanate interstate to these states and their rulers. A Third World state's lack of control over its international environment worsens the problems that accompany state making and nation building.<sup>22</sup>

There is a common view shared by the authors above that most threats to the security of Third World states emanate interstate, and that the threats to the security of First World countries, emanate primarily from outside their borders.

It has already been stated that there are concerns regarding the conduct of intelligence, especially in view of its link with secrecy. Control over intelligence has thus become an important mechanism in democracies. The next section deals with control of intelligence.

#### 4. CONTROLLING INTELLIGENCE

Control entails some measure of checking, directing and restraining. Controlling intelligence means taking steps to check and give direction to the functioning of the intelligence services, including review of the functions and setting certain restraints where necessary. A brief comparison is made in this section between certain countries such as the UK, Canada, USA, New Zealand, Australia and South Africa.

##### 4.1 THE RATIONALE FOR CONTROL

The notion of control of intelligence is centred around the need to maintain the balance between secrecy and transparency. It is an accepted principle that countries would easily perish at the hands of their foreign enemies without the protection afforded by the eyes and ears of the intelligence community.

However, a caveat needs to be added immediately that democracies must also maintain strong safeguards to protect their citizens against the possible misuse of secret power by the security services at home or abroad.<sup>23</sup>

Various forms of safeguards are tried and tested, some successfully some not. These are executive oversight, legislative oversight, and judicial oversight. The need for controlling intelligence is based on the nature of the intelligence craft, which requires amongst others, clandestine collection of information. These clandestine methods usually lead to the violation of the rights and liberties of the public. The technical collection of intelligence may violate the right to privacy of the target if the correct legal procedures are neglected.

According to South African law, human collection of intelligence requires for instance, breaking into buildings to take photographs and to remove certain items, and open collection of information through ordinary research methods such as collecting and analysing information from various media, publications and Internet. The former violates the rights and liberties of the targets of such action and is punishable by law if correct procedures are not followed.<sup>24</sup>

The US's Central Intelligence Agency (CIA) in particular, evolved through many Presidential Administrations and therefore became subjected to various policy changes. In the long period before the Second World War, intelligence was controlled through neglect. Following the Second World War, intelligence became critical to the nation's foreign policy, and in its early days it was subject to almost no control. During the Kennedy era, greater controls were introduced to reduce the embarrassment of intelligence failures.<sup>25</sup>

In Canada, a Commission of Inquiry: The McDonald Commission of Inquiry was established in July 1977 to investigate the atrocities committed by the Security Services against the citizens as an overreaction to a perceived threat to national security. The government had to find solutions to the tarnished image of the Services. The Commission called for the review of the activities of the Services and the management of these Services. The Commission thus

contributed to the enhancement of the control of the Services through oversight and review structures.<sup>26</sup>

The security services especially in democratic countries throughout the world have a challenge of operating within a legal framework, which requires respect for the privacy and freedom of individuals. This requires a balance between secrecy and transparency. On the challenges facing new democracies, Bruneau states that: "The biggest challenge facing world leaders at the beginning of the twenty-first century is the consolidation of the new democracies that have emerged world- wide during the last decade and a half, which requires restructuring economies and ensuring civilian control of the security services especially the intelligence services. The mystery of intelligence is associated with its secrecy. Those who are in possession of intelligence information keep it secret. New democracies are very tentative. The issue of how to develop trust and transparency in the context of the legacy of authoritarianism is very crucial. In certain instances, the intelligence services are not under government control, but instead, have power over the civilians".<sup>27</sup>

Countries require intelligence for their well-being. The question needs to be asked as to what kind of intelligence they need and how to control it. Control is needed for the following reasons namely: Secrecy is an enemy of democracy because it encourages abuse; and intelligence agencies collect and analyse information, and information is power. Control has to be properly defined and structured. The legal framework has to be clear and explicit.<sup>28</sup>

The next section deals with oversight, monitoring and review of intelligence as elements of controlling intelligence.

#### 4.2 CONTROL, OVERSIGHT, MONITORING AND REVIEW OF INTELLIGENCE

The terms control, review and oversight are often confused when used in the context of security and intelligence. Review and oversight bodies can exist in either or both the administrative and legislative branches of government.<sup>29</sup>

It can be argued that control of intelligence encompasses to a large extent both oversight and review. Oversight bodies exercise some on-going control over the policies, procedures and activities of the services for which they are responsible<sup>30</sup>. Oversight is usually a shared responsibility between the executive and the legislature. The overseen issues vary from operational activity, budgets, to responses to policy requests and needs. The core oversight question is whether the intelligence services are properly carrying out their functions, that is, whether the community is asking the right questions, responding adequately to policy needs, are being thorough in their analysis, whether intelligence is properly co-ordinated, and whether there are right operational capabilities in place.<sup>31</sup>

These are the issues, which most services worldwide cannot be expected to answer for themselves without the risk of subjectivity and bias. Even the administrative and political heads of these services may not objectively and adequately deal with the issues to the reasonable satisfaction of the public or the head of state. In order to circumvent possible bias and subjectivity, and therefore encouraging openness, structures outside the services themselves are put in place to oversee the activities of these services.

Review on the other hand, is the ex post-facto audit of actions taken or policies pursued by an organisation. Although they may make recommendations, review bodies are supposed to make recommendations to the person politically responsible for the organisation. Various institutional mechanisms are put in place in democracies to assist the state to control intelligence. Review is done through various institutions in different countries. Both the office of an Inspector-General of Intelligence and the Auditor-General conduct reviews of the activities of the Services in countries such as Canada and Australia.<sup>32</sup> In the US and New Zealand, review of the activities of the Services is only done by the Inspector-General of Intelligence.<sup>33</sup> In South Africa, the Human Rights Commission and the Public Protector (Ombudsman) conduct review of certain activities of the Intelligence Services in addition to the Inspector-General of Intelligence and the Auditor-General.<sup>34</sup>

The monitoring and review institutions conduct ex post facto audits of the various activities of the services. The audits take various forms varying from surprise inspections, report inspection and scrutiny, to investigations. The review process leads to reports to the head responsible for a Service and in certain instances to the head of state.<sup>35</sup> The reports on the findings of the audits encapsulate wrongdoing if there is any and remedies including recommendations for policy amendments or review where necessary.

Monitoring refers to supervision and constant observation of the activities of another. This includes issuing of policies and directives to ensure day-to-day smooth running of the organisation and requests for regular reports on those activities to ensure compliance with the policies. Different institutions may be responsible for issuing of policies and monitoring compliance with such policies. Oversight is divided into three categories which are discussed below.

#### 4.2.1 LEGISLATIVE OVERSIGHT

The scope of oversight powers varies from country to country. In the US, UK and South Africa, there is legislative oversight of the Services. The legislative committees especially are responsible for legislative oversight of the intelligence activities<sup>36</sup>. They look at the budget, they hold hearings and conduct investigations into intelligence activities. The Congress in the US also has to be informed of covert action, which is to the advantage of the CIA should Congress approve it. Approval guarantees legislative support should the operation fail.<sup>37</sup>

The Canadian Security Intelligence Review Committee oversees the duties and functions of the Services. The Committee is not a legislative committee but is composed of non-members and members of the legislative. The Committee also reviews reports prepared by the Director of a Service on its annual activities, and directions issued by the Minister to the Director regarding the command and control of his or her Service. The Committee conducts investigations on complaints from members of the Services and the public about any Canadian Security and Intelligence Service.<sup>38</sup>

In Australia, there is a Joint Standing Parliamentary Committee for the Australian Security and Intelligence Organisation. This Committee only deals with this Intelligence Service in Australia. Unlike in the countries above where the legislative committee has a good relationship with the Services, the Intelligence Service under the oversight of the Joint Standing Parliamentary Committee in Australia is suspicious of legislative oversight in general and the Committee does not have good relations with this Service.<sup>39</sup> This lack of good relations between the legislature and some of the Intelligence Services raises concerns with regard to the oversight of the Services and may have an impact on public confidence in these Services.

#### 4.2.2 EXECUTIVE OVERSIGHT

The National Security Council (NSC) is at the centre of executive oversight of the Services in the US. The NSC also has sub-committees that deal with intelligence. The purpose of the NSC is to provide a forum for the coordination of foreign policy information prepared for the President, and the discussion of policy alternatives. The NSC does not take decisions, the President does.<sup>40</sup>

In South Africa, executive oversight is implemented through ministerial supervision of the Services. The Minister issues directives and regulations, which prescribe how the Heads of the Services should exercise, control and command of the Services. The Minister can order an investigation into the affairs of the Services either through an independent body of persons appointed by the Minister or through the office of the Inspector-General. The reports help the Minister to review policy and to put effective control mechanisms in place.<sup>41</sup>

In Canada, the Prime Minister provides broad guidance to the security and intelligence community and collectively establish priorities.<sup>42</sup>

In New Zealand, there is a Cabinet Strategy Subcommittee on Intelligence and Security, which considers issues of oversight, organisation and priorities for the New Zealand community and any issues which, because of their security or intelligence implications, the Prime Minister directs be considered by the committee. The Prime Minister and his appointees make up the majority of the committee, and this gives him the authority to call hearings on matters for the consideration of the committee. The committee does not look into matters that are operationally sensitive.<sup>43</sup>

In Australia, there is a Cabinet Committee system to oversee the activities of the Australian Intelligence Services.<sup>44</sup> The system works effectively and conducts thorough review of the activities of these Services. In addition to this system, there is ministerial review. Several ministers are involved, including the Prime Minister.<sup>45</sup>

The system of executive oversight differs from country to country. It is only in South Africa where the head of state does not preside or sit in a formal committee that oversees the activities of the Services. The President only presides over Cabinet meetings, and operational activities of the Services are not submitted to this forum for scrutiny.

#### 4.2.3 JUDICIAL CONTROL

Judicial control of intelligence activity is exercised through the courts of law and takes the form of oversight and review. Oversight also takes the form of approval of interception and monitoring of communications. A judge in most countries or an Attorney General in Canada for instance, authorises the interception and monitoring of communications.<sup>46</sup>

Further, the courts can review the actions taken by the Services, if they were conducted outside the confines of the law. This includes review of decisions that were procedurally flawed. In the UK, a minister issues warrants for interception of communications and reviews are done by the Commissioner or the Tribunal.<sup>47</sup>

In Australia, the Minister responsible for security intelligence is empowered to issue warrants for interception of communications. Judges may be appointed as prescribed authorities to preside over proceedings involving actions arising from issued warrants where there is a dispute of violation of rights. The categories of warrants include search warrants, tracking device warrants and computer access warrants.<sup>48</sup>

The authority for issuing warrants on interception of communications differs from country to country. Despite these differences, the heads (Directors-General) of the services make an application to a higher authority for approval.

## 5. CONCLUSION

The concepts discussed in the chapter deal with the elements of intelligence; threats facing Third World states; the Western concept of security; and the various ways of controlling intelligence. It is clear from the discussion that while intelligence is an important function of government, its activities require some degree of control in order to protect the public from possible abuse of authority, and to ensure that the Services function effectively. There are various challenges that face democratic governments on how to control intelligence effectively without disclosing secret information vital for the preservation of national security. A common control mechanism is to ensure that intelligence is separated into different agencies. Policymakers should prevent any single agency from having a monopoly on intelligence. Although this proliferation of structures may lead to tensions amongst the structures themselves, it is likely to eliminate the chances of monopoly by any single organisation. Oversight is another mechanism for democratic control<sup>49</sup>. This requires a balance between secrecy and transparency to ensure that the identities of sources of information and collection methods remain protected from disclosure, but on the other hand ensuring that the public has access to information they need to know. An understanding of intelligence as a process is imperative for the understanding of the need for control of intelligence.

While intelligence is a cornerstone of the existence of a state, the activities that underpin intelligence need to be carried out with circumspection.

Although the institutions discussed briefly in this chapter control intelligence, the public and the media also play a role in intelligence oversight. The public does this through whistle blowing and the media through open debates that involve the public and politicians.

The clandestine collection of intelligence creates a perception, sometimes a justified fear, that the intelligence function is a devious activity by government against its citizens. To minimise the fears, intelligence control mechanisms have to create a semblance of transparency of the activities of an intelligence organisation. Control has to be exercised at various levels of the intelligence process namely, during collection to ensure that collection methods are in line with the relevant laws, and analysis has to be done by qualified professionals independent of policy makers in order to tell policy makers what they ought to know not what they want to know. Evaluation should be encouraged to ensure that there are independent views by outsiders to the intelligence process who can critique an intelligence product in terms of quality and value to the policy makers.

The various mechanisms of control at various levels need to be understood in the context of the overall process of intelligence. These various mechanisms cannot be seen or enforced in isolation from each other. Oversight and review of intelligence complement each other. Where the former is concerned with the on-going activities of intelligence services, the latter focuses on the effect of an intelligence activity.

Where review is an after the fact activity, it is an effective means of control in that the services face the risk of having their members facing ministerial penalties, and even legal penalties for contravention of the law. Implemented together with oversight, these mechanisms safeguard the public against intelligence activities where required. Reviewing the activities of the services assists both the policy makers and the services themselves to manage these

structures effectively. In the event of wrongdoing by a service, the reviewing body should point out the flaws in the implementation of relevant policies and make recommendations on how these flaws can be rectified.

Chapter 2 provides a brief overview of the offices of the Ombudsman and the Auditor-General and how these oversight mechanisms complement the office of the Inspector-General. This overview will help in the analysis of some of the propositions formulated in the research problem. After this brief overview, the chapter contains a comparative analysis of the international offices of the Inspectors-General of Intelligence in the following countries namely the US, the UK, Canada, New Zealand and Australia.

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## CHAPTER 2

# INSTITUTIONS OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND OTHER MONITORING AND REVIEW INSTITUTIONS: AN INTERNATIONAL PERSPECTIVE

### 1. INTRODUCTION

This chapter deals with an international comparison of the institutions of the Inspectors-General of Intelligence. The comparison includes the functions, organisation, accountability and impact of these institutions in controlling intelligence in democracies. Chapter two also provides a brief overview of the other monitoring and review institutions such as the Ombudsman or Public Protector and the Auditor-General or the Comptroller and Auditor-General, and how these institutions complement the office of the Inspector-General of Intelligence. The following countries will be looked at namely, the UK, the US, Canada, New Zealand and Australia. South Africa will only be discussed when dealing with the Ombudsman and the Auditor-General, as the next chapter will specifically deal with the role of the Inspector-General of Intelligence in South Africa.

Government derives its authority and stature from its responsibility to serve the interests of its citizens. Governments across the globe have a wide range of functions such as providing social services and ensuring the economic and security welfare of its citizens. These roles require a great deal of discretion by public officials and also require maintenance of public order using the state's security machinery.<sup>1</sup>

The courts have the responsibility of providing protection to individuals aggrieved by government activities, by ensuring that government conducts its activities in

accordance with the law.<sup>2</sup> However, many individuals cannot afford the services of a lawyer and therefore do not have access to the courts. Accordingly, institutions that could offer free services to all members of the public aggrieved as a result of failure or perceived failure by government to serve, had to be established. In the case of the Intelligence Services, the office of the Inspector-General of Intelligence is established to review the activities of the Services including inter alia, investigating complaints by the public and employees of the Services against the Services. In the case of the general administration, the office of the Public Protector or the Ombudsman is established to investigate complaints by government employees and the public against government. In addition to these two institutions, the Auditor-General or the Comptroller and Auditor-General reviews the financial administration of government departments including some Intelligence Services. These institutions are either created by statute or by administrative policies. The Inspectors-General of Intelligence are either appointed by the legislature, head of state or head of the Service they monitor. The Public Protector or the Ombudsman and the Auditor-General or the Comptroller and Auditor-General are appointed by the head of state.

The core elements of the task of the Ombudsman are to protect the rule of law and to fight corruption, and therefore the incumbent should be independent from those who are subject to his or her scrutiny. However, for effective checks and balances, the Ombudsman is accountable to Parliament.<sup>3</sup> It may be argued that how the institution is created and who appoints the incumbent should not determine the success of the institution. Instead, what matters should be whether there are sufficient checks and balances within the state to allow the office to function without bias and fear of favour.

When a monitoring and review body is part of the executive, and the primary task arises from the need to monitor the staff of the executive, the position and activity is classified as internal. Independence of the institution plays an important role in

the success of the office. The following characteristics are required for the success of a monitoring and review institution:<sup>4</sup>

- Institutional independence, which refers to an institution which is not part of any one of the three spheres of government namely, the judiciary, executive and legislature.
- Functional independence, which refers to the independence of the institution from any outside pressure. This institution must be able to interpret its own competence, use its powers of investigation and formulate its own decisions. The budget must be adequate to support operational activities and the appointment of staff, and the institution should have the ability to protect members of the public.
- Personal independence, which requires that the term of office of the incumbent should be clearly defined by law, so as to ensure that the incumbent is not dismissed from office prematurely. The incumbent must be able to function impartially and his or her personal integrity must be beyond all doubt.

## 2. COMPLEMENTARY MONITORING AND REVIEW INSTITUTIONS

Various countries have different complementary monitoring and review mechanisms to the office of the Inspector-General, such as the Public Protector or Ombudsman, the Auditor-General or the Comptroller and Auditor-General and the legislative committees. This section primarily deals with the office of the Auditor-General or the Comptroller and Auditor-General as a complementary monitoring and review institution to the office of the Inspector-General of Intelligence. While the section also briefly deals with the institution of the Ombudsman internationally, the complementary role of the Public Protector to the office of the Inspector-General of Intelligence will only be discussed in the

case of South Africa. These institutions conduct investigations on the activities of government following complaints by the public and government employees against government. Although these institutions focus more on public administration, they do reviews of certain activities of the Intelligence Services in some countries.

## 2.1 THE PUBLIC PROTECTOR / OMBUDSMAN

The office of the Public Protector or the Ombudsman is a public institution which has a responsibility to investigate the way in which government bodies and their employees have conducted themselves in the performance of their duties vis a vis members of the public and to give judgement about these actions. The investigations by the Ombudsman and possible interventions are directed towards helping, in an individual case, to resolve problems in the relationships between citizens and public authorities. The interventions are partly aimed at preventing repetition of the incidents. The Ombudsman institution is complaint-driven.<sup>5</sup>

In the UK, the Ombudsman is appointed by the Prime Minister and deals with what is termed maladministration, which covers all aspects of governance. The Ombudsman reports to Parliament on the findings of his or her investigations.<sup>6</sup>

In Australia, the Ombudsman investigates action that relates to a matter of administration in respect of which a complaint has been made to him or her, or to a prescribed authority. After an investigation, the Ombudsman reports to the department against whom the complaint is made or to the prescribed authority.<sup>7</sup>

In the US, there is a United States Ombudsman Association (USOA), which is the national organisation for public sector Ombudsman professionals. An Ombudsman created in law, with a term of office, full investigative powers, and

access to records, is the model promoted foremost by the USOA. From its origin in 1809 in Sweden to today in the United States and around the world, the Ombudsman helps guarantee citizens fair and equitable treatment under the law.<sup>8</sup>

The Ombudsman deals with general issues of governance. The literature examined for all countries except South Africa, provides no information regarding the relationship of the Ombudsman with the Intelligence Services.

In South Africa, the office of the Public Protector is established by legislation. The appointment of the Public Protector is done by the President after Parliament approves the nomination of the candidate.<sup>9</sup> The Public Protector investigates complaints from the public against all government departments.<sup>10</sup> The scope of the functions of the Public Protector in South Africa includes the Intelligence Services and Security Services. The Public Protector has received and inquired into complaints lodged by former members of the National Intelligence Agency against the Agency.<sup>11</sup> The office of the Inspector-General of Intelligence was not functional at the time of this inquiry. However, the enabling legislation for the office of the Inspector-General of Intelligence was amended in 2002 to limit the functions of the Inspector-General to monitoring and review of the operational activities of the Services.<sup>12</sup> In this regard, it can be argued that issues pertaining to the general administration which require an inquiry into the Intelligence Services, would still be referred to the Public Protector by an aggrieved person for an investigation, as the Public Protector deals with complaints against all government departments. With respect to improprieties relating to the operational activities of the Intelligence Services, the Inspector-General of Intelligence is the institution with the legal mandate to investigate. This is an illustration of how the functions of the Inspector-General of Intelligence are complemented by a monitoring and review institution other than a legislative oversight committee.

## 2.2 THE AUDITOR-GENERAL

The Auditor-General conducts investigations on financial management by government. In South Africa, the Auditor-General is entrusted with the responsibility to audit and report on accounts, financial statements and financial management of organs of state, and reports to government. To fulfill this task the Auditor-General carries out financial investigations, conducts inspections, and formulates opinions on the on-going financial affairs and status of the finances of the organs of state.<sup>13</sup> The President appoints the Auditor-General after the nomination of the candidate is approved by Parliament. The Auditor-General institution of South Africa represents best practice amongst its peers because of the way in which the institution conducts business. The following are listed as the special elements of the institution: Independence, internal quality control, external quality review, public dissemination of reports, applicability to other African countries and financial autonomy.<sup>14</sup>

In Canada,<sup>15</sup> the Auditor-General reports to Parliament and protects public interests. The Auditor-General's functions in Canada go beyond traditional financial auditing and include policy compliance audit, which includes whether management has complied with rules and regulations. Where traditional financial audit is included in reports, the role of the Auditor-General in this regard is to assure the legislature that government's financial statements correctly represent its financial position and results. Members of Parliament expect the office of the Auditor-General to produce value-for-money audit reports that allow them to hold ministers and public servants accountable for government operations. The office of the Auditor-General has expressed concerns about the independence of the office as a result of the practice that negotiations for the budget of the office are held with the National Treasury. The office feels that this is an uncomfortable arrangement as it may lead to unwarranted pressure, which may result in the withholding of funds, and thereby compromise the independence of the office.<sup>16</sup>

In the UK, the National Audit office scrutinizes public spending on behalf of Parliament. The office is totally independent of government and audits the accounts of all government departments and agencies as well as a wide range of other public bodies, and reports to the Parliament on the economy, efficiency and effectiveness with which government bodies have used public money. The National Audit office is headed by the Comptroller and Auditor-General, who is an officer of the House of Commons.<sup>17</sup> In the UK, an all-party committee of members of Parliament recommends the budget of the office of the Comptroller and Auditor-General. These members put the budgetary decision where it rightly belongs, namely with Parliament to which the Comptroller and Auditor-General is responsible.<sup>18</sup>

In Australia, the role of the Auditor-General is to provide Parliament with an independent audit function on the operations of government.<sup>19</sup> The Auditor-General audits financial statements and conducts performance audits. The Auditor-General also reports to the Ministers of State on matters that in his or her opinion are of importance to the Ministers. The report of the Auditor-General is made public, except sensitive information which may prejudice the security or international relations of the Commonwealth.<sup>20</sup>

In the US, the Inspector-General of Intelligence also audits the financial affairs of the Services in addition to the operational activities.<sup>21</sup> However, the Auditor-General or the Comptroller-General conducts financial and policy compliance audits of the executive including the Intelligence Services in South Africa, Australia, Canada, UK and New Zealand. In Australia and South Africa, the Auditor-General excludes from his or her report information which may prejudice the security of the country.<sup>22</sup> The relationship between the Services and the Auditor-General can be understood in the context that this office deals with financial issues rather than the operational intelligence activities of the Services, and concerns itself with compliance with policies and whether there was value for money in the operations. In this regard, the Auditor-General's office complements

the Inspector-General of Intelligence by performing a specialist financial review, whereas the Inspector-General of Intelligence performs operational intelligence reviews.

The next section deals with an international comparative analysis of the office of the Inspector-General of Intelligence. This section will also compare the office of the Inspector-General of Intelligence with the Auditor-General or Comptroller and Auditor-General and the Public Protector or Ombudsman to determine the extent to which the latter institutions complement the office of the Inspector-General of Intelligence.

### 3. THE INSPECTOR-GENERAL OF INTELLIGENCE

Most Western democracies such as Canada, Australia, the US, and the UK, are particularly concerned that their Intelligence Services operate within the legal framework, do not intrude excessively into the lives of citizens, and offer timely, relevant, and useful products to inform the policy makers. The Services are usually not subjected to the same level of scrutiny as other state agencies because of the secret nature of some of their activities which have to be protected from public disclosure. However, on the other hand, it is this secret nature that causes ambivalence in the public, hence there is a dire need to put the necessary checks and balances in place. Inspectors-General of Intelligence offices have been created as part of the oversight of intelligence.<sup>23</sup>

The offices are categorised as administrative and independent offices. The administrative offices are those that are not established by legislation and the independent offices are those established by legislation. The creation of the independent offices of the Inspectors-General of Intelligence is premised on inter alia the following reasons:<sup>24</sup>

- Concern for accountability by government administration;

- desire by Ministers and governments to avoid scandal;
- failure or need for support by other scrutiny structures; and
- building confidence of the public in the security services.

The Inspector-General of Intelligence's office is either part of the executive or the legislature, and serves as the ears and eyes of the heads of the Services in many democracies.

The next sub-sections deal with the appointment, functioning, and reporting mechanisms of the office of the Inspector-General of Intelligence in different countries. The following countries will be discussed: the Canada, Australia, New Zealand, UK, and US. South Africa will be discussed in the next chapter.

### 3.1 CANADA

In Canada, scandals that accompanied the Security Services of the Royal Canadian Mounted Police in 1979 gave rise to the establishment of a new Intelligence Service namely, the Canadian Security Intelligence Service (CSIS).<sup>25</sup> The Canadian Security Intelligence Service Act C-23 of 1984, established the office of the Inspector-General of Intelligence in 1984 to oversee the activities of the Canadian Security Intelligence Service (CSIS). The office of the Inspector-General of Intelligence commenced to operate in 1985, is independent of the CSIS and forms part of the Department of the Solicitor-General for administrative purposes. The Governor in Council, responsible to the Solicitor-General (the Minister responsible for CSIS), appoints the Inspector-General of Intelligence. The Inspector-General of Intelligence also serves as the internal auditor for CSIS. The Inspector-General of Intelligence has unlimited access to information in the possession of the CSIS.<sup>26</sup>

The functions of the Inspector-General of Intelligence are to:<sup>27</sup>

- Monitor compliance by the Service with its operational policies;
- review the operational activities of the Service; and
- submit certificates to the Minister on the operational performance of the Service.

The Solicitor-General may direct the Inspector-General of Intelligence to examine particular issues and operational activities. This function has been invoked periodically by the Solicitor-General acting on the advice of the deputy Solicitor-General. The Solicitor-General is required to submit to the Security Intelligence Review Committee, the annual report from the Director of CSIS, and a certificate issued by the Inspector-General of Intelligence on compliance with the legal framework. The Inspector-General of Intelligence also provides on-going advice or commentary in various forms to the Solicitor-General, the deputy Solicitor-General and CSIS, in relation to the compliance matters and the effectiveness of the control and accountability framework, including the directions the Solicitor-General provides to CSIS under the Canadian Security Intelligence Service Act C-23 of 1984.<sup>28</sup>

### 3.2 AUSTRALIA

The institution of the Inspector-General of Intelligence and Security was created by the Inspector-General of Intelligence and Security Act 101 of 1986. However, the office was established to function in February 1987 to oversee the activities of the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), the Department of Defence Organisation (DSO), the Defence Signals Directorate (DSD) and the Office of National Assessments (ONA).<sup>29</sup> The Governor-General on the recommendation of the Prime Minister appoints the Inspector-General of Intelligence. The leader of the opposition is required to be consulted by the Prime Minister prior to any nomination being put forward.<sup>30</sup> Employees from the Public Service staff the office of the Inspector-

General of Intelligence. The functions of the Inspector-General of Intelligence are inter alia to:<sup>31</sup>

- Inquire into any matter that relates to the compliance by ASIO with the laws of the Commonwealth and of States and Territories, and compliance by ASIO with directions or guidelines given to ASIO by the responsible Minister;
- inquire into the procedures of ASIO relating to redress of grievances of employees of ASIO;
- inquire into the procedures of a Service relating to redress of grievances;
- investigate complaints from Australian citizens or permanent residents on the activities of a Service; and
- inquire into whether the collection of intelligence by a Service, concerning an individual was justified.

In conducting an inquiry, the Inspector-General of Intelligence can require the attendance of witnesses, take sworn statements, copy and retain documents and demand entry into Service premises. The Inspector-General of Intelligence can also conduct preliminary inquiries in order to decide whether or not to commence a full inquiry. Inquiries are not conducted publicly, as most investigations are concerned with sensitive national security issues.<sup>32</sup>

### 3.3 NEW ZEALAND

The position of Inspector-General of Intelligence in New Zealand was established by the Inspector-General of Intelligence and Security Act, 47 of 1996. The Inspector-General is required to be a person who has been a judge of the High Court and is appointed by the Governor-General. The Inspector-General assists the Minister responsible for the New Zealand Security Intelligence Service and the Government in the oversight and review of the activities of the Intelligence Services.<sup>33</sup> The functions of the Inspector-General include:<sup>34</sup>

- Inquiring into any matter that relates to a Service's compliance with the laws of New Zealand;
- inquiring into complaints from New Zealand 'persons', from employees and former employees of a Service aggrieved by malpractices of the Service;
- inquiring into the propriety of particular activities of a Service; and
- reviewing the effectiveness and appropriateness of the procedures adopted by the Service to ensure compliance with the Inspector-General of Intelligence and Security Act, 47 of 1996.

The Inspector-General has unlimited access to information he or she needs for the performance of his or her functions, and reports annually to the Minister responsible for the New Zealand Security Service and the Prime Minister.<sup>35</sup>

#### 3.4 THE UNITED KINGDOM

The UK is an exception in that it does not have an Inspector-General of Intelligence, but has Commissioners appointed by the Prime Minister, that are mandated to review the exercise of the powers of the Minister responsible for a Service, in relation to warrants and, in the case of the Intelligence Services Commission, the authorisation of acts outside the British Islands. There are two legislated positions of Commissioner, one covering one Service, the Security Service, and the other covering the Government Communications Headquarters (GCHQ), but the same person holds the two positions.<sup>36</sup> Investigation of complaints about the Intelligence Service or GCHQ is done by a Tribunal. The decisions of the Commissioner and the Tribunal are not subject to appeal or liable to be questioned in any court. The Tribunal investigates the following:<sup>37</sup>

- Whether the Intelligence Service or, GCHQ as the case may be, has obtained or provided information or performed any other tasks in relation to the actions or intentions of the complainant; and

- if so, whether, applying the principles applied by a court on an application for judicial review, the Intelligence Service or GCHQ had reasonable grounds for doing what it did.

The Commissioner on the other hand investigates the following:<sup>38</sup>

- Whether a warrant was issued for entering into premises or interference with wireless telegraphy under section 5 of the Intelligence Services Act, c-23 of 1994; and
- whether an authorisation was given for interception of communications relating to acts outside the British Islands under section 7 of the Intelligence Services Act, c-23 of 1994.

Although there is no Inspector-General of Intelligence in the UK, the Tribunal and the Commissioner perform similar functions to the Inspector-General of Intelligence. In addition to these institutions, the Intelligence and Security Committee also reviews compliance by the Services and GCHQ with warrants and operational policies.<sup>39</sup> These functions are performed by the Inspector-General of Intelligence in other countries.

### 3.5 THE UNITED STATES OF AMERICA

Until the 1970s, the Inspectors-General in the US were not creatures of the legislature, but were administratively established. The trend towards statutory Inspectors-General was initiated in 1977 by the Department of Energy and the other state departments followed later.<sup>40</sup> There is more than one Inspector-General in the US, and all are appointed by the President with the advice and consent of the Senate.<sup>41</sup> These are: the Defense Inspector-General; the National Imagery and Mapping Agency (NIMA) Inspector-General; the Central Intelligence Agency (CIA) Inspector-General; the Federal Bureau of Investigations (FBI) Inspector-General; and the Treasury Inspector-General. The first three

Inspectors-General will be discussed in this section. The Defense Inspector-General oversees the following Services under its administration: the National Security Agency (NSA), Central Imagery Office (CIO), National Reconnaissance Office (NRO), and the Defense Intelligence Agency (DIA).<sup>42</sup>

### 3.5.1 THE INSPECTOR-GENERAL OF DEFENSE INTELLIGENCE AGENCY

The functions of the Inspector-General of DIA include the following:<sup>43</sup>

- Development of policy and procedures for audits, inspections, criminal investigations, inquiries, requests for assistance, complaints, and intelligence oversight.
- Serving as a primary focal point or interface with other Inspectors-General and comparable audit, inspection, and criminal investigative entities in the Department of Defense (DOD), the Department of State and the following Services: CIA, NSA, NRO, and other government organisations.
- Conducting performance and financial audits throughout DIA to assess the economy, efficiency, and effectiveness of DIA programs, functions, or operations.
- Conducting inspections of DIA operational elements and broad functional activities to assess mission accomplishment and compliance with laws and directives, and to promote economy, efficiency, and overall effectiveness.

### 3.5.2 THE INSPECTOR-GENERAL OF NATIONAL IMAGERY AND MAPPING AGENCY

The functions of the Inspector-General of NIMA include the following:<sup>44</sup>

- Serving as principal advisor to the Director on matters falling within the Inspector-General's purview and responsibilities.

- Conducting audits, evaluations, and reviews of NIMA operations and programs based on the President's Council on Integrity and Efficiency, General Accounting Office, DOD, and NIMA instructions, and procedures.
- Providing recommendations to the Director based upon the results of an Inspector-General audit, evaluations or investigations, in order to improve the efficiency and effectiveness of NIMA's processes, programs or business practices.
- Conducting administrative investigations of complaints received from internal and external sources, including the DOD Inspector-General Hotline, and special inquiries directed by the Director or other authority.

### 3.5.3 THE INSPECTOR-GENERAL OF THE CENTRAL INTELLIGENCE AGENCY

The functions of the Inspector-General of the CIA include the following:<sup>45</sup>

- Conduct, supervise and co-ordinate audits, inspections, and investigations relating to the programs and operations of the CIA, to ensure that such programs and operations are conducted efficiently and in accordance with applicable laws and regulations.
- Keep the Director fully and currently informed concerning violations of law and regulations, fraud, and other serious problems, abuses and deficiencies that may occur in the CIA programs and operations, and report the progress made in implementing corrective action.
- Take due regard of the protection of intelligence sources and methods in the preparation of the Inspector-General reports.

For purposes of the independence of the office, each Inspector-General of Intelligence in accordance with the US Inspector-General Act, 1101 of 1978, reports, and is under the supervision of the head of the establishment involved or, to the extent that such authority is delegated, the officer next in rank below

such head, but does not report to, or is subject to supervision by, any other officer of such establishment.<sup>46</sup>

#### 4. MEASURING THE OUTPUTS OF THE INSPECTOR-GENERAL OF INTELLIGENCE

The outputs of the Inspector-General of Intelligence can be divided into regular reports and reviews relating to specific incidents. The recommendations vary from incident to incident. The recommendations seek to ensure the activity does not recur, by advising on policy deficiencies and deficiencies in the implementation of programs. In Australia and the UK, the regular reporting is done annually. The Australian reports can be fairly lengthy and cover a wide range of topics<sup>47</sup>. The performance of the Australian Inspector-General of Intelligence for instance, is measured according to the following criteria:<sup>48</sup>

- The timeliness of inquiries;
- the acceptance of the conclusions and recommendations of inquiries;
- the acceptance by Ministers of the recommendations;
- the level of assurance the Inspector-General of Intelligence gives Ministers and the public that the Services are conducting their activities legally and with propriety;
- the extent to which there has been change within the agencies as a result of the activities of the office of the Inspector-General of Intelligence; and
- an analysis of statistical trends pertinent to the operations of the office.

The reports on the oversight of the British Intelligence Services are brief and consist of only a few pages. In the US the regular reports to Congress of various statutory Inspectors-General are bi-annual. In Canada, the regular output consists of certificates based on the annual report. The certificate indicates whether CSIS has done anything not authorised in terms of the law. The certificate and the Directors' report are then forwarded to the Minister. the

Solicitor-General and the Security Intelligence Review Committee. The special Inspector-General report covers a whole range of issues: Intelligence targeting, warrant operations, recruitment and handling of human sources, file information management, security screening programs, cooperation, gender issues and others. In the US, some of the reports of the Inspector-General were regarded as 'mega projects' by the Inspector-General. In the area of compliance, the Inspectors-General have found that the Services generally comply with the prescripts. Regarding complaints, the Inspectors-General have occasionally found that the complainants had a case.<sup>49</sup>

## 5. COMPARISON OF MONITORING AND REVIEW MECHANISMS

This chapter dealt with the institution of the Auditor-General or Comptroller and Auditor-General to determine its relationship with the office of the Inspector-General of Intelligence based on an international comparative analysis. The Public Protector or Ombudsman was discussed briefly, as according to the information gathered, only the Public Protector in South Africa complements the office of the Inspector-General of Intelligence. The roles of these institutions relate to the monitoring and review of the activities of the executive arm of government to ensure that there is no abuse of power and there is compliance with applicable laws by the executive and its employees. The Public Protector or Ombudsman and the Auditor-General or Comptroller and Auditor-General focus more on the functioning of the general administration of the executive, leaving the Inspector-General of Intelligence to deal with the activities of the Intelligence Services. Despite this delineation of responsibilities, there are fundamental principles, which underpin the establishment and success of all these institutions.

The main principles are the independence of the institution from those whom the institution oversees and mutual respect between the monitoring and review body and those monitored.

A good statutory framework plays an important part in creating independence of the institution. Those working in these institutions need to respect and support the independence of the office and should on the other hand be prepared to accept criticism by the oversight institution. A statutory regulation regarding the appointment of the incumbent may be undermined if the body responsible for the appointment neglects to fill the vacancy for the position in good time, because this has the effect of undermining the continuity of the office. The incumbent of an overseeing institution who adopts a negative attitude, risks not to be re-appointed or to vacate office earlier than the specified term of office, and to be replaced by someone expected to be more accommodating.<sup>50</sup>

The question that arises is whether it is the location of the office and lines of accountability that may blur independence of the institution or whether it may be personalities in such locations. It can be argued that each institution and its role have to be scrutinised and judged on merit. For the Inspector-General of Intelligence's office, the intention of the legislature in democracies is to have an institution which is not far removed from the executive even though the institution is created by the legislature. An institution which looks after the interest of the executive, which will be able to ensure that the Services act in compliance with the applicable laws, promote human rights, and are held accountable for their actions. The office should be able to advise the executive on shortcomings in legislation and policies applicable to the Services. The findings on investigations should also provide for solutions to problems where they arise. The institution should also facilitate reporting by the Services to the legislature by elaborating on the good and bad aspects of the functioning of the Services.

The Inspector-General of Intelligence should assist the Services he or she monitors to understand the role of the institution, the obligation of the institution towards the public, and the obligations of the Services towards the institution.

In Canada, independence means that the Inspector-General of Intelligence's assessment of the Director's reports to the Minister, and the opinions expressed in the reports of reviews conducted by the office of the Inspector-General of Intelligence, must be arrived at a position of complete independence.<sup>51</sup> The UK is an exception to New Zealand, Canada, the US and Australia as there is no Inspector-General of Intelligence.

The UK has a Commissioner and a Tribunal to monitor and review the operational activities of the Intelligence Services.<sup>52</sup> As discussed previously, in Canada and Australia, an Auditor-General or the Comptroller and Auditor-General in the UK reviews the financial activities of the government departments and the Services.

In the US, the Inspector-General also deals with financial audits of the Services,<sup>53</sup> and he or she reports to the head of the Services that are monitored. In New Zealand, although the Inspector-General is a creature of statute, the Inspector-General reports to each Minister responsible for an intelligence and security agency he or she monitors and to the Prime Minister once a year.<sup>54</sup> In Canada, the Inspector-General of Intelligence reports to the Minister responsible for CSIS for monitoring the activities of the Service, who submits these reports to the Security Intelligence Review Committee.<sup>55</sup> In Australia, the Inspector-General of Intelligence reports to the Minister responsible for a Service under investigation and also to the Prime Minister, if the investigation was on communication or collection of intelligence. The Inspector-General of Intelligence consults with the head of a Service under investigation for comments before the final report is issued.<sup>56</sup> The relationship between the Inspectors-General of Intelligence with the legislatures of their countries varies. The only direct and formal relationship where an Inspector-General of Intelligence is required to appear before the legislature occurs in the US congressional system for statutory Inspectors-General, including the Inspector-General of the CIA. In general, the

legislatures tend to regard the Inspectors-General as useful mechanisms, which can quite often assist them in their roles.<sup>57</sup>

In all countries discussed, the Inspector-General of Intelligence has unlimited access to information required for the performance of his or her functions. The staff of the Services are obliged to cooperate with the Inspectors-General of Intelligence.

Although some laws are silent on the procedure of staffing the Inspectors-General offices, in Australia the staff of the Inspector-General of Intelligence comes from the public service.<sup>58</sup> In New Zealand, the Inspector-General appoints staff on conditions determined by him or her in consultation with the Prime Minister's office.<sup>59</sup> However, the legislation of the US and Canada are silent on the appointment of staff of the Inspector-General's office.

In South Africa, the Public Protector complements the office of the Inspector-General of Intelligence by dealing with issues of general malpractice and corruption. The Auditor-General or the Comptroller and Auditor-General complements the Inspector-General of Intelligence by conducting financial audits. The Inspectors-General of Intelligence in all the countries discussed are responsible in the main for monitoring compliance by the Services with the policies and applicable laws of the Services. Although as stated, there is no Inspector-General of Intelligence in the UK, the role of the equivalent institutions is to investigate abuses and to ensure that the Services and GCHQ execute their mandates within the enabling laws.

The comparison discussed in this section is illustrated in the following tables:

Table 1: Appointment of the Inspector-General

Inspector-General	USA	CANADA	AUSTRALIA	UK	NEW ZEALAND
Appointed by head of state		√	√	√	√
Appointed by head of Service	√				
Creature of statute	√	√	√	√	√
Appointment of staff in legislation			√		√

Table 2: Roles and functions of the Inspector-General

Inspector-General	USA	CANADA	AUSTRALIA	UK	NEW ZEALAND
Promotes economy, effectiveness and efficiency		√	√		√
Reviews compliance with executive directives and operational policies				√	√
Ensures compliance with warrant authorizations	√			√	
Reviews operational activities				√	
Reviews pending legislation and regulations		√			
Has access to all records and information of the Services	√	√	√	√	√
Initiates investigations on own initiative				√	
Investigates complaints about the Services	√	√	√		√
Ensures compliance with regulations on release of records and information		√			
Overseeing finances	√			√	√
Controls staff provided for in law			√		

Table 3: Reporting on activities by the Inspector-General

Inspector-General	USA	CANADA	AUSTRALIA	UK	NEW ZEALAND
Reports to the Minister		√	√		√
Reports regularly to legislature	√				
Reports regularly to the Services head (s)	√		√		
<b>AUDITOR-GENERAL</b>					
Oversees finances of the Services		√	√	√	√
Reports to legislature	√	√	√	√	√

## 6. CONCLUSION

This chapter dealt briefly with the institutions of the Public Protector or Ombudsman, and in detail with the Auditor-General or Comptroller and Auditor-General and the Inspector-General of Intelligence on the basis of an international comparative analysis. The Public Protector in South Africa complements the office of the Inspector-General. The common institutions of monitoring and review of the activities of the executive in democracies are the Public Protector or Ombudsman, the Auditor-General or Comptroller and Auditor-General, the Inspector-General of Intelligence and the legislative committees. These institutions are creatures of statute and their reporting mechanisms vary from country to country. However, maintenance of their independence is a prominent feature of these institutions, and some complement each other in the monitoring and review of the executive.

Some of the activities of the Intelligence Services may violate the rights of the public and care has to be taken in executing these functions. Judicial approval is required for certain clandestine intelligence collection methods such as

interception of communications. In the case of interception of communications, monitoring and review of the activities of the Services is required to ensure inter alia, that the Services adhere to the judicial approval granted for such clandestine collection of information.

The Ombudsman is responsible for overseeing the general administration and inquires into complaints lodged by the public and aggrieved government employees against government. The Auditor-General is responsible for overseeing the financial management of the executive including some Intelligence Services in the course of their day-to-day operations. The Auditor-General ensures that the money appropriated to the Services is used for the purpose it is appropriated for. The legislative committees on the other hand are responsible for overseeing the general functioning of the executive. There is no evidence gathered to suggest that the Ombudsman reviews the activities of the Intelligence Services except in South Africa where the office investigates complaints relating to the general malpractices and corruption by the executive including the Intelligence Services. The Auditor-General or the Comptroller and Auditor-General oversees the activities of all government departments in the countries discussed including the Intelligence Services, except in the US. The Inspector-General of Intelligence on the other hand is responsible for monitoring the operational activities of the Intelligence Services.

It is necessary that a monitoring and review institution functions independently from the structures overseen, and must be treated with respect by the employees of the Intelligence Services. To promote mutual respect, it is the duty of staff in the monitoring and review institution to provide the institution with any such information that it requires. Mutual respect and independence of monitoring and review institutions are important for purposes of effectiveness, confidence and authority. These are intimately connected, and predicated on one another. Where confidence is lacking, the public will see no point in lodging complaints.<sup>50</sup> The standards and principles used in the performance of the Inspector-General of

Intelligence functions must have been adopted autonomously for the office to function independently. In Canada, this means that the Inspector-General of Intelligence will conduct his or her work with a full understanding of the importance of the statutory mandate given to CSIS, and with particular regard for the Director's role in the "control and management" of the Service. In doing so, the Inspector-General of Intelligence will respect CSIS knowledge and experience of operational realities.<sup>61</sup>

The office of the Inspector-General of Intelligence or the Commissioner or Tribunal in the UK, and the office of the Auditor-General or the Comptroller-General complement each other in the review of the activities of the Services except in the US where the Inspector-General audits the finances of the Services as well. Because of the nature of the service they render, it is envisaged that each one of these offices offer expert review services to ensure that the services comply with the relevant statutory provisions governing their financial and operational activities. Where in the US the Inspector-General also reviews the financial activities of the Services, it is expected that such an Inspector-General would have the necessary expertise to review both the financial and operational activities of the Services.

Chapter 3 deals with the office of the Inspector-General of Intelligence from a South African perspective. It examines the legal framework, media comments and other relevant material on the office of the Inspector-General of Intelligence and its functioning.

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## CHAPTER 3

# THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE IN SOUTH AFRICA: ASSESMENT AND INTERNATIONAL COMPARISON

### 1. INTRODUCTION

The chapter deals with the office of the Inspector-General of Intelligence of South Africa. In discussing this office, the chapter analyses the relevant legislation, parliamentary debates, newspaper comments and other relevant material to outline the evolution of intelligence monitoring and review in South Africa by the Inspector-General of Intelligence. A brief international comparative analysis will be made to illustrate the criteria for the success of the office of the Inspector-General based on the analysis done in chapter 2. As discussed in chapter 2, the Public Protector and the Auditor-General in South Africa complement the office of the Inspector-General. In this regard, these two institutions will not be re-discussed in this chapter.

South Africa, like other democracies, such as Canada, the US, New Zealand and Australia, has oversight bodies that oversee the activities of the executive including the Intelligence Services. The establishment of the office of the Inspector-General of Intelligence in South Africa was informed by the White Paper on Intelligence of 1994<sup>1</sup>. It was agreed by the Transitional Executive Council in 1994 that a number of control measures to regulate the activities of the civilian intelligence community should be implemented. The control mechanisms included inter alia the following principles and practical measures<sup>2</sup>:

- An independent Inspector-General of Intelligence, one each for the two civilian Intelligence Services;
- ministerial accountability;

- a clearly defined legal mandate;
- subordination to the rule of law; and
- allegiance to the Constitution.

These principles were given effect to in the trilogy of intelligence legislation passed by Parliament in 1994 namely, the Intelligence Services Act, 38 of 1994, the National Strategic Intelligence Act, 39 of 1994, and the Intelligence Services Control Act, 40 of 1994. In passing the latter Act, Parliament approved the establishment of the office of the Inspector-General of Intelligence who would be appointed by a majority of 75 percent<sup>3</sup> of the members of the National Assembly.

However, there were reservations regarding whether this percentage would provide a guarantee that the candidate would be a competent person who will uphold the provisions of the Constitution. Pressure was put on the President to appoint someone entirely acceptable to the majority party. It was argued that a candidate should recognize how intelligence structures operate and that the candidate should be a person who will recognize the capacity of the intelligence forces to commit harm and danger not only to the community, but also to their own members. A preference was expressed for someone who is fearless, courageous and strong.<sup>4</sup>

## 2. THE EVOLUTION OF THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE

The Intelligence Services Control Act, 40 of 1994, provides for the appointment of Inspectors-General of Intelligence who would monitor and review the activities of the Intelligence Services including the intelligence divisions of the SANDF and the SAPS, respectively. These persons would have unhindered access to classified information. The Inspector-General is appointed by the President after a nomination by the JSCI and an approval of the candidate by a resolution supported by the National Assembly.<sup>5</sup> The intention of the legislature in

establishing the office of the Inspector-General was to have an Inspector-General of Intelligence who is appointed in the same way as the Public Protector.<sup>6</sup> An Inspector-General of Intelligence has to be a South African citizen, and is governed by security requirements that apply to members of the Service he or she monitors. These security measures include obtaining a security clearance certificate and observing the confidentiality requirement of that Service. The conditions of service of the Inspector-General of Intelligence are determined by the President with the concurrence of the JSCI. Only the President can remove the Inspector-General of Intelligence from office on inter alia, the grounds of incapacity, withdrawal of security clearance, poor performance or incompetence.<sup>7</sup>

When Parliament passed the enabling legislation for the office of the Inspector-General of Intelligence in 1994, the functions of the Inspector-General were limited to the following:<sup>8</sup>

- Monitoring compliance by the Services with the Constitution, applicable laws and policies;
- reviewing the activities of the Services;
- performing all functions designated to him or her by the President or Minister concerned;
- receiving and investigating complaints from members of the public and the Services on alleged maladministration, abuse of power and transgressions of the laws and policies;
- submitting certificates to the Minister responsible for a Service; and
- submitting reports to the JSCI on investigations referred to him or her by this Committee.

### 3. IMPLEMENTATION OF THE LEGAL FRAMEWORK GOVERNING THE OFFICE OF THE INSPECTOR - GENERAL OF INTELLIGENCE

Nominations for the first Inspector-General of Intelligence were sought in October 1995 by the JSCI. The chairperson of the Committee stated that “the Inspector-General’s task would be to ensure that the intelligence services operated within the law, and to scrutinize them more closely than we are able to scrutinize them. The Inspector-General would be a South African and a very special person would have access to all information in the Services”.<sup>9</sup> The chairperson further expressed the view that the person would “be a public protector and an ombudsman who has to be respected by both the intelligence services and the public”.<sup>10</sup>

The Constitution of the Republic of South Africa Act, Act 108 of 1996, provides for civilian monitoring of the activities of the intelligence services including the intelligence division of the SAPS and the SANDF respectively, by an inspector appointed by the President as head of the executive by two thirds of the members of the National Assembly. This provision of the Constitution repealed the 75 percent majority required for the appointment of the Inspector-General of Intelligence in terms of the enabling Act passed by Parliament in 1994.<sup>11</sup>

Advocate Lewis Skweyiya was appointed as the first Inspector-General of Intelligence by an overwhelming two thirds majority in March 1996.<sup>12</sup> By December 1996, he could not take office because of a dispute over how much he was to be paid. He resigned from his post in November 1996 as a result of delays and difficulties experienced in the negotiations around the terms of his contract. The office of the Inspector-General of Intelligence was not functional when he resigned from office.<sup>13</sup>

Although Advocate Skweyiya denied that his resignation was over his remuneration package, subsequent to his resignation, the Business Day reported

on 6 June 1997, that it was regrettable that he resigned from office over a remuneration dispute. The article emphasized that in such positions, expertise must be paired with integrity, experience, public standing and independence and that a nomination to this post should be seen as an honour to the candidate rather than a chance to fleece the taxpayer.<sup>14</sup>

The National Intelligence Agency was subsequently rocked by scandals such as the theft of minibuses and computers from its headquarters in 1999. The number of misconduct cases were excessive which gave an impression of lack of effective personnel management and enforcement of rules, and a surveillance camera placed by the National Intelligence Agency was discovered in front of the premises of the German Embassy.<sup>15</sup> These scandals were linked to the absence of an Inspector-General of Intelligence in office. In this regard, appeals were made by the National Party to the President and the Minister of Justice who was responsible for the Intelligence Services, to appoint an Inspector-General of Intelligence following the resignation of the first incumbent.<sup>16</sup> The Democratic Party expressed the view that the discovery of the surveillance cameras in front of the German Embassy was an illustration that there was a need for the appointment of an Inspector-General of Intelligence.<sup>17</sup>

In 1999, Parliament adopted the Intelligence Services Control Amendment Act, 42 of 1999, which provided for the following:

- A two-thirds majority for the appointment of the Inspector-General of Intelligence in keeping with the provisions of the Constitution.
- The President to appoint one or four Inspector(s)-General of Intelligence for all the Services.
- The Inspector-General of Intelligence to have access to intelligence in the possession of members of the Services and members of the public.

- The Inspector-General of Intelligence to consult with the President and the relevant Minister before publishing findings which may have an impact on national security.
- A fine of five years imprisonment for persons who deny the Inspector-General of Intelligence access to information.
- The remuneration of the Inspector-General of Intelligence to be the same as that of the Public Protector.<sup>18</sup>

In 2000, the President appointed Dr F Randera as the second Inspector-General of Intelligence with effect from 1 May 2000, four years after Advocate Skweyiya resigned from office.<sup>19</sup> Randera saw his function as being to ensure that the Intelligence Services comply with spirit and letter of the law and do not become ciphers of the governing party, even though and perhaps because the ANC occupies an apparently unassailable position, having secured a mandate to rule from the electorate. He recognised that to achieve that objective he needed to be impartial and independent in his post, one which, though provided for in the Intelligence Services Act, has not been fully occupied before.<sup>20</sup>

The Democratic Party did not vote for the appointment of Randera in Parliament, and rather adopted a skeptical, wait-and-see position. "Randera still has to prove that he is not a party loyalist first and foremost, in exercising his supervisory role over clandestine operations of government sleuths."<sup>21</sup>

In January 2002, Randera resigned from office for personal reasons.<sup>22</sup> During his appointment he established the office of the Inspector-General of Intelligence with integrity, independence and impartiality and established a solid foundation for the important institution. He said that during his term in office he had the full cooperation of all Services and had worked in an atmosphere of mutual trust and respect with Intelligence Minister Lindiwe Sisulu and former minister, Joe Nhlanhla.<sup>23</sup>

#### 4. REVISION OF THE LEGAL FRAMEWORK RELATING TO THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE

While in office, Randerer assisted the Ministry for Intelligence Services and the JSCI to streamline the functions and lines of accountability of the Inspector-General. In 2002, Parliament adopted the Intelligence Services Control Amendment Act, 66 of 2002 which regulated the functioning of the office of the Inspector-General of Intelligence as follows, namely the Inspector-General of Intelligence:

- Will review the intelligence and counter-intelligence activities of the Services;
- will monitor compliance by the Services with operational policies, relevant laws and the Constitution;
- notify the heads of the Services prior to conducting an investigation within the premises of the Services;
- will obtain a search warrant before he or she conducts an investigation in premises not belonging to the Services;
- will account to the JSCI for the overall functioning of his or her office; and
- will report to the committee at least once a year.
- will report to the President, relevant Minister or the JSCI when tasked by these offices.<sup>24</sup>

In addition to the above-mentioned functions, the Act provides for the appointment of one Inspector-General of Intelligence who will be responsible for all the Services; the budget of the Inspector-General of Intelligence will be part of the budget of the National Intelligence Agency; and the Minister for Intelligence Services will appoint staff to the office of the Inspector-General of Intelligence.<sup>25</sup>

When introducing this Bill in Parliament on 31 October 2002, the Minister for Intelligence Services said that the principal Act proved to be inadequate with

regard to the functioning of the office of the Inspector-General of Intelligence in that there were no clear lines of accountability for the incumbent and no clear guidelines for his functions. Therefore, the amendments were made to ensure that all those matters that were vague in the initial legislation would now be clearly spelt out in the Intelligence Services Control Amendment Act, 66 of 2000.<sup>26</sup>

## 5. AN ANALYSIS OF THE FUNCTIONING OF THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE SINCE 1995

The resignation of the Inspector-General, Randerera did not bring the establishment of the office of the Inspector-General of Intelligence to a halt. The Minister for Intelligence Services, Lindiwe Sisulu appointed a chief operating officer in 2002, one of the key posts created by Randerera.<sup>27</sup> The organogram created by Randerera and approved by both the JSCI and the Minister for Intelligence Services, makes provision for fifteen posts in the office of the Inspector-General of Intelligence. The key functions are the following: day-to-day administration whose head is a chief operations officer, investigations, research and analysis, and legal services. The post of research and analysis is already filled<sup>28</sup>. The rest of the post are not yet occupied, however a process is underway to search for appropriate employees.<sup>29</sup> As indicated above, the staff of the Inspector-General of Intelligence will be appointed by the Minister for Intelligence Services. The staff may be appointed from within the Services or from outside.

Since the creation of the office of the Inspector-General in 1995, it is evident that the office has not functioned to its fullest capacity. Although Randerera indicated that he had contributed to the functioning of democracy by establishing the office of the Inspector-General of Intelligence, there was no public report issued either by the Minister for Intelligence Services nor the JSCI on the activities of the Inspector-General of Intelligence when he was in office.<sup>30</sup> It can therefore be inferred that no investigations relating to the operational activities of the Services

were done. It can also be deduced that during his term in office there had not been any improprieties or that if there were, they did not come to the attention of the Inspector-General of Intelligence or he did not get an opportunity to investigate them. This vacuum created by the absence of a long serving incumbent creates uncertainty with regards to the compliance by the Services with the laws governing their intelligence mandate, as there was no certificate or voucher to confirm adherence by the Services to their mandates as contemplated in the Intelligence Services Control Act, 40 of 1994.<sup>31</sup>

## 5.1 CRITERIA TO ASSESS THE SUCCESSFUL FUNCTIONING OF THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE

In terms of the enabling legislation, the Inspector-General of Intelligence in South Africa must serve impartially and independently and perform his or her functions in good faith and without fear, favour, bias or prejudice. Issues relating to the independence of the office will be examined in the context of the analysis of Oosting,<sup>32</sup> as discussed in the previous chapter, namely institutional, functional, and personal independence.

The success of the office of the Inspector-General of Intelligence is based on the independence of the office, the integrity of the incumbent and the professionalism displayed by the office in conducting its work. Independence of the office may entail a number of factors, namely whether the office is physically located within the premises of those being monitored; the ability of the incumbent to appoint his or her own staff; the ability of the incumbent to determine and control his or her own budget; and the ability of the incumbent to make findings on a matter without interference from those being monitored. Does the South African institution of the Inspector-General of Intelligence meet these requirements? As stipulated earlier, the amendments passed by the legislature in 2002 to the enabling Act dealt with some of these issues. Some of the issues that are pertinent to the success of an independent review institution are discussed below. An international comparative

analysis will be made where relevant to determine whether the office of the Inspector-General in South Africa compares with international practice. Although international practice serve as a benchmark for the South African office of the Inspector-General, some of the international aspects may be irrelevant to South Africa. This section will address those issues as well from a brief international perspective. As illustrated in chapter 2, the success of the office of the Inspector-General like the other review institutions is measured against inter alia, the independence of the office from those that the office is monitoring; the level of integrity of the incumbent; the quality of the staff appointed to assist the incumbent; the availability of funds; clear lines of accountability; access to information; and a clearly defined mandate.

#### 5.1.1 THE CRITERION OF INSTITUTIONAL INDEPENDENCE

This refers to an institution which is not part of any one of the three spheres of government namely, the Judiciary, Executive and Legislature.

##### (a) The appointment of the Inspector-General of Intelligence

As stated in the previous chapter, in the US, the Inspectors-General are appointed by the head of a Service. In Canada, Australia, New Zealand and the UK where they have equivalent monitoring institutions, the Inspector-General is appointed by the head of state. In all countries that inform the international comparative analysis in Chapter 3, the Inspector-General or the equivalent offices in the UK are creatures of statute. In South Africa, although the institution is not one of the independent institutions supporting democracy listed in chapter 7 of the Constitution, the Inspector-General of Intelligence is appointed by the President and the institution is a creature of statute and has to function impartially, independently and without fear of bias.

(b) Lines of accountability for the Inspector-General

In the US the CIA Inspector-General reports to the head of the CIA. In Australia the Inspector-General reports regularly to the head of the Service being monitored and to the minister responsible for that Service, and in New Zealand and Canada the Inspector-General reports to the minister responsible for the Service being monitored.

In South Africa, reporting by the Inspector-General of Intelligence is described below:

(i) Political accountability

This relates to the Inspector-General of Intelligence's accountability to the legislature through the JSCI. The Inspector-General of Intelligence reports annually to the JSCI on the overall functioning of the office. The reports are produced on the basis of the investigations and inquiries held, and the findings are independent of the minister responsible for a Service and the head of a Service. The Executive becomes involved to the extent to which the contents may compromise national security instead of influencing the Inspector-General to withhold information pertaining to wrongdoing by the Services.

(ii) Functional accountability

Where the Inspector-General of Intelligence receives a tasking from the JSCI, the Minister or the President, he or she reports directly to these entities. Further, the JSCI can request the Inspector-General to appear before the committee to answer any aspects of a report sent to the committee.

(iii) Administrative accountability

The Inspector-General of Intelligence reports to the Minister for Intelligence Services and the Director-General of the NIA for the personnel and general expenditure.

5.1.2 THE CRITERION OF FUNCTIONAL INDEPENDENCE

This refers to the independence of the institution from any outside pressure. This institution must be able to interpret its own competence, use its powers of investigation and formulate its own decisions. The budget must be adequate to support operational activities and the appointment of staff, and the institution should have the ability to protect members of the public.

(a) The budget of the office of the Inspector-General

In the US, the independent Inspectors-General (those appointed by statute) have their own budget. It is argued in the US that the ability of the Inspectors-General to do their work requires an adequate budget. The CIA for instance has a separate budget account for the office of the Inspector-General. This separation prevents the CIA officials from reducing funding available to the Inspector-General after their allocations have been specified in law. In general, Congress has protected the budgets of the Inspector-General.<sup>33</sup> In countries like New Zealand and Australia, no information was available with respect to budgetary arrangements for the office of the Inspector-General except that the Inspector-General in New Zealand appoints staff on such conditions as he or she may determine in consultation with the head of the Prime Minister's office and Cabinet.<sup>34</sup> The concurrence of Cabinet and the head of the office of the Prime Minister may be viewed as a control measure over personnel expenditure for staff in the office of the Inspector-General, and consequently the inference can

be drawn that the Inspector-General of Intelligence in New Zealand does not have full control over the budget.

In South Africa, the budget of the Inspector-General is under the administration of the Director-General of the NIA, one of the overseen Agencies. The question needs to be answered as to whether this can have an impact on the independence of the Inspector-General of Intelligence. The process of determining the budget of the Inspector-General of Intelligence involves submission of the activities and needs of the office to the Director-General of the National Intelligence Agency, and the expenditure is governed by the Public Finance Management Act, 1 of 1999. The Inspector-General of Intelligence is expected to submit monthly reports to the Director-General of the NIA on the expenditure of the office and these reports are consolidated into the accounts of the NIA for a report to the National Treasury.<sup>35</sup> Ideally, the Director-General does not interfere with the activities of the office and cannot withhold funds unless there is evidence of abuse of such funds, which is regulated practice in terms of the Public Finance Management Act, 1999.<sup>36</sup>

Although the information from a discussion with the Chief Financial Officer of the NIA is that the Director-General does not interfere in the budgetary processes and expenditure on the budget of the Inspector-General, there appears to be a bias of control of certain activities of the Inspector-General towards the NIA.<sup>37</sup> Although the administration of the funds by one of the Services monitored by the office may create the perception that the Inspector-General is under the control of the Director-General of the NIA as the Inspector-General is expected to report to him or her, it can be argued that the Inspector-General of South Africa is functionally independent from the Executive as this perception has never been put to a test.

(b) The appointment of staff to the office of the Inspector-General of Intelligence

As mentioned in the previous chapter, in Australia, the staff of the Inspector-General of Intelligence and Security is appointed under the Public Service Act, 1994. The Inspector-General is the head of the statutory agency where the staff resides while appointed in his or her office. The Australian legislation is silent on who appoints the staff.<sup>38</sup> In New Zealand, the staff is appointed by the Inspector-General of Intelligence and Security.<sup>39</sup> In Canada, some of the staff of the Inspector-General's office have often been in the Inspector-General's office for a long period and have developed expertise because of this exposure. In the US, some members of Congress have expressed concern that the practice of using agency staff on rotation basis compromises the independence of the office of the Inspector-General.<sup>40</sup>

In South Africa, the Ministers of Safety and Security and Defence can respectively second personnel to the office of the Inspector-General of Intelligence.<sup>41</sup> The Minister for Intelligence Services on the other hand has the authority to appoint staff to the office of the Inspector-General.<sup>42</sup> In practice the staff of the office of the Inspector-General of Intelligence will be staff of the Services monitored by the Inspector-General of Intelligence. This practice is followed in the US and Canada and although there is criticism regarding the independence of this staff, the practice seems to be functioning well in those countries. It is difficult to say if the system is problematic in South Africa as the office has not functioned to its fullest capacity. It can be argued that a combination of secondment and appointment of staff by the Ministers responsible for the Services will create a balance in terms of the representation of the interests of the various stakeholder Services. Further, it can be argued that when staff is appointed from the Services being monitored, the Inspector-General's office will benefit from the support from these employees both in terms of expertise and insider knowledge of where the problems are in their respective organisations.

(c) Access to information

It can be argued that the success of the office of the Inspector-General of Intelligence would be hampered if the incumbent or staff do not have access to information they need to perform their duties. The degree of access in the US is encapsulated in statute. In Australia, the enabling legislation empowers the Inspector-General to obtain information from such employees or non-employees relevant to the investigation, and to make inquiries as he or she thinks.<sup>43</sup> In South Africa, the Inspector-General of Intelligence has unlimited access to information in the possession of the Services and in the possession of non-members of the Services. It is a criminal offence to refuse access to information to the Inspector-General of Intelligence.<sup>44</sup>

The Inspector General of Intelligence's reports and certificates on compliance by the Services with the relevant laws are sent to the JSCI through the Minister responsible for a Service. However, the JSCI can request the Inspector-General to appear before the Committee to clarify certain matters pertaining to his or her legal mandate.<sup>45</sup> Before reports are published, the Inspector-General of Intelligence is expected to consult with the relevant Minister and the President to ensure that the reports do not contain information which may be harmful to national security.<sup>46</sup> In this respect it can be argued that the Inspector-General of Intelligence functions independently. In fact, the enabling Act provides that the Inspector-General must function independently, impartially and without fear, favour or prejudice. However, as it has been mentioned in previous sections, the office has never functioned consistently since its legal establishment in 1994, so it is difficult to formulate a firm view on whether the office has lived to the expectations of the legislature.

## 5.2 THE GENERAL FUNCTIONING OF THE OFFICE OF THE INSPECTOR-GENERAL SINCE 1996

The office of the Inspector-General of Intelligence in South Africa has not functioned to its full capacity because of the change in incumbents since the legislative establishment of the office. Two incumbents left the office without public record of the execution of their mandate stipulated by law. This premature departure of the two incumbents led to the amendment of legislation to correct some issues relating to the remuneration of the Inspector-General of Intelligence; the mandate of the Inspector-General of Intelligence; and the lines of accountability of the incumbent. A new Inspector-General of Intelligence was appointed in January 2004. Although there was no immediate incumbent after the resignation of Randerer in 2002, a minimal staff component was appointed by the Minister for Intelligence Services. This staff component continued to establish the office by putting systems in place and ensuring the appointment of more personnel. Because of the lack of continuous functioning of the office, it is difficult to assess if the office is executing the mandate given to it by the Parliament. A clear picture of the extent of the functioning of the office will be determined when the current Inspector-General of Intelligence produces a report in 2005.

## 6. CONCLUSION

The institution of the Inspector-General of Intelligence of South Africa has been established in line with the offices of Inspectors-General internationally, namely Canada, the US, New Zealand and Australia. Although there may be differences in the legislative provisions regarding lines of accountability, appointment of staff, and budgeting requirements, the principle of independence which the institutions should strive towards are the same.

It is important to emphasise that since the enabling legislation was enacted by Parliament in 2004, both Parliament and the Executive have shown commitment

to have the office of the Inspector-General established and to function to its full capacity. However, the first Inspector-General of Intelligence had to resign after less than a year in office because of differences in reaching finality regarding his remuneration. Although he denies this, the perception is that Parliament and the Executive failed to determine the conditions of service of the incumbent before his appointment and also failed to finalise these when he assumed office. These could be regarded as teething problems of an institution in the making. The departure of the first Inspector-General saw Parliament and the Executive determine the conditions of service of the incumbent before the appointment of the next Inspector-General. During the tenure of office of the second Inspector-General, it was reported by the incumbent that he had a cordial relationship with his political principals. However, there is speculation from the interviews included in the next chapter that it appeared there were problems of access to information in the Services and a lack of understanding by the incumbent of the role of the office.

It is true that activities of the services all over the world are obscure, including the activities of their employees. In this regard it is difficult for an outsider to the services to know the truth about professional relationships of key players and the activities of these services. In this regard, it would be fair to accept Randera's statement that he helped to support democracy and that the working environment was conducive for him to execute his mandate. No media speculation to the contrary occurred and therefore it would be prudent to see how the current incumbent will execute his mandate. Comparatively, the South African office of Inspector-General is in line with its international counterparts with regard to the pillars required of a review and monitoring institution.

## References

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<sup>1</sup> RSA; White Paper on Intelligence, Government Printers, Pretoria, 1994, p 7

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<sup>2</sup> Ibid

<sup>3</sup> RSA: Intelligence Services Control Act, 40 of 1994, Government Printers, Pretoria, section 7

<sup>4</sup> RSA: Debates of the National Assembly, Hansard, first session, 1994, Cape Town, columns 4150-4152

<sup>5</sup> RSA: Intelligence Services Control Act, 40 of 1994, op cit, section 7

<sup>6</sup> RSA: Debates of the National Assembly, op cit, columns 4150-4152

<sup>7</sup> RSA: Intelligence Services Control Amendment Act, 66 of 2002, section 7

<sup>8</sup> RSA: Intelligence Services Control Act, 40 of 1994, op cit, section 7

<sup>9</sup> Pretoria News, (Pretoria), 4 October 1995.

<sup>10</sup> Sowetan, (Johannesburg), 6 December 1995.

<sup>11</sup> RSA: Constitution of the Republic of South Africa Act, 101 of 1996, section 210

<sup>12</sup> The Citizen, (Johannesburg), 20 March 1996.

<sup>13</sup> Sunday Times, (Johannesburg), 29 December 1996

<sup>14</sup> Business Day, (Johannesburg), 6 June 1997

<sup>15</sup> The Star, (Johannesburg), 23 November 1999; The Citizen, op cit, 22 September 1999; and The Cape Times, (Cape Town), 10 October 1997

<sup>16</sup> Rapport, (Pretoria), 11 January 1998, and The Natal Witness, (Durban) 12 January 1998.

<sup>17</sup> The Star, op cit

<sup>18</sup> RSA: Intelligence Services Control Amendment Act, 42 of 1999, section 7

<sup>19</sup> Financial Mail, (Johannesburg), 28 April 2000

<sup>20</sup> Ibid

<sup>21</sup> Ibid

<sup>22</sup> Business Day, (Pretoria), 29 January 2002

<sup>23</sup> SAPA, (Johannesburg), 27 January 2002.

<sup>24</sup> RSA: Intelligence Services Control Amendment Act, 66 of 2002, section 7

<sup>25</sup> Ibid

<sup>26</sup> RSA: Speech of the Minister for Intelligence Services in the National Assembly, Ministry for Intelligence Services, Cape Town, 31 October 2002.

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- <sup>29</sup> Ngcakani, Z Discussion, July 2004, Pretoria
- <sup>30</sup> RSA: Annual Report of the Joint Standing Committee on Intelligence, Parliament, op cit , 1 April 2001-31 March 2002, unnumbered
- <sup>31</sup> RSA: Intelligence Services Control Act, Act 40 of 1994, op cit, section 7
- <sup>32</sup> Oosting M, "Protecting the Integrity and Independence of the Ombudsman Institution: The Global Perspective" The VIIIth International Ombudsman Institute Conference, Durban, South Africa, 2000, p 21
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- <sup>34</sup> New Zealand: Inspector-General of Intelligence and Security Act, 47 of 1996, section 10
- <sup>35</sup> RSA: Chief Finance Officer, National Intelligence Agency, Discussion, Pretoria, 20 May 2004
- <sup>36</sup> RSA: Public Finance Management Act, 1 of 1999, Government Printers, Pretoria, section 40
- <sup>37</sup> RSA: Chief Finance Officer, National Intelligence Agency, Discussion, op cit
- <sup>38</sup> Australia: Inspector-General of Intelligence and Security Act, 101 of 1986, section 32
- <sup>39</sup> New Zealand: Inspector-General of Intelligence and Security Act, op cit, section 10
- <sup>40</sup> Weller G, " Comparing Western Inspectors-General of Intelligence and Security," op cit, pp 393-394
- <sup>41</sup> RSA: General Intelligence Laws Amendment Act, 52 of 2003, section 7
- <sup>42</sup> RSA: Intelligence Services Control Amendment Act, 66 of 2002, op cit section 7
- <sup>43</sup> Weller G: "Comparing Western Inspectors General of Intelligence and Security", op cit, p 39

<sup>44</sup> RSA: Intelligence Services Control (Oversight Act), 40 of 1994, op cit,  
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<sup>45</sup> ibid

<sup>46</sup> ibid

## **SELECTED VIEWS REGARDING THE OFFICE OF THE INSPECTOR- GENERAL OF INTELLIGENCE IN SOUTH AFRICA**

### **1. INTRODUCTION**

This chapter focuses on the results of personal interviews and written comments received from some members of the JSCI; the former Minister for Intelligence Services; and some of the heads of the Intelligence Services or their deputies, namely the intelligence division of the SANDF and SASS; the judge responsible for authorising interceptions; and the current Inspector-General of Intelligence.

The views of the following individuals were obtained:

- Mrs M Olkers, a former member of the New National Party in Parliament and former member of the JSCI.
- Mr S Abram, a member of the African National Congress (ANC) in Parliament, and former member of the JSCI.
- Dr S Cwele, a member of the ANC in Parliament and former chairperson of the JSCI.
- Ms L Sisulu, former Minister for Intelligence Services.
- Mr ZT Ngcakani, the Inspector-General of Intelligence.
- General M Motau, head of the intelligence division of the South African National Defence Force.
- Ms S Africa, former Deputy Director-General, SASS.
- Judge Gordon, a former judge of the High Court of South Africa, currently the judge responsible for authorising interception of communications.

When Parliament was dissolved in February 2004 prior to the elections in April, all its committees were disbanded. Accordingly, the members of the JSCI are reflected in this chapter as former members of this committee. After the elections in April 2004, the President announced a new Cabinet. Ms Sisulu, the then Minister for Intelligence Services was appointed Minister of Housing.

The aim of the interviews and written comments to questions received was to determine the successes and failures of the office since its creation in 1995, and to determine the understanding and expectations of the institutions that are part of the general oversight of the Services including the head of the intelligence division of the SANDF and the deputy head of SASS, on the functioning of the office of the Inspector-General of Intelligence.

## 2. VIEWS ON THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE

A number of key issues were focused on here namely inter alia:

- (a) The legal framework relating to the office of the Inspector-General;
- (b) the adequacy of the legal framework;
- (c) the lines of accountability of the Inspector-General;
- (d) the comparison between the South African Inspector-General and the international offices of the Inspector-General;
- (e) the expectations of the JSCI, the heads of the Services and the Ministers responsible for the Services; and
- (f) the relationship between the office of the Inspector-General and other review and monitoring institutions.

### 2.1 THE RELEVANCE OF THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE IN A DEMOCRACY

Generally, the respondents understand the objectives of the office of the Inspector-General of Intelligence of Intelligence and most of them participated in the formulation and passing of the legislation dealing with the office of the Inspector-General of Intelligence.

Abram<sup>1</sup> says that the institution is new to South Africa's democracy, and the legal framework is clear and desirable after the amendments of 2002. He states that the intention with the legislation was to give effect to the principles and prescriptions laid down in the Constitution on the oversight of the security services and upholding human rights, and if there are inadequacies in this legal framework they will be identified as the institution develops and grows and responds to its mandate. Abram

believes that the office of the Inspector-General of Intelligence needs to root itself and establish its credentials. The office of the Inspector-General of Intelligence needs to study the environment within which the office exists and has to function and adapt itself to this environment.

The current Inspector-General of Intelligence, Ngcakani<sup>2</sup> explained that there is a need for oversight mechanisms to ensure the Services comply with the Constitution. He states that Government must rely on the intelligence establishment to obtain information that others would deny or keep secret. To this end, the Services need capabilities and authorities not available to other government departments. Intelligence services must use intrusive techniques and must have the legal power to use them. Furthermore, the Services have to do much of their collection and analysis in secret, for if their sources and methods become known, the targets of their investigations will react to protect their secrets, and access to the intelligence may be lost. Ngcakani's view is that with the founding of a modern democracy in South Africa, it was proper that an independent oversight mechanism should also form part of the establishment of institutions that would protect fundamental human rights and that would prevent the state from treating the public in an unfair and high-handed manner. Ngcakani says that the Inspector-General of Intelligence is one of a number of players in the national security system, and that for the system as a whole to operate effectively, everyone must work together in a cooperative fashion. In other words, the objective of oversight focuses on the development of solutions or remedies in a collaborative relationship with other participants in the national security system.<sup>3</sup>

Africa responded to the questions on behalf of the head of SASS. Her views coincide with the views expressed by the Ngcakani. She states that the appointment of the Inspector-General of Intelligence, who is in essence an ombudsman, gives effect to the principles of democracy, namely equality, transparency and accountability as enshrined in the Constitution. This is an attempt by government to promote these principles in a practical manner to provide meaningful support for the system of constitutional democracy and open government, providing for institutions like the Inspector-General of Intelligence to function independently, impartially without fear, favour and prejudice. She further says that the establishment of the office of the Inspector-General of Intelligence is vital to ensure an effective, accountable and

responsible government. The Inspector-General's independence and the impartiality will enhance the concept and practice of independent control over intelligence. The establishment of the office of the Inspector-General will also ensure that various sensitive issues stay within the intelligence 'family', securing the secrets of the country, especially where it is inappropriate or not possible to obtain legal remedy.<sup>4</sup> The views expressed by the three respondents above, are in support of the existence of the legal framework and the office of the Inspector-General. There is a common view that South Africa, with its historical background where the security services had minimal oversight mechanisms and review and monitoring institutions, needed the establishment of this institution.

Sisulu's<sup>5</sup> views are that the office of the Inspector-General compares fairly well with international counterparts. She says that the legislation establishing the institution of the Inspector-General of Intelligence was based on international best practice like, the US, Canada, New Zealand and Australia. Olkers and Cwele<sup>6</sup> share these views and state further that they cannot compare the functioning of the office of the Inspector-General of Intelligence with that of its international counterparts because the South African Inspector-General's office has never functioned fully.

## 2.2 THE CALIBRE OF PERSON REQUIRED TO BE AN INSPECTOR-GENERAL OF INTELLIGENCE

Although the Intelligence Services Control Amendment Act, 66 of 2002 provides that the Inspector-General of Intelligence must be a South African citizen with knowledge of intelligence, it was important to determine the views of certain institutions and individuals on the quality of the candidate expected for the position. Abram's<sup>7</sup> views are that in addition to having educational qualifications, a candidate for the Inspector-General post must be:

- A loyal citizen with an impeccable record;
- a person of integrity and be tolerant;
- a team person;
- visionary and share the vision of fellow country people; and
- a servant of the country and its entire people.

In his response to the questionnaire, Cwele<sup>8</sup> shared the views of Abram, but using a different choice of words. He says that the candidate should have integrity and must be beyond reproach. He says further that for the Inspector-General of Intelligence to act with integrity, he or she must understand the intelligence environment and be able to apply his or her mind to challenges facing the office.

Sisulu<sup>9</sup> expressed the qualities of an Inspector-General of Intelligence candidate as follows, namely a person:

- Who will assist the committee in exercising authority on those activities of the Services that are in contravention of the law;
- with total commitment to what is expected of the Services;
- with high level of integrity, who will to restore the integrity of the Services;
- who has the confidence of the public and the members of the Services;
- who will function independently and not be seen as part of the Services; and
- who will not easily be 'deceived' by the Services.

Olkers<sup>10</sup> in her response says that the Inspector-General must have the capacity to lead. Motau's<sup>11</sup> view is that for the Inspector-General of Intelligence to successfully monitor the activities of Defence Intelligence (DI), he or she must develop specific military and defence competencies as DI functions in a specific and unique operational environment.

### 2.3 THE ROLE OF THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE

Molau's<sup>12</sup> view on the functions and functioning of the office of the Inspector-General of Intelligence is that in terms of the legal frameworks governing DI, it is currently audited by the Inspector-General of the SANDF, Auditor-General and by the Inspector-General of Intelligence. Motau says the office of the Inspector-General of Intelligence is however in the best position, because of its mandate, to ensure the in-depth intelligence oversight that is required in the intelligence environment, and can complement the Inspector-General of the SANDF because of the specific and unique nature of the conduct of defence intelligence. The Inspector-General of the SANDF audits the defence/military and departmental aspects applicable to DI. Motau continued to state that while the Inspector-General will be capable of focusing on

general administrative matters, the department of Defence (DoD) and the SANDF have unique administrative procedures and regulations which may not be applicable to the Ministry for Intelligence Services. The Inspector-General of Intelligence will in this regard have to liaise with the Inspector-General of the SANDF to ensure that they complement each other.

Ngcakani<sup>13</sup> reiterated the functions of the Inspector-General of Intelligence spelt out in legislation and expressed the view that as an important participant in South Africa's national security system, the Inspector-General of Intelligence will support the President, the concerned Ministers and the JSCI by providing independent, impartial and sound reports, advice and recommendations on the activities of the Services.

Olkers<sup>14</sup> view on the functions of the Inspector-General of Intelligence is that the functions stipulated in legislation are sufficient and require to be tested before a declaration of its inadequacy and successes of the office can be questioned.

Cwele<sup>15</sup> believes that the Inspector-General of Intelligence must not be involved in frivolous tasks. Instead he or she must focus on issues of compliance with the relevant laws by the Services. His view is that the new Inspector-General of Intelligence must prioritise tasks from the Ministers and the JSCI. The incumbent must also investigate complaints and report to the stakeholders. These investigations must state the facts of each case, must provide solutions and timeframes set by the stakeholders must be met. The JSCI would expect answers to problems for it and the relevant Ministers to intervene where there is non-compliance with policies and where policies are inadequate. Cwele says the Inspector-General of Intelligence must also strengthen the coordination of intelligence by ensuring that there is cooperation between the Services during collection of intelligence, interpretation and dissemination to the policy makers.

The next section deals with the relationship between the Inspector-General with other monitoring Institutions. In chapter 2, it was stated that the Inspector-General of Intelligence is complemented by the Public Protector and the Auditor-General.

### 3. THE RELATIONSHIP BETWEEN THE INSPECTOR-GENERAL OF INTELLIGENCE AND OTHER MONITORING INSTITUTIONS

Africa<sup>16</sup> expresses her views on the functions of the Inspector-General of Intelligence and relationships with other institutions as follows, namely, she is of the opinion that the Inspector-General should deal with both administration and operational issues of the Services. This is the case because the Public Protector has the following statutory powers:

- (a) To investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any improprietary or prejudice;
- (b) to report on that conduct; and
- (c) to take appropriate remedial action.

It is Africa's view that if the Inspector-General of Intelligence's functions are limited to operational matters, it means that the Public Protector might have access to an administrative matter, which is related to an intelligence (operational) matter. More often than not these two issues are so interwoven that the one cannot be resolved without disclosing the other. She remarks that the Constitution also requires that the Public Protector to be accessible to all persons and communities. Therefore it can be argued that it would be absurd to limit the functions of the Inspector-General, while the Public Protector has wider powers.<sup>17</sup> Cwele<sup>18</sup> does not share the views of Africa regarding the Inspector-General of Intelligence's role on administrative matters. His view is that the Inspector-General of Intelligence should investigate complaints regarding intelligence matters of the Services. The administrative grievances should be handled by the Minister responsible for a Service and the Public Protector. However, he goes further to say that the Inspector-General should have a cooperative relationship with the Public Protector and other review institutions to ensure that issues that border between administration and operational, should be managed by the competent authority. Further, he says that the cooperative spirit would ensure that the members of the Services do not abuse the delineation of roles and consult on the basis of convenience.

Sisulu's<sup>19</sup> view on the relationship between the Inspector-General of Intelligence and the Public Protector is that the two institutions must delineate what issues need to be managed by each one of them within their legislative mandate, as there may be grey areas in terms of what is an administrative and operational grievance, and the two institutions must cooperate with each other.

Olkers<sup>20</sup> shares the views of Cwele and says that there should be a coordination body, which will be constituted of the Inspector-General of Intelligence, the Auditor-General and the Public Protector to ensure that there is sharing of relevant cases and experiences. She says there should be an open door policy where aggrieved employees can seek guidance in terms of who is the appropriate institution to deal with a grievance. Motau<sup>21</sup> summed up his views on the functioning of the office of the Inspector-General of Intelligence by stating that the conduct of Intelligence is a specialised function, be it national security, crime or defence and should best be left to the people and organisations that are trained and mandated to execute these functions. He says that the National Strategic Intelligence Act, 39 of 1994 and the Defence Act, 42 of 2002 provide a clear mandate in this regard and also set the parameters in which DI may function and execute its task. In terms of the Intelligence Service Control (Oversight Act), 40 of 1994, the Inspector-General of Intelligence has an oversight and monitoring function and not an executive function in the conduct of intelligence.

Motau emphasises that this situation should be maintained. The Inspector-General of Intelligence is empowered to monitor compliance with the applicable laws, review intelligence and counter intelligence activities, certify annual reports of the intelligence services and address internal and external complaints. There is a strong view amongst those who expressed their views in this regard, that the Inspector-General for Intelligence should be the main institution to monitor and review the activities of the Services. However, they also state that the other review and monitoring institutions should complement the Inspector-General's office, but the functions and role of each of these institutions must be clearly defined in order to avoid blurred roles regarding the oversight of the Services and review of their functions. These views support the legislative framework governing the financial oversight of the Services by the Auditor-General, the Public Protector and the Inspector-General of Defence who monitors the activities of DI.

The respondents also expressed their views with regard to the functioning of the Office of the Inspector-General. It was stated in chapter 3 that the office of the Inspector-General has not been consistent since 1995 because of a number of factors. Some of these factors were addressed by the respondents below.

#### 4. THE FUNCTIONING OF THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE SINCE 1995

As stated in chapter 2, the office of the Inspector-General of Intelligence did not function to its full capacity since its creation by statute in 1994. Two Inspectors-General of Intelligence were appointed and resigned from office within eighteen months of resuming office. There has been speculation with regard to the reasons for their departure, and in some instances the absence of an Inspector-General of Intelligence was blamed for certain poor performances by some of the Services. Sisulu,<sup>22</sup> on the departure of Randera says that Randera left because of misunderstandings over the interpretation of the legislation. The legislation was flexible to ensure that the incumbent can function independently. It was assumed that the incumbent would interpret the law in a manner that would advance cooperative governance between the Inspector-General's office, the JSCI and the Executive. In hindsight, Parliament should have spelt out the exact details regarding the mandate of the office of the Inspector-General of Intelligence to avoid ambiguities and confusion. She went further to say that a person with in-depth understanding of intelligence would be the appropriate candidate to ensure that the law is interpreted and applied contextually. The candidate must be prepared to serve to the best of his abilities, knowledge and ability to give and serve. She says the ambiguities in the legislation led to Randera being burdened with administrative matters from members of the Services.

Motau<sup>23</sup> says that the Inspector-General of Intelligence's office has been functioning very intermittently since its inception. Because of the high turnover of incumbents and the fact that the post of the Inspector-General has been vacant for almost two years, DI has had very little input or contact with the Inspector-General of Intelligence. DI has been functioning in accordance with the National Strategic Intelligence Act, 39 of 1994 and the Defence Act, 42 of 2002 and has been audited by the Inspector-General of the SANDF and Auditor-General in the absence of the Inspector-General of Intelligence.

The judge responsible for issuing authorisations, Judge Gordon's<sup>24</sup> views on the functioning of the office of the Inspector-General relate to the constraints he says were suffered by Randera when he was in office as the Inspector-General. The judge says in meetings with Randera to discuss cooperation between his office and the office of the Inspector-General, and the legal mandates of the Services, his impression of Randera's experience with the Services is that Randera experienced difficulties on occasions when called upon to exercise functions on problems relating to grievances by personnel and when dealing with certain clandestine operations.

The judge states that the following factors should be taken into account by a review and monitoring institution when working with the Services: -<sup>25</sup>

- (a) The question of invasion of privacy must always be considered a priority and should be exercised with caution and in conformity with existing legislation.
- (b) Reports should be treated with proper confidentiality and filed accordingly.

Abram<sup>26</sup> shares the views of Sisulu on the departure of Randera. In his view, the former Inspector-General of Intelligence had his own interpretation of the mandate which legislation had prescribed for the office of the Inspector-General. Furthermore, there were too many concerns about where the Inspector-General of Intelligence fits in with respect to protocol. He came from the medical and political fraternity. Abram remarks that Randera's short term as the Inspector-General will not have any impact on the current incumbent who comes from the intelligence environment, and has 'insider' knowledge of how the Intelligence Services function. However, he holds the view that the office needs to be given a chance to prove its relevance. Abram adds that South African society is heterogeneous, there are massive levels of illiteracy and poverty on the one hand and inordinate wealth amongst the minority on the other. The systems are in place for this institution to flourish, but there must also be acceptance that there will be tensions from time-to-time, which

will have to be managed and capacity is needed to do so. Abram stated further that he expects the institution to conduct its activities in terms of its mandate as prescribed by legislation. The institution will be subjected to strain, and must be managed. The incumbent has built up experience and should add value to the institution. He is no stranger to this environment. One expects him to develop it into an institution which will occupy a place amongst similar institutions internationally.

In conclusion Abram said that the existence of the office of the Inspector-General of Intelligence must be recognised as giving effect to the Constitution. He says that the office must be marketed amongst civil society so it can earn the respect and trust of all. Abram emphasises that the Services also have the major role to play in this regard. He states that for the office to function effectively it must be funded adequately and must bear the hallmarks of neutrality, independence and not be seen as an instrument of the State.<sup>27</sup>

Africa<sup>28</sup> says that with the latest amendments to the Intelligence Services Control Act, 40 of 1994 addressing certain problems, the role of the Inspector-General of Intelligence will become more efficient and effective. As indicated above, Africa reiterates that the Public Protector should not have more powers than the Inspector-General of Intelligence when it involves intelligence. She is uneasy about the current position where the role and certain functions of the Inspector-General of Intelligence and Public Protector overlap, as "all organs of state" are required to assist the Public Protector to ensure the effective performance of his or her powers and functions. Notably, the Public Protector's role and functions also overlaps with those of the Auditor-General and Commission for Gender Equality.

Sisulu<sup>29</sup> is sceptical about the future in the light of other review mechanisms such as the judge responsible for issuing directions on interception of communications and the Director of the office of Interceptions. Her view was that the functions of these structures must be looked at to ensure there are no overlaps and duplication of activities. She reiterates that the Inspector-General of Intelligence is a constitutional institution to ensure the integrity of

the Services and public confidence in the Services and therefore it should be retained. She says that there is a need to harmonise the functions of the various monitoring and review institutions.

Olkers<sup>30</sup> view on the functioning of the office is that Skweyiya wanted more money to accept the post. When Randera left, not much review and monitoring was done. Instead, there was only a skeletal staff in the office. She further states that it would be unfair to judge the overall performance of the office on the basis of the lack of performance during the tenure of office of the previous incumbents. She says that although some operational work was done which was confidential, most of the work done involved administrative complaints.

Cwele<sup>31</sup> says that the office never functioned to the satisfaction of the JSCI since its creation in 1995 because of the short periods spent by the incumbents in office. However, he hopes that with the current incumbent the office is expected to start functioning properly because the legislation is explicit on the mandate of the Inspector-General and lines of accountability.

The inference that can be drawn from the above views is that the members of the JSCI were not impressed with the performance of Randera. It appears that their view is that Randera did not have a clear and common understanding with the JSCI on what the role of the office of the Inspector-General should be. It appears that the amendments made to the enabling legislation in 2002 were intended to address some of the legislative shortcomings which came to the fore during Randera's tenure of office.

After an examination of the functioning of the office of the Inspector-General, it was imperative to get the views of the respondents on the future of the office. The views are discussed below.

## 5. THE FUTURE OF THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE

Abram's<sup>32</sup> view is that the office should be given time to prove itself. He expects that the institution will establish itself firmly, and carry out its mandate and functions. He says the office of the Inspector-General must also earn the respect of civil society because in its functioning, shortcomings will surely be identified. He remarks that by trial and error, the adequacy of the office of the Inspector-General will be subjected to vigorous tests. He foresees amendments to the legislation as the office of the Inspector-General develops and as society transforms. Abram says a periodic evaluation must be done to ensure the number of matters or complaints the office of the Inspector-General of Intelligence deals with and the number of reports it has compiled should not be the only criterion to determine the office's success.

Cwele's<sup>33</sup> view is that the calibre of people that are appointed to serve in the office will assist the Inspector-General of Intelligence to build credibility for the office. His view is that the Services being monitored must second staff to the office of the Inspector-General of Intelligence, and he reiterates the legislative provision that there should be permanent staff in the office appointed by the Minister for Intelligence Services. The staff will be under the supervision of the Inspector-General to ensure that they function independently of their employers. He further states that the Inspector-General must assist the Services to strengthen coordination of intelligence by ensuring that they adhere to their legal mandates to share relevant intelligence.

Motau<sup>34</sup> states that continuity and appointment of personnel with the required intelligence background will help to ensure the effective functioning of the office of the Inspector-General. He says that proper liaison and cooperation procedures with the Inspector-General of the SANDF and other institutions such as the Auditor-General are needed to avoid duplication and omissions of oversight. It is essential that the Inspector-General of Intelligence functions within his or her legal mandate, which is a review and monitoring mandate.

## 6. CONCLUSION

All respondents share the view that there is a need for the office of the Inspector-General of Intelligence. Cwele<sup>35</sup> on this aspect expressed himself by stating that the Inspector-General of Intelligence is an important institution for democracy and is a crucial institution for the effective functioning of the Services. Cwele says that the institution cannot be replaced by the Minister or the JSCI. Instead, these institutions must complement each other in the oversight of the Services. Olkers<sup>36</sup> says that the Inspector-General of Intelligence must work closely with the JSCI and should work through the JSCI to the relevant Ministers and the Presidency. Although this line of reporting is not clear, she explained further that the Executive must consult with the JSCI in order to avoid placing the Inspector-General of Intelligence under undue pressure to be dependent on the Executive for decision making.

Although the relevance of the office of the Inspector-General is shared by all interviewed, the fact that the office has not functioned to its full capacity since its creation, leaves a void in terms of the effectiveness of the office. The overlapping mandate with the Public Protector is of concern, and the general view is that the two institutions should cooperate with each other. It appears that the problems that led to the departure of the two former Inspectors-General of Intelligence are currently addressed in legislation through various amendments. In this regard, the general view is that the legislation is adequate to guide the current incumbent regarding the mandate of the office and the lines of accountability. The staff of the office of the Inspector-General of Intelligence will have to be of high calibre to ensure that they give the incumbent the support he or she needs to carry out the legal mandate. With regard to the past record of the office since its inception, it can be said that the office has not yet fully delivered on its mandate and therefore it would be difficult to critique the need for its existence.

There is a dire need for the office of the Inspector-General of Intelligence to start operating fully to satisfy the public that when there are no irregularities that are suspected or reported it is because the Services are abiding by the

Constitution in the execution of their mandates. The other review and monitoring institutions, namely, the Auditor-General, the DI Inspector-General and the Public Protector, will remain complementary institutions. There is a general view amongst the respondents that these other institutions should be part of a body of monitoring and review institutions that will share information on a need-to-know basis with the Inspector-General's office to ensure that complaints about the Services are received and processed by the competent institution. In this way, monitoring and review will be strengthened.

There is hope that the office of the Inspector-General will be able to rise to the legal and intelligence challenges that face it. Abram<sup>37</sup> says that there should be periodic reviews to ensure the current incumbent adheres to the legislative mandate.

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<sup>24</sup> Gordon G, Written response, op cit

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<sup>34</sup> Motau M, Written response, op cit

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## CHAPTER 5

### EVALUATION

#### 1. INTRODUCTION

This chapter summarises the main aspects of the research; tests the propositions of the study; and concludes with findings and some recommendations on the functioning of the office of the Inspector-General of Intelligence.

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

Chapter 1 of the dissertation dealt with a description of the concepts of intelligence, national security, and control of intelligence. It dealt with national security threats facing Third World states, the Western concept of security and the various ways of controlling intelligence. The discussion in this chapter indicates that for intelligence to be effective, its functions have to be distributed amongst various agencies to avoid one powerful agency whose assessments are not corroborated by assessments of its peers. Further, for intelligence to be effective it has to be separated from policy making, and lastly it has to be subject to various methods of scrutiny.

Chapter 2 briefly compares the other monitoring and review institutions such as the Ombudsman or Public Protector and the Auditor-General or Comptroller and Auditor-General with the offices of the Inspectors-General internationally. This comparison forms part of an introductory section in chapter 2 and the chapter deals in detail with the office of the Inspector-General of Intelligence internationally from a structural and functional point of view. The comparative analysis includes Canada, Australia, the US, New Zealand and the UK.

Chapter 3 deals with the office of the Inspector-General of Intelligence from a South African perspective. It includes legislation, relevant parliamentary debates, media reports and any other relevant open material or classified material approved for disclosure by the Director-General of the National Intelligence Agency. The chapter examined how the office of the Inspector-General evolved in South Africa and compares the office with its counterparts internationally. Further, the enabling legislation has been amended three times in order to clarify the role of the Inspector-General; the lines of accountability of the incumbent; the administration of the budget; the salary of the incumbent; and the appointment of staff.

Chapter 4 provides the views of selected respondents regarding the office of the Inspector-General of Intelligence in South Africa. This chapter outlines the perceptions of the respondents regarding the office of the Inspector-General of Intelligence; its relevance in a democracy; and the relevance of the other monitoring and review institutions. It is the general view of the respondents that the office needs to be given an opportunity to establish itself firmly, and there is hope that the current Inspector-General of Intelligence will deliver on the mandate provided by legislation.

### 3. TESTING OF PROPOSITIONS

This section deals with the propositions that informed the research and provides evidence supporting or refuting these propositions.

#### 3.1 PROPOSITION 1

The first proposition made in the research is the following:

“The legislation creating the Office of the Inspector-General was ambiguous with respect to the functioning, structure and lines of reporting of this office, thereby creating legal uncertainty and it can be argued this created a lack of common understanding on the role of the office by the stakeholders.”

The legislative framework of the office of the Inspector-General of Intelligence was created in 1995 through the Intelligence Services Control Act, 40 of 1994. Minor amendments were introduced by the Constitution of the Republic of South Africa Act, 108 of 1996. These amendments related to the procedure for the appointment of the Inspector-General of Intelligence from a 75 percent majority of members of the National Assembly, to a two thirds majority of members present in the National Assembly.

The Democratic Party expressed concern during the passing of the Intelligence Services Control Act, 40 of 1994, that an approval by a 75 percent majority of members present in the National Assembly should not be seen as a guarantee of the success of the office. Unfortunately, the percentage was repealed before it could be put to test. However, six months after approval by a two thirds majority, Advocate Skweyiya resigned from office without any service rendered. There was speculation regarding his resignation relating to the resolution of a remuneration dispute. However, the chairperson of the JSICI, Mapisa-Nqakula did mention that although the legislation was clear on who determines the conditions of service, these were not determined by the relevant parties beforehand. Amendments were effected to the enabling Act in 1999 to provide that the remuneration will be the same as that of the Public Protector.

When the second Inspector-General of Intelligence was appointed in 2000, the conditions of service were determined before he was appointed. Randerera was appointed in 2000, but resigned in January 2002. Speculated as reasons for his departure were the lack of cooperation by the Services; lack of clear lines of accountability; and lack of understanding of the role of the office. In 2002, major amendments were made to the enabling Act to address the deficiencies in legislation acknowledged by both the Executive and the Legislature as follows:

- (a) the lines of accountability of the Inspector-General of Intelligence to the JSICI, the relevant Ministers and the President were addressed. Prior to

these amendments, the Inspector-General of Intelligence was responsible to the President. The literal interpretation of this was that the Inspector-General could only report to the President on the activities of his or her office. This interpretation could have the effect that the President should be first person to be consulted after an inquiry before the findings are brought to the attention of the relevant Ministers. Although this interpretation was never tested, it could turn the President, who is head of the executive into an administrator who would have to deal with huge and trivial administrative disputes against the Services, and also to supervise the relevant Ministers on matters that instead required their attention as immediate political heads of the Services. The amendments clarified the lines of accountability as follows:

- i. on financial matters the Inspector-General of Intelligence will report to the Minister for Intelligence Services and the Director-General of the National Intelligence Agency;
- ii. on inquiries relating to a specific Service, the Inspector-General will report to the relevant Minister;
- iii. on the general functioning of the office, the Inspector-General of Intelligence will report to the Joint Standing Committee on Intelligence once a year; and
- iv. on tasks by the President, the Inspector-General of Intelligence will report to the President.

(b) Only one Inspector-General of Intelligence would be appointed in respect of all the Services: Prior to the amendments, an Inspector-General of Intelligence could be appointed in respect of each Service. The sizes of the Services are small so that the appointment of one Inspector-General of Intelligence for each Service at the salary scale of the Public Protector would have been a waste of resources.

(c) Appointment of personnel: The relevant Ministers could appoint personnel to the office of the Inspector-General of Intelligence. This

had the consequence of employees with different conditions of service working on a full time basis in the same environment. As conditions of service differ amongst the various Services, this is likely to create tension amongst staff, thereby affecting the morale and performance of these employees. The management of these employees by the Inspector-General was also going to be difficult. The amendments placed the responsibility for the appointment of permanent staff under the Minister for Intelligence Services who is also responsible for the budget of the office of the only Inspector-General of Intelligence.

- (d) Clarifying the mandate of the Inspector-General of Intelligence: Prior to the amendments, the Inspector-General of Intelligence was responsible for both operational and administrative matters of the Services. In this regard, members with personnel related grievances would seek relief from the Inspector-General of Intelligence. This resulted in the office being overburdened with frivolous administrative issues which could otherwise be dealt with by the Directors-General of these Services. An Intelligence Services Council on Conditions of Service was established to review grievances of members. The Public Protector on the other hand has a constitutional obligation to deal with administrative complaints of all government departments. The amendments have the effect of streamlining the functions of the Inspector-General of Intelligence to focus on the core business of the Services.
- (e) The budget of the office of the Inspector-General of Intelligence will be appropriated through the NIA. With four previously envisaged Inspectors-General of Intelligence, each Minister would budget for the expenditure of the office. With one Inspector-General of Intelligence, Parliament decided to place the administrative responsibility of the office of the Inspector-General of Intelligence under the Minister for Intelligence Services as the Minister responsible for the administration of the Intelligence Services Control (Oversight) Act, 40 of 1994. Although the budget is administered by the Director-General of the

NIA, the Public Finance Management Act, 1 of 1999 applies to the expenditure of the office of the Inspector-General of Intelligence.

- (f) The candidate should have knowledge of intelligence. Prior to the amendments, the requirements for the post were South African citizenship and security competence. Although there has never been speculation about the intelligence expertise of the previous incumbents, shortly after this amendment was effected, the next candidate to obtain the current position was drawn from within the Services in keeping with the legislative provision that the candidate must have intelligence expertise.
  
- (g) The Inspector-General of Intelligence must obtain a search warrant to search premises outside the Services and should notify the heads of the Services if he or she needs to search Services premises. This is international practice from Australia and from the South African Criminal Procedure Act , 51 of 1977.

The first Inspector-General of Intelligence never assumed duty, so it is difficult to say if he or she had or did not have a common understanding with the Legislature and the Executive on the role of the office. The second Inspector-General of Intelligence left office after nineteen months in office. As mentioned previously, no public report was issued by the JSCI nor the Minister for Intelligence Services on the activities carried out by the Inspector-General when he was in office. However, Olkers during the interview did indicate that the incumbent dealt mainly with administrative matters which were kept confidential.

Although Randera stated that he worked well with Services during his tenure of office, Judge Gordon<sup>1</sup> indicated that Randera did express concern around lack of cooperation by the Services in the execution of his duties. If indeed this was the case, it could be argued that a lack of cooperation was either a result of lack of understanding by the Services of the role of the Inspector-General of Intelligence or lack of understanding by the incumbent himself.

Since there is no public report on the functioning of the office, it is difficult to reach a conclusion in this regard. It was also stated by Sisulu and Abram that the Inspector-General of Intelligence misinterpreted the law and this led to tensions with the stakeholders.

The amendments to the enabling legislation which dealt with issues spelt out in paragraphs (a) to (g) above are an indication that the legislation contained some levels of ambiguity which required clarification by the Legislature. The proposition is correct in that the lack of clarity in legislation created interpretation problems by various parties as outlined in chapter 4. It was not clear whether the Inspector-General was only answerable to the President for all his or her activities or only with regard to the overall functioning of the office on an annual basis or a regular basis. Further, it was not clear who was responsible for the budget and administration of the office of the Inspector-General. The judge responsible for authorising interceptions states that Randera experienced problems in having access to information held by the Services. When Skweyiya resigned it was reported that the dispute was about issues around his salary, which were not clearly spelt out in legislation. After the departure of both incumbents, the enabling Act was amended to address the issues which could be inferred to be obstacles to their successful occupation of office.

The legislation is a record of the intention of the legislature to ensure parameters are set for certain activities. It can be argued that the mindset of the parties matter more than just the presence of a legal framework. Although this view should not be interpreted as insinuating that during Randera's time there was lack of willingness by the parties to work together, it should be viewed as an illustration of the need to harmonise the legislative framework with the mindset of the parties to give effect to the intention of the legislature, which in most legal frameworks is not properly recorded but can be sought from those that wrote the legislation.

### 3.2 PROPOSITION 2

“There is still a need to test the impact of the office of the Inspector-General on the Services and the public.”

The office has never functioned to its full capacity since 1994. Except for the controversies that arose in the late 1990' were a camera was discovered in front of the premises of the German Embassy, the theft of minibuses from the NIA headquarters and the high number of misconduct cases in the Services, there has not been any scandal that required the intervention of the Inspector-General. In 2003 there were allegations that Ngcuka, the then National Director of Prosecutions, was a spy.<sup>2</sup> The President set up a Commission of Inquiry to investigate these allegations. Although the Intelligence Services declined to present evidence in keeping with the legislative provisions protecting intelligence, it can be inferred that the President accepted this position of the Intelligence Services as the matter was not referred to any review and monitoring institution to follow up. Further, in 2004, alleged South African mercenaries were arrested in Zimbabwe and there were allegations that the intelligence services were aware of their activities, but omitted to take action against them before they left South Africa. The matter was placed before the High Court with some of the security services (the NIA and the SANDF) being co-respondents. Although the Democratic Party was reported as stating that they viewed the matter in a serious light and would want the security services to explain certain matters, to date there is no public information that a request has been made to the Inspector-General to obtain clarity from the Services. In this regard, it can be argued that the Services are conducting themselves within the framework of their enabling legislation and therefore the Inspector-General may not have the same challenges he would have had he been appointed and functioned consistently prior to 1994 and shortly afterwards. However, lack of public reports on the activities of the Services should not be an absolute indication that there is strict adherence to the legal mandates. The Inspector-General is yet to issue a certificate at the end of each year to confirm compliance with the relevant laws .

The amendments made in 2002 to the enabling Act and the appointment of the Inspector-General of Intelligence in 2004 are an indication that Parliament and the Executive have clear expectations from the office of the Inspector-General of Intelligence. The appointment of a candidate from within the Services still has to be proven to be the best decision by the policy makers. Cwele and Motau argue that understanding intelligence will ensure that the incumbent deals with the Services with sensitivity and integrity and he or she would not be misled by these Services. Abram believes that the appointment of the candidate from the Services will empower the Services and strengthen oversight of intelligence. An argument can be presented that appointing an incumbent from one of the Services may lead to bias or hostility towards those Services depending on the nature of the relationship the incumbent had while an employee of that Service. However, the independence and the integrity of the incumbent is still yet to be seen as he carries out his responsibilities throughout his tenure of office. The adequacy of the legal framework also still has to be tested through the current incumbent. There is consensus amongst the interviewed members of the JSCI that the legislation is adequate, but still needs to be put to a test. Parliament has restated the need for this institution through various legislative changes. However, because of the short duration which the past incumbents spent in office, the impact of the office of the Inspector-General still has to be tested. In this regard, the proposition is true.

### 3.3. PROPOSITION 3

“The Inspector-General’s office requires other oversight mechanisms to complement its functions.”

As mentioned in previous chapters, there are other review and monitoring institutions in South Africa whose mandate also extends to the Intelligence Services. In addition to these institutions there is Ministerial and Parliamentary oversight of the Services. The Public Protector and the Auditor-General review some of the activities of the Services namely: administrative (personnel) and financial matters respectively. Members of the Public and of

the Services can lodge complaints with the Public Protector regarding the activities of the Services. It was mentioned in chapter 2 that former members of the NIA had complained about the Agency to the Public Protector. The Auditor-General on the other hand has the constitutional mandate to review the financial expenditure of the Services. In doing so, the Auditor-General goes through the financial statements of the Services to ensure that the money was used for the purpose it was appropriated for. Motau indicated that Defence Intelligence has an Inspector-General of Defence who in the absence of an Inspector-General of Intelligence conducted reviews of the activities of Defence Intelligence. The proposition is correct in that the individuals whose views were obtained on the matter for purposes of this research, all accept the need to have these review institutions to complement the office of the Inspector-General. However, they all caution against grey areas and propose that there should be cooperation amongst these institutions. The existence of these complementary institutions will ensure that each one of them are experts in their areas. The Inspector-General will focus only on operational matters and develop his or her expertise and that of the staff in the office in this area. The Minister and Parliament are policy makers and are required to improve policies where there are deficiencies found by the Inspector-General of Intelligence.

It is clear that the Inspector-General needs to work in collaboration with other review and monitoring institutions to ensure that where cases are referred to a competent institution. With regard to the complementary review and monitoring institutions the finding is that the office of the Inspector-General requires the support of the Public Protector, the Auditor-General, the Inspector-General of Defence and the Intelligence Services Council on Conditions of Services for the NIA and SASS. The proposition is therefore true.

#### 4. CONCLUSION

The amendments made to the enabling Act were in the main to align the South African legislation with international best practice on the structure and

functioning of the office of the Inspector-General of Intelligence. To ensure the effective functioning of the office of the Inspector-General the following is suggested:

- (a) An understanding of the mandate of the Inspector-General of Intelligence by all parties who are stakeholders to the activities of the this office;
- (b) regular briefings by the Inspector-General of Intelligence to the policy makers on his impressions of the functioning of the Services;
- (c) proposition of solutions to problems where there are policy or operational deficiencies;
- (d) an open door policy by the Inspector-General of Intelligence to ensure that the public and the Services can consult at ease;
- (e) development of strategies and business plan by the Inspector-General of Intelligence without influence by the Services and the policy makers;
- (f) consultation by the Inspector-General with the relevant Ministers and the Presidency before reports are published to ensure that national security matters are protected;
- (g) the staff of the Inspector-General appointed or seconded by the Ministers should have the expertise required for the office and have integrity; and
- (h) the Inspector-General of Intelligence should be the eyes and ears of the relevant Ministers.

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<sup>1</sup> Gordon G, Written response, March 2004, Pretoria

<sup>2</sup> RSA: President's Minute, number 551, September 2003

## **SUMMARY**

### **A COMPARATIVE ANALYSIS OF THE ROLE AND FUNCTIONS OF THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE WITH SPECIFIC REFERENCE TO SOUTH AFRICA**

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**DEGREE: MASTER OF SECURITY STUDIES**

The dissertation conducts a comparative analysis of the roles of the Inspectors-General of Intelligence with specific reference to South Africa. The analysis assessed the roles, functions and structures of the office of the Inspectors-General in the following countries: Canada, Australia, New Zealand, the United States of America, South Africa and equivalent institutions in the United Kingdom. The study was based on a review of existing literature and interviews and written responses with some of the members of the Joint Standing Committee on Intelligence, the former Minister for Intelligence Services, LN Sisulu, the head of the intelligence division of the South African National Defence Force, the former deputy Director-General of the South African Secret Service, judge Gordon who is responsible for interception of communications and the current Inspector-General of Intelligence, Mr ZT Ngcakani. The performance of the office of the Inspector-General of Intelligence since 1995 indicates that:

- (a) there were ambiguities in the legal framework for the office of the Inspector-General which led to various interpretations by stakeholders on the functioning of the office;

- (b) there is still a need to test the impact of the office of the Inspector-General on the Services and the public; and
- (c) the Inspector-General's office requires other oversight mechanisms to complement its functions.

### **List of key terms**

Analysis

Collection

Controlling intelligence

Counter- intelligence

Covert action

Executive

Intelligence

Judiciary

Legislature

Monitoring and review

National security

Oversight

## **OPSOMMING**

### **‘N VERGELYKENDE ONTLEDING VAN DIE ROL VAN DIE KANTOOR VAN DIE INSPEKTEUR-GENERAAL VAN INTELLIGENSIE MET SPESIFIEKE VERWYSING NA SUID- AFRIKA**

Deur

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Die verhandeling behels 'n vergelykende ontleding van die rol van die Inspekteurs-Generaal van Intelligensie met spesifieke verwysing na Suid-Afrika. Die ontleding fokus op die rol, funksies en strukture van die Inspekteurs-Generaal in die volgende state: Kanada, Australië, Nieu-Seeland, die Verenigde State van Amerika, Suid-Afrika en soortgelyke instellings in die Verenigde Koninkryk. Die studie is gebaseer op 'n oorsig van bestaande literatuur en onderhoude met sommige van die lede van die Gesamentlike Staande Komitee oor Intelligensie, die voormalige Minister vir Intelligensie Dienste, L N Sisulu, die hoof van die Intelligensie Afdeling van die Suid-Afrikaanse Nasionale Weermag, die voormalige Adjunk-Direkteur-Generaal van die Suid-Afrikaanse Geheime Diens, Regter Gordon wat verantwoordelik is vir onderskepping van kommunikasies en die huidige Inspekteur-Generaal vir Intelligensie, Z T Ngcakani.

Die funksionering van die kantoor van die Inspekteur-Generaal vir Intelligensie sedert 1995 dui aan dat:

- (a) daar statutêre tekortkominge was in die skepping en funksionering van die kantoor sodat daar 'n gebrek aan algemene begrip met betrekking tot die rol van die kantoor bestaan het;
- (b) daar is steeds 'n behoefte om die uitwerking van die Kantoor van die Inspekteur-Generaal op die Dienste en die publiek te toets; en
- (c) die kantoor van die Inspekteur-Generaal ander oorsig-meganismes vereis om hul funksies aan te vul.

### **Lys van sleutelterme**

Beheer oor Intelligensie

Insameling

Intelligensie

Kovert aksie

Monitering en oorsig

Nasionale Veiligheid

Ontleding

Oorsig

Regsprekende gesag

Teen-intelligensie

Uitvoerende gesag

Wetgewende gesag

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