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A FRAMEWORK FOR INTELLIGENCE OVERSIGHT?

THE HIGH LEVEL REVIEW PANEL OF 2018

by

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DECLARATION

I declare that the dissertation, which I hereby submit for the degree, Master of Arts (Political Science) at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at another university. Where secondary material is used, this has been carefully acknowledged and referenced in accordance with university requirements. I am aware of the University's policy and implications regarding plagiarism.

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ABSTRACT

In South Africa, the intelligence services are an important tool in South African statecraft and are subject to intelligence oversight which has been developed from international best practice available at the time of inception in 1994. Intelligence has been the subject of review from time to time and in the 2018 review, through the High Level Review on the State Security Agency, not only were findings and recommendations made on the civilian intelligence service, but also intelligence oversight.

The purpose of this study is to assess whether the findings and recommendations on intelligence oversight can serve as a framework for intelligence oversight in South Africa. To achieve this, the adequacy of the existing intelligence oversight framework, as well as the recommendations of the HLRP on intelligence oversight, are measured against select practices (as adapted for this study) in the Centre for the Democratic Control of the Armed Forces and UN Compilation of Good Practice on Intelligence and its Oversight. To this end a literary review based on a qualitative approach was conducted.

This study finds that the findings and recommendations of the HLRP on SSA, on their own, would not constitute the basis for a framework of intelligence oversight, but the implementation of its recommendations would, along with the existing intelligence oversight framework, constitute such a framework. The framework should however be complimented by authority, ability, as well as willingness, attitude and integrity, as effective oversight is the sum total of good practice and all these.

List of Key Terms

Accountability
Abuse
Civilian Oversight
Complaint
Constitutional Democracy
Control

Deference

Executive Oversight

Good Practice

Hindrance to Oversight

Hybrid Regime

Insulation

Intelligence

Intelligence Exceptionalism

Intelligence Oversight

Intelligence Police Agency/ Service

Judicial Oversight

Legislative Oversight

Politicisation

Rule of Law

Secrecy

Shielding

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Nil Nisi Nitendo!

LIST OF ABREVIATIONS

AG - Auditor General

AGA – Auditor General Act

ANC – African National Congress

ANCYL – ANC Youth League

AU – African Union

BIIS – Bophuthatswana Internal Intelligence Service

BOSS - Bureau for State Security

CASAC – Council for the Advancement of the Constitution

CDI – Chief of Defence Intelligence

CI – Crime Intelligence Division of the South African Police Service

COMSEC – Communication Security (Pty) Ltd

DCAF – Geneva Centre for the Democratic Control of the Armed Forces

DDR - German Democratic Republic

DDG – Deputy Director General

DG – Director General

DGI – Direccion General de Inteligencia

DHA – Department of Home Affairs

DI - Defence Intelligence Division of the SA National Defence Force

DIRCO – Department of International Cooperation

DIS – Department of Intelligence and Security

DMI - Division of Military Intelligence

DMV - Department of Military Veterans

DOD – Department of Defence

DONS - Department of National Security

DPCI – Directorate for Priority Crime investigations (aka The Hawks)

DPRK – Democratic People's Republic of Korea

EU – European Union

GILA - General Intelligence Laws Amendment Act(s)

HLRP on SSA – High Level Review Panel on the State Security Agency

HUMINT – Human Intelligence

IA – Intelligence Academy

ICCS – Intelligence Council on Conditions of Service

IGI - Inspector-General of Intelligence
IPID – Independent Police Investigative Division
IRAC – International Review Agency Conference
ISOA – Intelligence Services Oversight Act 40 of 1994
JCIC – Joint Coordinating Intelligence Committee
JSCI - Joint Standing Committee on Intelligence
KGB – Komitet Gosudarstvennoy Bezopasnosti (State Security Committee)
MI5 - British Secret Service
MOU – Memorandum of Understanding
MPD – Ministerial Powers Delegation
MPS – Municipal Police Services
MRC – Ministerial Review Commission aka Matthews Commission
NAT – Department of National Security and Intelligence
NCC – National Communication Centre
NCM – National Coordinating Mechanism
NDPP – National Director of Public Prosecution
NEC – National Executive Committee
NGO – Non-Governmental Organisation
NIA – National Intelligence Agency
NICOC – National Intelligence Coordinating Committee
NIS – National Intelligence Service
NP – National Party
NSC – National Security Council
NSIA – National Strategic Intelligence Act 39 of 1994
NSMS - National Security Management System
OAU – Organisation of African Unity
OECD – Organisation for Economic Cooperation and Development
OIC – Office of Interception Centres
OIGI - Office of the Inspector-General of Intelligence
OSCE – Organisation for Security and Cooperation in Europe
PAC – Pan Africanist Congress
PAN – Principal Agent Network
PASS – Pan Africanist Security Service
PFMA – Public Finance Management Act 1 of 1999

PP – Public Protector
PPA – Public Protector Act 23 of 1994
PSIB – Protection of State Information Bill
RDP – Reconstruction and Development Programme
RICA – Regulation of Interception of Communication Act 70 of 2002
SAA – South African Airways
SACP – South African Communist Party
SAHRCA – SA Human Rights Commission Act 40 of 2013
SAHRC – South African Human Rights Commission
SANAI – South African National Academy of Intelligence
SANDF – South African National Defence Force
SAPS – South African Police Service
SASS – South African Secret Service
SCI - Sub-Council on Intelligence
SDP – Strategic Development Programme
SO – Special Operations
SSA – State Security Agency
SSC - State Security Council
SSD – Staatssicherheitsdienst
SSR – Security Sector Reform
TBVC – Transkei, Bophuthatswana, Venda and Ciskei
TEC – Transitional Executive Council
TIS – Transkei Intelligence Service
TOR – Terms of Reference
UK – United Kingdom/ Great Britain
UN - United Nations
UNHRC – United Nations Human Rights Commission
USA/US – United States of America
USSR/ Soviet Union – Union of Soviet Socialist Republics
VNIS – Venda National Intelligence Service

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CHAPTER 1

INTRODUCTION

1.1 Introduction to the Research Theme

Intelligence, or foreknowledge of the enemy, his capabilities and intentions, is probably as old as mankind itself. Sun Tzu, the Chinese military philosopher pointed out nearly 2500 years ago that “the reason the enlightened prince and wise general conquer the enemy… is foreknowledge”. According to him this knowledge “must be obtained from men who know the enemy situation” and that an “army without secret agents is … like a man without eyes or ears” (Kennedy, 1987: 6).

In more recent times, as societies evolved, growing more complex and interdependent, so the need for intelligence grew. Leaders and decision makers not only increasingly depended on the skills of their spies to advise them of threats to their interests, and latterly national security, but also to counter such activities by adversaries, to ensure that their vital interests are protected.

Intelligence, the process of collecting, evaluation, correlation and interpretation of security information, consequently became a vital adjunct to statecraft, which in due course gave rise to the establishment of specialised intelligence services who perform these activities nationally and internationally. Intelligence services, as a tool of governments, remain a permanent feature of nation states today.

In democratic societies intelligence services are regarded as indispensable components of the security architecture, where they support the formulation of government policy; gather intelligence to identify and counter threats to national security; combat crime and support the activities of the armed forces (Matthews et al, 2008: 7). Although intelligence is vital, it is, as pointed out by Kasrils (in Hutton, 2009a: 11,12, 20), being secret, also quite dangerous. Safeguards to prevent the abuse of intelligence and special powers related to it, have in time been devised, revised and variously applied and have, according to Gill (2003:1) as well as Leigh (in Born et al,

2005: 3-5), become a distinguishing feature between constitutional democracies and authoritarian states.

While intelligence and intelligence services have been in existence through the ages, the field of intelligence oversight is fairly new, emanating from the USA and Western Europe in the 1970's and has, in South Africa, mainly been developed as part of the post-1994 democratic dispensation. As a relative latecomer to intelligence oversight South Africa has had the benefit of learning and borrowing from international best practice. The South African approach to intelligence oversight relied heavily on the Australian, Canadian and British examples while an element of the Swedish approach, the Ombudsman, was also incorporated, which provided South Africa with a hybrid parliamentary and Inspector-General model of Intelligence Oversight. The mandate role and functions of the Joint Standing Committee on Intelligence (JSCI) and Inspector-General of Intelligence (IGI) is defined in the Intelligence Services Oversight Act, Act 40 of 1994 (ISOA).

In the immediate post-Cold War and newly democratic era, with some of the assumptions, prevalent at the time, South Africa seemingly had the ideal model to ensure civilian oversight of its intelligence services. The global environment has however gone through significant changes since the heady days at the end of the Cold War and the start of the post '94 South Africa. As a consequence, the threat perception, as reflected in the White Paper on Intelligence (1994), has undergone some changes while domestic political, socio-economic and security realities have all contributed to a changing role of the intelligence services and, with it, the perceived role of intelligence oversight. It can be argued that the intelligence services have not been as subservient and amenable to scrutiny and intelligence oversight, while the executive have complicated matters by not fulfilling its control and oversight role as intended in a democratic state (O'Brien in Born et al, 2005: 199-201, 203-204, 218-219). As it grappled to address the role of the intelligence services, as found by Africa (2012), successive administrations have sought to realign and reorganize, especially the civilian intelligence component (van den Berg, 2014: 104).

Matters came to a head when President Ramaphosa established a High Level Review Panel (HLRP) on the State Security Agency (SSA) in 2018 to address issues

debilitating the civilian intelligence service. The Panel made a series of findings and recommendations, which also included changes to intelligence oversight. Amongst others, it recommended that the IGI regulations be promulgated, the recommendations of the 2006 and 2008 reviews be reviewed and implemented, the functions of the JSCI be reviewed and consideration be given to a dedicated capacity for the JSCI. While these findings and recommendations are welcomed, it at the same time raises questions about the extent to which said findings and recommendations could serve as blueprint for future intelligence oversight in South Africa.

The South African environment is unique given the need to transform the state, entrench constitutionalism and address socio-economic inequalities. In the security sector this requires entrenching civilian control of the intelligence services and as such the model and approach to oversight has to develop a more specific South African character given our history of abuse, oppression and limited safeguards and accountability. Further enquiry is therefore needed, not only to expand our body of knowledge on intelligence oversight, but also to assist in improving the practice of oversight, as befitting a constitutional democracy. It is to this end that unpacking the proposals of the HLRP on SSA to determine whether it provides a sound basis for a more relevant model of intelligence oversight in South Africa, is required.

1.2 Literature Review

A comprehensive review of literature was conducted and organized in three themes; international intelligence oversight, intelligence oversight in South Africa and intelligence oversight best practice as developed by Born and Wills.

Born et al, 2005, in ***Who's Watching the Spies?*** reviewed intelligence oversight since its inception in the 1970's, by drawing on the United States (US), United Kingdom (UK), Canadian, Norwegian, Polish, Argentinian, Republic of Korea (South Korea) and South African experience of intelligence oversight. *In the* ***DCAF Toolkit – Legislating for the Security Sector Guidebook Understanding Intelligence Oversight***, 2007, Wills provides an introduction to how democratic states can govern their intelligence services. Baldino, 2010, in ***Democratic Oversight of the Intelligence Services***, argues that Intelligence accountability is shaped by a range of domestic institutional

norms and political considerations. Goldman and Rascoff et al, 2016, in ***Global Intelligence Oversight Governing Security in the 21st Century***, reflect on the evolution of intelligence oversight.

Intelligence accountability and governance is regarded as a relatively new phenomenon in Africa. Hutton, 2009, in ***Intelligence and Accountability in Africa***, reflects on historical trends governing intelligence on the continent.

In the South African context Hutton, 2007, in ***Looking beneath the cloak - An analysis of intelligence governance in South Africa***, reflects that in the restructuring and design of a new intelligence community, South African legislators studied international models and compared different organisational structures. In ***To Spy or Not to Spy, Monograph 157, 2009,*** **Hutton (editor),** Fazel, reflects that intelligence reform in South Africa is the consequence of constitutional reform. The Constitution provides for the establishment of intelligence services, but also provides for governing principles and safeguards to ensure compliance and mitigate against abuse and bias. Gilder argues that while the intelligence services operate in secrecy, they are subject to stringent oversight and control. Sole, conversely argues that in a democracy secrecy inhibits self-correction and eventually reduces, instead of increases, security. Hutton concludes by commenting on the report of the 2008 Ministerial Review Commission on Intelligence (MRC), pointing out some concerns and limitations on intelligence oversight.

Dlomo, 2004, in his MA Mini-dissertation, **An Analysis of Parliamentary Oversight in South Africa with Specific Reference of the Joint Standing Committee on Intelligence**, analysed parliamentary intelligence oversight in South Africa, focussing mainly on the term of the second democratic parliament, 1999-2004. Netshitenzhe, 2005, in her MA Mini-dissertation, **A Comparative Analysis of the Roles and Functions of the Inspector-General of Intelligence with Specific Reference to South Africa**, analysed the various mechanisms of intelligence oversight by comparing the South African IGI[1] with inspectors-general internationally. In essence

[1] For the purposes of this study the Inspector-General of Intelligence (IGI), refers to the person appointed as envisioned by the Constitution and ISOA to occupy the position of IGI and conduct civilian oversight of the intelligence services.

assessing the first decade of the Office of the Inspector-General of Intelligence (OIGI)[2], 1995-2005. Dube, 2013, in his MA Dissertation, **Accountability and Oversight of Intelligence Services in South Africa post 1994,** sought to establish to what extent South Africa's post 1994 model of intelligence oversight remains effective and relevant in dealing with 21st century intelligence challenges. Masiapato, 2018, in his PHD Thesis, **Cooperation of South African Democratic Intelligence Oversight Structures for Good Governance**, pointed out that while post-1994 South Africa had established multifaceted intelligence oversight machinery, it remained fragmented in execution, uncoordinated, reflecting a silo approach and consequently playing a minimal role in promoting good governance.

Africa (in Cawthra 2009) writing on "Governing Intelligence in the South African Transition, and Possible Implications for Africa", in **African Security Governance Emerging Issues**, commented that intelligence services are receiving increased attention in debates on security sector governance. She points out that the post-1994 intelligence services are quite different from their pre-1994 antecedents. Nathan (in Bentley et al, 2013) in **Falls the Shadow: Between the promise and the reality of the South African Constitution** reflected on what he termed "Constitutional subversion by the intelligence services". He highlighted typical obstacles to intelligence reform in South Africa since 1994.

Mufamadi et al, 2018, in **The Report of the High Level Review Panel on the State Security Agency**, primarily reflected on the reconstruction of a professional national intelligence capability for South Africa. The Panel made recommendations on civilian intelligence as well as intelligence oversight. It is in this context that consideration can be given to whether these findings and recommendations would improve intelligence oversight and serve as a basis for a redesigned oversight regime.

Born and Wills (editors), 2012, in ***Overseeing Intelligence Services – A Toolkit,*** consolidated their earlier findings and recommendations on international best practice on intelligence oversight. Their United Nations (UN) endorsed toolkit provides an

[2] For the purposes of this study the Office of the Inspector-General of Intelligence (OIGI) is the office or structure established in terms of ISOA to support the IGI in the execution of their mandate.

international standard against which the findings and recommendations of the HLRP can be assessed.

1.3 Conceptualising Intelligence Oversight

It is generally accepted that intelligence services require special powers to conduct its intelligence and counter-intelligence activities. In the same vein intelligence services may abuse their powers and require some form of oversight[3] and control[4]. The challenge is to ensure that the intelligence services execute their mandate without abuse or threat to the state and its citizens. This is achieved by appropriate measures of control and oversight. Winkler and Mevik in Born (et al, 2005: ix) point out that a sound system of checks and balances, which places intelligence agencies under democratic supervision, is necessary.

This system of checks and balances or intelligence oversight gained traction in the middle seventies of the 20th Century, to address abuse by security and intelligence agencies, in the mostly liberal democracies of North America, the Antipodes and since the middle 1980's, Europe. Since the 1990's it has also slowly spread to other democratic states, such as South Africa (Leigh in Born et al, 2005: 3-4; Gill, 2003: 1).

Hutton (2007:10), states that the most basic control mechanism of state power and its security capabilities is the rule of law. The rule of law is not only a fundamental and indispensable component of a democracy, but the intelligence services themselves obtain their powers as well as their legitimacy from the law. The intelligence services are furthermore subject to legislation which governs their mandate, role and functions as well as the control, accountability and oversight regime. Legislation governing the conduct of intelligence should therefore, according to Hutton, provide for the competing dynamics of secrecy and accountability while ensuring that intelligence fulfils its mandate. To this end, the strength of legislative sanction lies in the oversight and holding to account of intelligence structures by several levels of authority.

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[3] **Oversight** – "A means of ensuring public accountability for the decisions and actions of security and intelligence agencies. It is a looser form of control than day-to-day management. Its form, objectives and methods vary according to the body involved in oversight, whether executive or legislative" (Born et al, 2005: 7).

[4] **Control** – "Some measure of checking, directing or 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 restraints where necessary" (Netshitenzhe, 2005: 10).

Baldino (2010: 9) and Netshitenzhe (2005: 1) found that intelligence oversight is conducted at 3 levels, executive, legislative and judicial level while Born and Leigh (2005:15, 140), also add internal control by the services and independent oversight by civil society. Born and Leigh furthermore point out that while there are is no international level, inter-governmental forums may perform an oversight role. According to Wills (2007: 32) five main types of institutions control and/or oversee the intelligence services; internal management of the intelligence service, the executive, the judiciary, parliament and expert oversight structures.

Fazel (in Hutton, 2009a: 32) opines that the oversight of intelligence not only includes executive supervision, control and policy-making, but it also broadly refers to activities looser than management and control which may take on many forms and instruments. These are executive, legislative, judicial and civilian oversight mechanisms, which focus on different areas of interest and employ different strategies of scrutiny, both before and after an event, incident or activity. Baldino (2010: 212) reflects that reliable and realistic democratic oversight systems must deal with special executive powers, the requirements of secrecy, the relationship between processes and structures and (even) other pressing national security issues. In his estimation, at a minimum, well-functioning oversight and prudent review[5] requirements are not an option, but an imperative to enhance, and give legitimacy to, not only the role and capabilities of intelligence, but also to mission accomplishment.

Hutton (2007: 10) is adamant that intelligence role players should be held to account for the public good and she cites Leigh (2005) in pointing out that there are three basic concerns in the design of oversight procedures: the need to establish mechanisms preventing political abuse while providing for effective governance, upholding the rule of law, and ensuring the proportionate use of exceptional powers to protect civil rights. Hutton finds that these concerns are best addressed through a combination of mechanisms and levels of control be they executive, legislative, judicial or civilian.

The aim of intelligence oversight, according to Netshitenzhe (2005:1), is to ensure that the services function with due regard for the law and accountability. They should

[5] **Intelligence Review** – "ex post facto monitoring the intelligence services' work and the legal status of their actions" (Born & Leigh, 2005: 139).

furthermore also be held to account for the resources allocated to them. Hutton (2007:10) citing Leigh (2005), states that the main objective of an intelligence oversight system is to ensure public accountability for the actions and decisions by the intelligence services. The purpose of intelligence oversight in a democracy, according to Baldino (ed) (2010: 19), is that the public should have assurance that the tools of intelligence are constitutionally sound, resources are not wasted and that law abiding citizens are protected from arbitrary and deviant behaviour. According to Born and Leigh (2005: 13) the object is to insulate the security and intelligence services from political abuse without isolating them from executive governance.

Caparini (in Caparini and Born [eds], 2016: 9) offers a comprehensive breakdown of oversight of intelligence and security services. She states that oversight aims to assess one of two things: Firstly, oversight could seek to determine the efficacy or the ability of a service to fulfil its mandate. Executive level oversight usually focusses on efficacy issues such as effectiveness in fulfilling tasks, meeting its mandate and whether it has adequate capabilities. Secondly, oversight seeks to determine the propriety of an intelligence service, whether it acts correctly and complies with legal and ethical norms in the course of its activities. Judicial oversight focusses on the propriety of intelligence activities, whether they have been conducted in a lawful manner. Legislative oversight tends to involve a bit of both, efficacy and propriety, as it may be concerned not only with the intelligence budget and whether funds are properly allocated, but also whether intelligence activities are conducted in compliance with the law. Public oversight tends to be more focussed on propriety issues in understanding the accountability of intelligence and security services.

In a similar vein Den Boer (in Born and Wills, 2012: 6) argues that Intelligence accountability has many layers. Some, according to Den Boer, relate to the control of intelligence services as applied internally by serving officials and externally by members of the executive. Others relate to oversight as practiced by Parliament, the judiciary, and expert oversight bodies. She states that the central purpose of intelligence oversight is to discourage impropriety by national intelligence services. Oversight, as opposed to control, which refers to the direct management of a service, includes monitoring, evaluation, scrutiny, and review. By promoting openness and transparency, oversight bodies can limit abusive tendencies in the services and in so

doing provide Parliament and the executive (and others who exercise control responsibilities) with useful information and expertise.

According to Netshitenzhe (2005: 10), control over intelligence is an important mechanism in democratic states. Fazel in Hutton (2009a: 32), concurs with Netshitenzhe while Kasrils (in IRAC, 2006: 19) believes that intelligence oversight has a critical role to play in assuring the national security mandate of intelligence services.

The South African intelligence oversight regime is the product of international benchmarking based on best practice (legislation and operational) identified in mainly the UK, USA, Australia, Canada and Belgium (Dlomo: 2004: 8, 112). As a relative latecomer to intelligence oversight South Africa seemingly could establish an oversight regime providing for executive, legislative and civilian oversight as it could emulate international best practice.

Reviews in 2006 and 2008 identified deficiencies in the oversight regime which were never addressed according to Mufamadi (et al, 2018). Further enquiry and case studies by Dlomo (2004), O'Brien (2005), Netshitenzhe (2005), Dube (2013) and Masiapato (2018) highlighted deficiencies such as ambiguities in enabling legislation, untested impact of the OIGI, reliance on other oversight mechanisms such as the Auditor General (AG) and Public Protector (PP), independence and professionalism of oversight personnel, resource allocation, fragmented oversight, common oversight doctrine, accountability culture, political interference and over-emphasis of secrecy and raised the question whether the oversight regime has become dated.

The deficiencies in the intelligence oversight regime was brought into sharp focus by the Report of HLRP on SSA of 2018, which made a number of recommendations. The value and use of these recommendations, as a basis for improved intelligence oversight or even a model for intelligence oversight therefore needs to be assessed. The best approach would be to assess the current regime along with the recommendations against international best practice.

Hans Born and Aiden Wills have extensively interrogated intelligence oversight and have conducted various studies into intelligence oversight globally. They have

identified what may be termed a “blueprint” for intelligence oversight. Based on international best practice Born (et al, 2005: 236-238) identified independence, investigative powers, access to classified information, ability to maintain secrets and adequate support staff as 5 vital elements of effective intelligence oversight while Wills (2007: 34, 38-39) identified a set of standards or focus areas for expert intelligence oversight bodies. The oversight of the legality of operations and policy, oversight of the effectiveness of operations, oversight of administrative practice and oversight of financial management is regarded as the minimum focus or standard for intelligence oversight. Their work is encapsulated in the 2010 UN Compilation of Good Practices on Intelligence Agencies and their Oversight, which provides for (1) Intelligence services being overseen by a combination of oversight institutions whose mandates and powers are based in law; (2) effective oversight includes at least one independent civilian institution; (3) all the work of the intelligence services are covered; (4) oversight institutions have the power, resources and expertise to initiate and conduct their own investigations; (5) they have full unhindered access to information, officials and installations; (6) oversight institutions receive full cooperation from the intelligence services and law enforcement authorities; (7) oversight institutions take all necessary measures to protect classified information and personal data; and (8) penalties are provided for breach of these requirements. They also recommend that what constitutes an intelligence service should be defined in a functional manner; monitoring of activities should cover the full intelligence cycle and that the effectiveness of the intelligence oversight system be assessed regularly while intelligence oversight bodies should benchmark internationally to identify and share best practices.

1.4 Research Problem

The HLRP on the SSA in 2018 identified issues debilitating the civilian intelligence service. It made recommendations to address some of these challenges, which also included changes to intelligence oversight, speaking to transparency, accountability and good governance. It is in this context that the HLRP recommendations on intelligence oversight be interrogated to determine if a framework for intelligence oversight can be developed from the HLRP recommendations.

The aim of the research is to determine whether the recommendations of the HLRP related to intelligence oversight can serve as a framework for intelligence oversight in South Africa.

This will be achieved by addressing the following two questions:

- Is the existing intelligence oversight framework in South Africa adequate when measured against international standards of best practice?
- To what extent do the HLRP recommendations meet the standards of international best practice as a basis for intelligence oversight development?

1.5 Research Methodology

The study is a literary review based on a qualitative approach as it is believed that qualitative research will best address the research question. This will entail an in-depth literary review using primary sources (official documents available in the public sphere) and secondary literature (scholarship dealing with intelligence oversight) as core sources of research. Although the topic is by nature sensitive and borders on the secretive, in keeping with transparency and accountability in a constitutional democracy, official reports are available and/or have been redacted to promote public discourse. Intelligence oversight is also the focus of academic and public discourse providing for case studies of international best practice. Data was collected through a qualitative analysis of existing literature available in the public domain.

The study uses a conceptual, rather than a theoretical framework and research focussed on the existing intelligence oversight regime in South Africa, the recommendations of the HLRP on the SSA and measuring it against principles of international best practice in intelligence oversight as identified by Dr Hans Born and Aiden Wills.

Hans Born and Aiden Wills, are both internationally respected authorities on intelligence oversight. They have either authored or contributed to numerous books, articles and publications on the topic of intelligence oversight and good governance in the security and defence sector. Through their work at the Geneva Centre for the

Democratic Control of the Armed Forces (DCAF) they have conducted international case studies on intelligence oversight regimes in various countries and have developed a toolkit which provides guidance on the establishment and management of intelligence oversight.

The existing oversight regime in South Africa as well as the recommendations of the HLRP will be evaluated against the best practice in the toolkit to determine whether it meets these requirements and, whether the HLRP meets these requirements to serve as basis for a redesigned oversight regime.

1.6 The Structure of the Research

Chapter 1: Introduction. This chapter contextualises the study. The research topic, research problem, research questions as well as a general description of the research design and methodology is provided. Literature used is demarcated, key concepts defined, and the literature reviewed, is discussed. It concludes with a general outline of the thesis.

Chapter 2: Intelligence in South Africa. A brief overview of the intelligence services, their role and mandate is provided and their performance is addressed.

Chapter 3: The 1994 Intelligence Oversight Regime. The regulatory framework, oversight role players and activities are addressed.

Chapter 4: The Findings and Recommendations of the High Level Review Panel (HLRP) on SSA. The findings of the HLRP specifically related to intelligence oversight are enumerated.

Chapter 5: International Best Practice in Intelligence Oversight. This chapter provides a case study of international best practice based on the principles and good practices identified by Born and Wills and the UN.

Chapter 6: Conclusions and Recommendations. Salient points are summarised and discussed. Results are interpreted, propositions tested, findings and

recommendations made while gaps and further opportunities for further examination and study identified.

CHAPTER 2

INTELLIGENCE IN SOUTH AFRICA

2.1 Introduction

The purpose of this chapter is to develop an understanding of the South African intelligence services by explaining the development, legislative framework, mandate, role and functions of the intelligence services. The performance of the South African intelligence services will also be addressed.

In order to achieve this, a common understanding of intelligence will first be established by explaining the relationship between intelligence and state and the type of intelligence services, serving different regime types, the role of intelligence in the state and defining pertinent security and intelligence concepts.

2.2 Typology of Intelligence and State: Conceptualising Intelligence and State

As mentioned in Chapter 1, from bygone times, nations, governments and communities have relied on intelligence as an essential guide to statecraft, in both governance and diplomacy. Empires, kingdoms, states and city states have used intelligence in a systematic manner as an essential feature of government.

2.2.1 Defining Intelligence and Security Terminology

Intelligence has been used as an instrument in conquest, exploitation, warfare and military supremacy. It is similarly a tool in acquiring dominance in trade and wealth creation for nations and people (Matthews et al, 2008:7). Despite being around since the beginning of time intelligence is however still regarded as “little understood” or “under-theorised” (Kruys, 2006: 67) and it is therefore opportune to settle on a basic or common understanding for the purposes of this study.

Kruys (2006: 66-67) citing Sherman Kent (1949), points out that intelligence means knowledge or information, as well as the organisation that produces knowledge and the activities conducted by these organisations. Intelligence is therefore generally understood to mean the (sequential) process of collecting information, the analysis or collation of information to turn it into intelligence and the dissemination and use of intelligence. Shulsky (2000) as cited by Kruys, refers to collection, analysis, covert action and counter-intelligence as the four activities or elements of intelligence. Intelligence is therefore understood to include a number of secret activities as well as the nouns, "Knowledge" or "information" and "producing organisation". It furthermore includes all the elements of collection, analysis, covert action[6] and counter-intelligence[7].

According to Gill & Phythian (2012: 18), the definition of intelligence should reference the following factors: it is more than mere information collection; it covers a number of linked activities; it is security based; it aims to provide advance warning; it is needed in a competitive environment (gains are relative); it includes the potential for covert action; and secrecy is essential to achieve competitive advantage.

Intelligence, according to Gill & Phythian (2012: 19), is therefore:

"… the umbrella term referring to a range of activities – from planning and information collection to analysis and dissemination – conducted in secret, and aimed at maintaining or enhancing relative security by providing forewarning of threats or potential threats in a manner that allows for the timely implementation of a preventative policy or strategy, including where deemed desirable, covert activities."

They elaborate on this definition by stating that the need for counter-intelligence arises from the competitive nature of the environment in which intelligence is pursued, as

[6] **Covert Action** – Daugherty (2004: 18-19) describes "Covert Action" as the deliberate, planned intervention in the sovereign rights of a nation by an outside government to influence or force a change of state policy. Hastedt & Knickrehm (1991: 228-231) elaborates and describe it as "secretly altering the balance of power in a state". Covert action takes the forms of clandestine support to individuals and organisations; black propaganda, economic operations, assassination of (foreign) leaders; and para-military operations.

[7] **Counter-intelligence** - Measures and activities applied and executed to create and maintain a condition of security (SADF, 1981: 9). According to Daugherty (2004: 11) the measures are aimed at impeding the activities of adversaries and may, according to Kennedy (1987: 22) be active (deception and disinformation) or passive (physical and personnel security). Wasemiller (1994: 2) equates active to offensive and passive to defensive.

secrets must be guarded. Counter-intelligence is therefore either offensive or defensive (Gill & Phythian, 2012: 19).

2.2.2 Intelligence and State

With the rise of the modern state system, intelligence requirements became more settled and the elements of intelligence more professional, while the stakes became larger, focussing on the protection of the state or head of state (Gill & Phythian, 2012: 21). With the advent of democratic states, a fundamental change took place in the nature of intelligence as a tool of government. Whereas previously the focus was on the security of the state and the survival of the regime, the emphasis shifted to a focus on human security and human rights and freedoms Matthews (et al, 2008: 7). These may be interpreted in terms of national security[8] or national interest.

Security is regarded as relative and the purpose of intelligence is consequently to provide a relative security advantage. Security, or the level of security offered against threats, is part of the social contract between state and citizens (Gill & Phythian, 2012: 10, 170).

No matter how it is viewed, Intelligence is regarded as vital to government and consequently directly related to the political regime (Van den Berg, 2014: 2). It is evident from history that intelligence, its techniques and elements have been used in pursuit of different objectives and that statecraft and its instruments are always a reflection of the culture and value system of a given society (Matthews et al, 2008: 7) Different strategic environments in different part of the world have led to the development of intelligence structures along very different lines, often closely related to threat perceptions (Gill and Phythian, 2012: 24-25).

[8] **National Security** - "National security is the first and most important obligation of government. It involves not just the safety and security of the country and its citizens. It is a matter of guarding national values and interests against both internal and external dangers – threats that have the potential to undermine the security of the state, society and citizens. It must include not just freedom from undue fear of attack against their person, communities or sources of their prosperity and sovereignty, but also the preservation of the political, economic and social values – respect for the rule of law, democracy, human rights, a market economy and the environment – which are central to the quality of life in a modern state". (Inter-ministerial Work Group on National Security [IWGNS], 2013 as cited by Cawthra, 2013: 3).

2.2.3 Typology of State and Intelligence

Van den Berg (2014) developed a useful typology which explains different intelligence services in different regime types.

According to Lowenthal (2009), cited in van den Berg (2014: 41) almost all states have some kind of intelligence service[9], which may be civilian, military or both. Each of these services are a unique expression of a country's history, needs and preferred government structures. Intelligence structures also differ between democratic and non-democratic countries (Van den Berg, 2014: 39).

According to van den Berg (2014: 41, 45) a classical structure of an intelligence community would provide for an internal security service, a foreign intelligence service, a technical service for government communications, a military intelligence structure, a police intelligence structure, foreign affairs; as well as a joint intelligence coordinating body.

Regime types and political systems are classified as democratic or non-democratic. Democratic refers to representative/ liberal, direct or social democracies while non-democratic refers to either authoritarian or totalitarian (Van den Berg, 2014: 52-53). A third type; hybrid regimes, which provides for states in transition, as proposed by van den Berg, is useful for this study. A hybrid regime is sited between democratic and non-democratic systems and is moving through three basic processes of democratisation; (1) authoritarian break-down, (2) democratic transition and (3) democratic consolidation. South Africa is consequently classified as a hybrid state in transition from authoritarianism to democracy. According to his classification South Africa is not yet a consolidated democracy, but in the stage of consolidation (Van den Berg, 2014: 59, 141-142).

Intelligence practice differs in the different regime types in each state as it is particular to the type of political system, ideological outlook and culture. This in turn informs

[9]**Intelligence Service -** "a state organization that collects, analyzes, and disseminates information related to threats to national security. It covers a wide variety of organizations—including military intelligence, police intelligence, and civilian intelligence services, both domestic and foreign. It also includes often-overlooked organizations frequently housed in finance ministries and treasury departments tracking the flow of money" (Born and Mesevage in Born & Wills, 2012: 6).

national threat perceptions and the way in which intelligence is employed. Van den Berg (2014: 78) presents a framework for states, political regimes and types of intelligence services (graphically depicted in Figure 2.1).

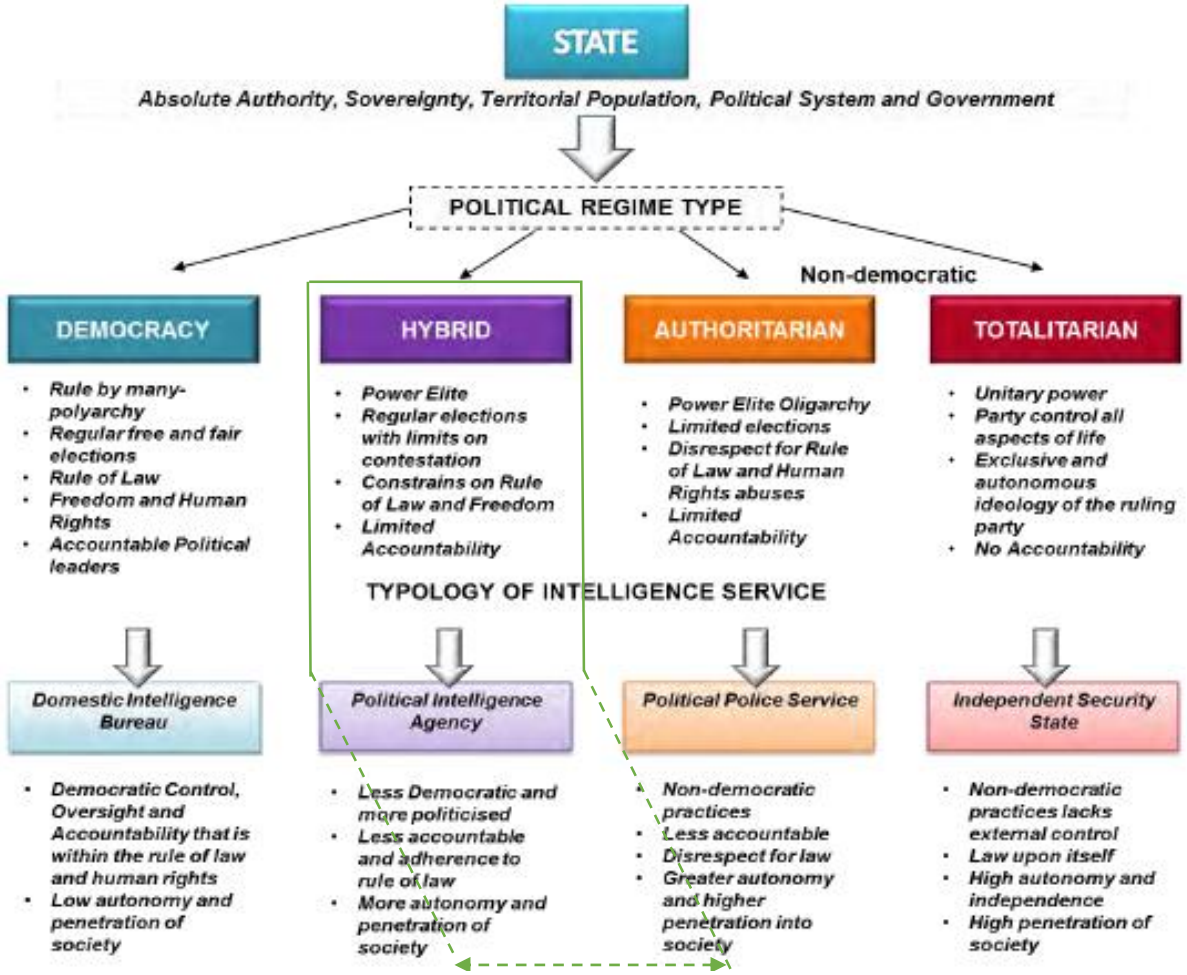

Figure 2.1: South Africa's position with the State Political Regime and Type of Intelligence Typology (van den Berg, 2014: 78-79, 138, 149)

Democracy is characterised by popular sovereignty, accountability of those in power, freedom and the rule of law. A hybrid regime is regarded as a form of government characterized by a power elite, regular elections with limits on contestation, constraints on the rule of law and freedom, and limited accountability. Authoritarian regimes reflect limited political opposition, less free and fair elections and a power elite with limited respect for the rule of law. In an authoritarian regime civil society is stifled and weakened by the state and is replaced by popular political mobilization. A totalitarian regime reflects a unitary center of power which controls citizen participation through a ruling party. Civil society is controlled and there is no accountability (Van den Berg, 2014: 57, 59, 78).

In terms of the typology of intelligence services four intelligence services are identified; domestic intelligence bureau, political intelligence agency, political police service and independent security state service. Figure 2.1 (above) offers a graphic description of the typology (Van den Berg, 2014: 76, 77, 78).

The Domestic Intelligence Bureau (Figure 2.1, p18) has limited and specific powers which are derived from a legal charter or legislation. Its principal function is to collect information for the criminal prosecution of security offenses. It does not engage in aggressive countering operations against citizens. The Bureau of Domestic Intelligence is inherently part of a democratic political regime. It is characterised by democratic control, oversight and accountability that is within the rule of law and human rights as well as low autonomy and penetration of society. The British Security Service (MI5), is an example of a Domestic Intelligence Bureau.

The Political Intelligence Agency (Figure 2.1, p18) reflects intelligence practices of both democratic and authoritarian regimes. There is however a tendency to be more non-democratic and independent from democratic policy-making processes through the amendment of legislation. This type of service is innately more politicised, serving the political elite and governing party while focusing more on opposition and threats on themselves rather than the protection of the constitution, welfare of the people or the security of the state as a whole. It is less accountable and adherent to the rule of law and more autonomous with greater penetration of society. The Pakistani Intelligence Bureau is an example.

A Political Police Service, as graphically depicted in Figure 2.1 (p18), is characterised by non-democratic practices, less accountability, disrespect for the law, greater autonomy as well as higher penetration of society. Operatives have greater autonomy from democratic policy-making and are shielded from legislative and judicial scrutiny. This type of security intelligence service, normally in an authoritarian regime, answers almost absolutely to the political elite and/or, governing party and focusses on domestic political opposition groups, often collecting intelligence not related to specific criminal offenses while conducting aggressive counter operations against internal political opposition. The Stasi (*Staatssicherheitsdienst* - SSD), in the erstwhile German

Democratic Republic (DDR) and the *Dirección General de Inteligencia* (DGI) of the Republic of Cuba are examples.

The Independent Security State Service, as seen in Figure 2.1 (p18), is a security intelligence service characterised by a dearth of external control and oversight, even from the authoritarian regime it serves. It decides its own objectives, which may not correspond with those of the political elite. It enjoys a high level of autonomy from routine political processes and keeps funding and policies concealed from governmental policy-making processes while authorising its own targets and countering actions. An Independent Security State Service is usually operating in a totalitarian regime, lacks external control, is a law upon itself, has high autonomy and independence and a high penetration of society. The *Komitet Gosudarstvennoy Bezopasnosti* (KGB) of the former Soviet Union and the State Security Department of the Democratic People's Republic of Korea (DPRK) are examples of this type of service.

Van den Berg (2014: 78-79) integrated political regimes and intelligence services based on the rule of law and human rights in regime types and the level of autonomy and penetration of society of the intelligence service. The level of oversight is a further indicator of the type of service and regime type as it reflects on accountability and the rule of law, where the more democratic provides for greater oversight and the less or non-democratic for reduced or no oversight. Based on his typology, as reflected in Figure 2.1 (p18), a Bureau of Domestic Intelligence is part of a democratic political regime, a Political Intelligence Agency is found in hybrid states, a Political Police Service in authoritarian states and the Independent Security State Service serves a totalitarian regime type.

Hybrid and non-democratic states and their practices are not ideal and Van den Berg identifies the ideal intelligence service as a Domestic Intelligence Bureau in a democratic regime type. While there are substantial distinctions between intelligence practices in democratic, hybrid and non-democratic states, as reflected in Figure 2.1 (p18), ultimately the primary role of intelligence in contemporary states is to assist the state in the pursuit of prosperity, protection and security. Success, in his estimation,

can only be ensured through good governance which requires oversight, appropriate control and increased effectiveness (Van den Berg, 2014: 81).

2.3 The South African Intelligence Regime

States employ Intelligence in ways which are particular to a nation, as prescribed by the ideological outlook, political system, and culture, which formulates the threat perception against which the intelligence regime is employed (van den Berg, 2014: 82). In this regard Gill (in Johnson, 2007: 83) reflects that intelligence is an integral part of government.

South Africa, as a state and a nation is no different. The intelligence regime is the product of political transition which led to the establishment of a democratic state in 1994 (Africa in Cawthra, 2009: 59). Africa points out that it was a complex and difficult process, closely linked to the broader political transition which took place. Hutton (2007: 4) and Africa (in Cawthra, 2009: 60) found that an interesting feature of the process was the role which the intelligence service of the government and the intelligence formation of the ANC played, with the National Intelligence Service (NIS) and Department of Intelligence and Security (DIS) handling early and initial contact between the government and the ANC.

Understanding the post-1994 intelligence regime in South Africa requires that the events and constituent elements of the future service be understood.

2.3.1 The Political Regime and Intelligence in South Africa, pre-1994

According to Van den Berg (2014: 114, 115-116) South Africa, pre-1994 can be variously classified as less democratic, non-free and more authoritarian with a high emphasis on national security and high internal threat perception. In the period 1990-93 it is rated as regime change, partly free and less authoritarian. State institutions are regarded as strong and the state extensive, placing South Africa in Quadrant II of the Fukuyima Matrix, as depicted in Figure 2.2.

Similarly, the intelligence service is variously classified as Political Police Service in the 1960's and 70's with the establishment and dominance of the Bureau for State Security (BOSS), Independent State Security in the 1980's with the demise of BOSS and its replacement by first the Department of National Security (DONS) and later NIS and the emergence of the Division Military intelligence (DMI) as dominant service, as South African society became increasingly militarised, and from 1990-1994 as Political Police Service.

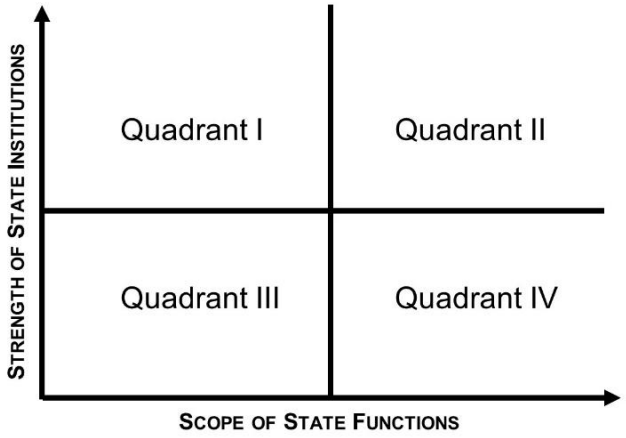

Figure 2.2: Stateness and Efficiency Matrix (Van den Berg, 2014: 114)

While the BOSS was the dominant service in the 1960's and 1970's, the 1978 Information Scandal led to its demise and replacement by first DONS and later NIS. For most of the 1980's DMI was the dominant service given the nature of the perceived threat and the subsequent increased militarisation of South Africa. In order to address the effective functioning of the intelligence community in terms of the National Security Management System (NSMS), the 1981 Simons Town Conference delineated the functions of the intelligence services. NIS was responsible for economic and political intelligence, counter-espionage and evaluation, DMI for military intelligence and counter-mobilisation and the Security Branch of the SA Police for counter-subversion, both domestically and internationally (Van den Berg, 2014: 95, 129). While, as O'Brien (2003: 7-8) points out, the military dominated the security system thereby controlling the national security structures and NSMS, NIS staffed the State Security Council (SSC) structures. Van den Berg (2014: 129) found that during this period there was a high level of political intervention in politics and a high level of intelligence intervention in politics. O'Brien (in Born et al, 2005: 200) argues that while the intelligence system was somewhat characterised by corruption, mismanagement, poor coordination and a poorly defined brief, a highly competent intelligence and security system was established which directed all government departments in the "Total National Strategy" against the "Total Onslaught".

During this time the national security strategy, according to O'Brien (2011), cited in Van den Berg (2014: 94) was built on two premises: the ANC's strategy of revolutionary warfare and the expectation that the South African security forces would preserve law and order to establish a stable environment in which the government could bring about evolutionary political change. The aim according to Africa (2006: 83), citing Cawthra (1986) and Grundy (1986) was the maintenance of white control.

The Intelligence services of the independent homelands, Transkei, Bophuthatswana, Ciskei and Venda (TBVC-states) were modelled on the NIS and these services received resources and training from South Africa. The purpose of the services reflected similar objectives as the South African intelligence regime; maintaining the status quo (Van den Berg, 2014: 97).

Towards the end of the Cold War and the end of Apartheid and resultant changes in the political regime, the dominance of the military was supplanted by that of NIS, as a military solution was replaced by a political solution (O'Brien, 2003: 9, 14).

During this time intelligence in the ANC evolved from the formation of the Department of National Security and Intelligence (NAT) in 1969, which according to O'Brien (2011), cited by van den Berg (2014: 98), had no formal structure until 1981, but primarily focussed on security and counter-intelligence. NAT was reorganised as National Directorate of the NEC (Hutton, 2007: 4) and later, as the ANC prepared for negotiations and transition, the Department of Intelligence and Security (DIS) (O'Brien, 2003: 14). Intelligence and security training was provided by Political Police Services and Independent Security State Services of countries with non-democratic regime types such as the Soviet Union, Republic of Cuba and DDR (Van den Berg, 2014: 77, 135)

With the unbanning of ANC, PAC and SACP in 1990, South Africa moved towards a negotiated settlement. During the negotiations the intelligence services played an important role (O'Brien in Born et al, 2005: 201-202; Africa in Cawthra, 2009: 59). Part of the negotiations involved determining a new role for the intelligence services. To this end the NSMS was abolished and replaced by the National Coordinating Mechanism (NCM), the State Security Council (SSC) was terminated and replaced by

the National Security Committee (NSC) under a Cabinet Committee for Security Affairs (CCSA) and significantly, Intelligence moved from the State President's Office to the Department of Justice (Van den Berg, 2014: 98-99). Furthermore, as part of the transition to democracy, the Transitional Executive Council Act 151 of 1993 provided for co-government between the National Party Government and ANC. Seven sub-councils, including one on Intelligence, facilitated the transition process (Africa in Cawthra, 2009: 61). The Sub-Council on Intelligence (SCI), comprising of the NIS, DIS, Transkei Intelligence Service (TIS), Bophuthatswana Internal Intelligence Service (BIIS), Venda National Intelligence Service (VNIS) and eventually also the Pan Africanist Security Service (PASS) of the PAC, spelled out legislation, adopted basic principles for intelligence, which would serve as foundation for the establishment of a new national intelligence capability in a democratic dispensation and a code of conduct for members (Van den Berg, 2014: 99).

Under the TEC the statutory and non-statutory intelligence services continued to exist, providing intelligence to their principals, but were bound by political agreement to prepare the way for a single intelligence dispensation (Africa in Cawthra, 2009: 62). Eventually with the White Paper on Intelligence in October 1994 and the passing of the Intelligence Services Act 38 of 1994, The National Strategic Intelligence Act 39 of 1994 and the Committee of Members of Parliament and Inspector General of Intelligence Act 40 of 1994 the new intelligence dispensation came into being on 1 January 1995 (Van den Berg, 2014: 100-101).

2.3.2 The Political Regime and Intelligence in South Africa, post-1994

South Africa's transformation of its security and intelligence services was one of the consequences of the political transition in the country (Africa in Cawthra, 2009: 58).

In transforming the security sector Van den Berg (2014: 100) and O'Brien (in Born et al, 2005: 202) found that the parties subscribed to models obtained from liberal democracies and in crafting a new intelligence regime South Africa was consequently significantly influenced by the Canadian, Australian and British models of intelligence, to address organisational culture, executive control, oversight and legislation. In this regard Hutton (2007: 4) points out that a significant concern was that the intelligence

community, as reflected in Figure 2.3, be held to account, as specified in the Constitution, by a parliamentary committee and an inspector-general, without hampering operational effectiveness.

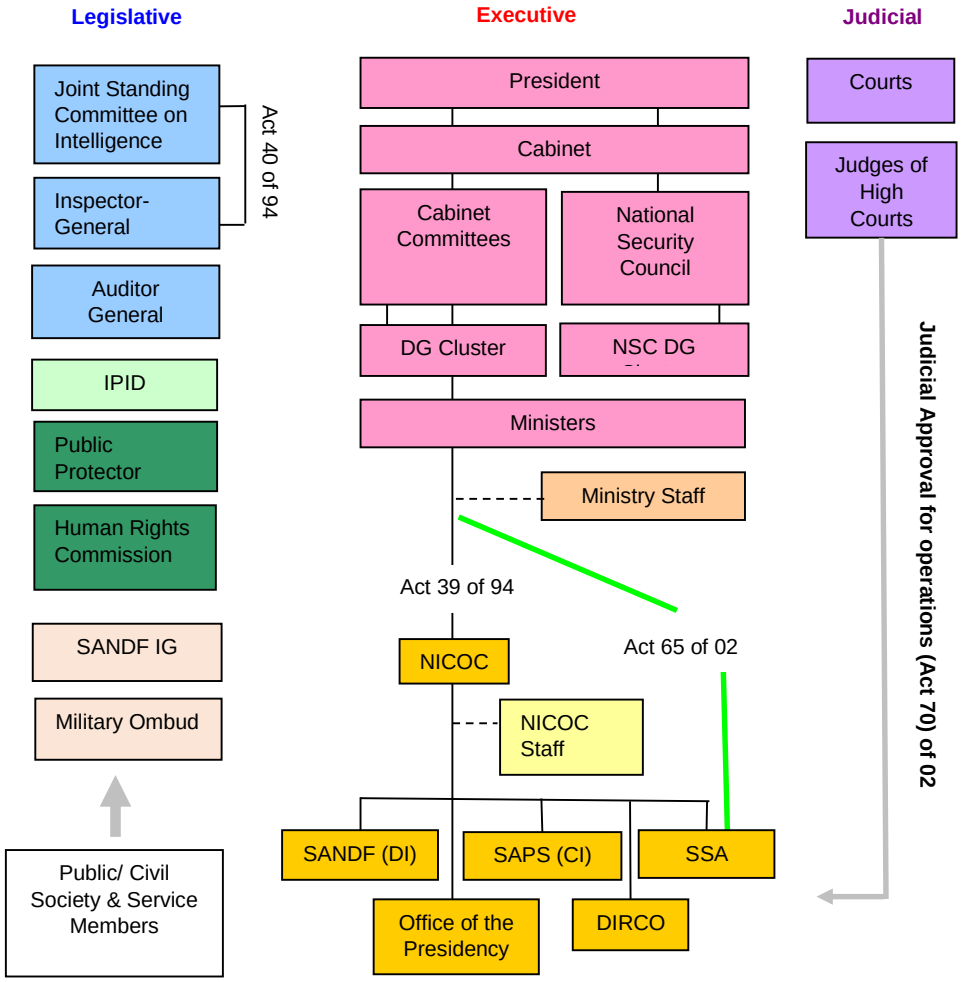

Figure 2.3: The South African Intelligence Dispensation (Own construct derived from Hutton 2007: 21 and Van den Berg, 2014: 106)

2.3.2.1 The White Paper on Intelligence, 1994

The 1994 White Paper on Intelligence was the first wide-ranging statement on the nature, role and functions of democratic intelligence services, making it clear that the intelligence services serve the Constitution and the government of the day (Hutton, 2009a: 2).

The intention of the White Paper was to provide a framework for understanding the philosophy, mission as well as the role of intelligence in a post-1994, democratic South

Africa. In many ways it encapsulated the departure from past intelligence practice (White Paper, 1994: 1).

The objective of the White Paper was to create an integrated, responsive and effective intelligence machinery which serves The Constitution and the government of the day by providing reliable, credible and relevant information (White Paper, 1994: 1).

The White Paper is clear that reshaping intelligence in a democratic South Africa comprises more than restructuring organisations, but should start with clarifying the philosophy, redefining the mission, focus and priorities to establish a new culture of intelligence Hutton (2007: 5). It furthermore emphasises the importance of ensuring a safe and secure environment for all South Africans, and that this objective can only be achieved through consistent effort and that it must remain a high priority alongside reconstruction, development and reconciliation (White Paper, 1994: 1-2).

Hutton (2007: 5) points out that, in terms of the White Paper, the purpose of intelligence is to provide policymakers with timely, critical and, at times unique information, to warn them of potential risks and dangers; to identify opportunities in the international environment by assessing competitors (real or latent) intentions and capabilities in specifically the realm of politics, economics, military, technology and science; and to assist in good governance by providing authentic and critical intelligence which highlights the weakness and mistakes of government.

The mission of the South African intelligence community is to provide evaluated information for the purposes of safeguarding the Constitution; upholding human rights (as encapsulated in the Bill of Rights); promoting the interrelated elements of stability, security, co-operation and development in the country and in relation to Southern Africa; achieving national prosperity, while actively contributing to global peace and other internationally defined priorities for the well-being of humanity; and promoting South Africa's ability to face external threats and enhancing its competitiveness in a dynamic world (White Paper, 1994: 1-2).

The White Paper defines intelligence 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." It furthermore describes "modern intelligence" as "organised policy related information" which also includes secret information. The White Paper allows for the collection of intelligence by overt or covert means from a range of sources; human as well as non-human, open or secret. A distinction is furthermore made between a range of intelligence "forms" such as political-, military-, economic-, technological-, scientific- and criminal intelligence as well as counterintelligence (sic) (White Paper, 1994: 2).

The relationship between intelligence and policy-making is described as a dynamic, reciprocal relationship. It points out that intelligence is but one tool of foreign and domestic policy making and, for intelligence to be of value, it must be accurate, relevant, predictive, provide warning and be timely. It concludes in this regard by stating that for an intelligence organisation to function optimally, and to the benefit of policy-makers, intelligence must be valued and fostered as an instrument of policy (White Paper, 1994: 2).

The White Paper defines a new approach to national security. It makes it clear that the maintenance and promotion of national security should be a government priority and, as intelligence is regarded as an instrument to realise national security, the two concepts are regarded as different sides of the same coin. In addressing national security, the White Paper moves away from the narrow state centric approach to national security.

The classic approach emphasises military threats and strong counter-action or retaliation. In this traditional approach, the accent was on the capacity of the state to ensure physical survival, territorial integrity, independence and the ability to maintain law and order inside its national territory. The focus of intelligence had been on the identification of military and para-military threats or potential threats to essential interests, as well as the evaluation of enemy intentions and capabilities (White Paper, 1994: 2).

Security in the modern post-cold war era is to be understood in more comprehensive terms than the narrow and almost exclusively military-strategic approach in order to

deal with new realities. These realities include the importance of non-military elements of security, threats to stability and development and international interdependence. In this regard the White Paper defers to the more wide-ranging approach to security as endorsed by the UN and Organisation of African Unity (OAU) and (since 2002) the African Union (AU).

In this vein it points out that, given the transnational character of security issues, solutions are seldom solely within the ambit of individual states and cannot be subject to a purely military approach. It points out that threats seldom emanate from a neighbouring military, but rather external, socio-economic, medical-health, ethno-religious and political challenges that can best be addressed through a range of international political, economic, military, social, religious, technological, ethnic, ethical and ethical factors. The White Paper therefore defines security "less in military terms and more in the broader sense of freedom from vulnerability of modern society". In term of this new thinking a number of key features are identified:

- Security is a holistic phenomenon which incorporates political, social, economic and environmental issues.
- The objects of security go beyond achieving the absence of war and encompasses the pursuit of democracy, sustainable economic development and social justice.
- Regional security policy is focussed on fostering collective security, non-aggression and peaceful settlement of disputes.

According to this approach to security policy should deal with broader and more complex issues concerning the vulnerability of society. National security should therefore more encompass the basic principles of, and core values related to quality of life, freedom, social justice, prosperity and development. As a consequence, socio-economic development (programmes such as the Reconstruction and Development Programme [RDP]) is closely tied to South Africa's national security doctrine. In this context the White Paper emphasises that democratisation ensures good governance (White Paper, 1994: 3-4).

Central to security doctrine are lessons learned from the negotiation process, namely; inclusivity, consensus, and the ability to reconcile innate political and social conflict. National security doctrine must promote a society that is free from violence and instability. It must furthermore bring about respect for human life and the rule of law (White Paper, 1994: 4).

A set of nine basic principles of intelligence serve as foundation for a proposed code of conduct as well as the legal framework for an intelligence dispensation in a democratic South Africa: an integrated national intelligence capability; departmental intelligence capability; political neutrality; legislative sanction, accountability and parliamentary control; balance between secrecy and transparency; separation of intelligence from policy-making; effective management, organisation and administration; coordination of intelligence and liaison with departmental intelligence structures and; an ethical code of conduct governing performance of individual members.

The Code of Conduct provides for, amongst others, a declaration of loyalty to the State; obedience to the laws of the country as well as subordination to the rule of law; compliance with democratic values; an oath of secrecy; adherence to the principle of political neutrality; commitment to the highest degree of integrity, objectivity and unbiased evaluation of information; and the promotion of mutual trust between policy-makers and intelligence professionals. Intelligence agencies are furthermore enjoined to execute their tasks in first and foremost accepting the authority of democratic institutions and constitutional structures mandated to participate and monitor the determination of intelligence priorities; no changes to the doctrines, structures and procedures of the national security framework are to be made without approval by the structures representing the people; and that they are bound by the Code of Conduct (White Paper, 1994: 5)

In addressing the structure of civilian intelligence the White Paper states that in a democracy a government must exercise meaningful control of the intelligence community through an array of measures. These include the separation of intelligence functions, the obligation to operate legally, control of access to the executive, and distinguishing between the collection, reporting, coordinating and review functions.

Provision is made for the amalgamation of the NIS, intelligence services of the TBVC states, the ANC's DIS and other intelligence capabilities which meets the requirements of the Intelligence Services Bill. These services were initially organised in the National Intelligence Agency (NIA), but two civilian intelligence agencies, one focussing on domestic intelligence – NIA and the other focussing on foreign intelligence – the South African Secret Service (SASS) were consequently established.

The mission of NIA, the domestic intelligence service is to conduct security intelligence inside South Africa's borders and to protect the Constitution. Its object is to ensure the security and stability of the State as well as the well-being and safety of its citizens. The mission of the foreign intelligence service, SASS, is to conduct intelligence related to external threats, opportunities and other issues that may affect the country, with the aim of promoting national security and interests of the country and its citizens (White Paper, 1994: 5).

This approach represented a substantial departure from the previous dispensation, as instead of one central national intelligence service, the White Paper provides for two with distinct mandates and functional responsibilities, while sharing essential support services. It is made clear that this separation not only subscribes to international norms, but also ensures greater focus, effectiveness, professionalism and expertise in the specialised fields of domestic and foreign intelligence. Areas of mutual interest are to be addressed through appropriate liaison mechanisms (White Paper, 1994: 5-6).

Control of the civilian intelligence services are to be exercised on the principles of loyalty to the Constitution, subordination to the rule of law, well-defined legal mandate, mechanism for parliamentary oversight, budgetary control and external auditing, independent inspectors-general, and the absence of law enforcement powers. The White Paper regards the proposed mechanism for parliamentary oversight as the most important measure of control as legislation makes provision for a joint standing committee of parliament as well as inspectors-general (White Paper, 1994: 6). The intelligence oversight regime will be interrogated in detail in Chapter 3.

Coordination of intelligence is ensured through an inter-departmental intelligence coordinating mechanism, The National Intelligence Coordinating Committee (NICOC). NICOC is to coordinate the activities of the intelligence community and act as link between policy makers and the intelligence community. A Coordinator for Intelligence will chair NICOC and will be accountable to the President. The functions of NICOC are to advise government on threats or potential threats to security, policy related to the conduct of intelligence on local, national and regional level; to coordinate the conduct of all intelligence functions and national collective intelligence resources, the production of national strategic intelligence; and to report to cabinet and the JSCI. NICOC is also to avoid or eliminate conflict, unhealthy competition and rivalry amongst members of the intelligence community (White Paper, 1994:6-7).

Intelligence methodology will be transformed by addressing training, effectiveness and standards, covert action and the secret intelligence budget. Training is regarded as a vital tool in developing intelligence professionals and establishing a viable and lasting intelligence dispensation. To this end the Intelligence Academy is restructured, and its content and syllabus remodelled. The building of new and competent intelligence services is set as a key objective and this requires efficient management structures as well as creative, farsighted, and uncompromising leadership. In this regard professionalism is to embrace new priorities and changes in the scope and methodology of intelligence. The White Paper therefore encourages the interaction with other strategic research institutions to promote integrated analysis and support to policy-making. The establishment of a more open intelligence community is encouraged as it would not only “demystify” the intelligence services, but also build trust. While the need for secrecy is understood, it should be subject to specific criteria which provides for classification as well as declassification, without becoming a tool for exclusion. Covert action, the deliberate interference in the regular political processes in other countries and/or parties and organisations involved in lawful activities in South Africa, is specifically prohibited and the White Paper calls for the strongest sanction against intelligence services and its members who are in breach. Parliament will, through its audit mechanisms, exercise financial oversight and budget allocations to the intelligence services will be subject to parliamentary audit (White Paper, 1994: 7).

The internal and external realities facing South Africa and the intelligence community is addressed and the White Paper concludes that intelligence has a crucial role to play in identifying threats and potential threats as well as opportunities. A transformed intelligence community will contribute to South Africa meeting national goals of peace and stability (White Paper, 1994: 7-8).

Hutton (2007: 6) points out that the White Paper on Intelligence, as a guiding document, does not contain much detail. She regards it as vague and failing in capturing the essence of intelligence activities and in providing decision-makers with credible and relevant information to base policy decisions on. It is furthermore odd that an intelligence service serves the government of the day, but also acts as an overseer which highlights mistakes as well as weaknesses of government. She points out that it does not acknowledge the role that intelligence services play in security screening and vetting and the setting of minimum security standards for state employees, information and infrastructure.

Nathan (2007: 98-99) criticises the White Paper on Intelligence as an empty set of principles that makes very little or no contribution to transforming the intelligence services. In comparing the White Paper on Intelligence and the White Paper on Defence he highlights a number of weaknesses and deficiencies in the White Paper on Intelligence. The White Paper on Intelligence is too abstract for implementation as it does not go beyond principles, norms and values and does not provide adequate guidance on objects and strategies. It furthermore lacks a sense of ownership by the intelligence community. It also lacks political leadership as there was no Minister of Intelligence (at the time), with intelligence resorting under the Justice Ministry and the Deputy Minister of Intelligence “preoccupied (sic) with the integration of the various intelligence services”. Transformation is consequently not addressed beyond integration. The White Paper was not only published without parliamentary engagement or public deliberation and consultation, but civil society was significantly largely mute on the topic, regarding intelligence as falling outside the ambit of public debate. Nathan (2010: 95) furthermore states that a new White Paper on Intelligence is needed.

According to Hutton (2007: 6) the White Paper on Intelligence expresses “current liberal security rhetoric” but miscarries in translating the conceptual understanding of an expanded security framework into the role and functions of an intelligence community in pursuit of human security. She cites Southall (1992) in pointing out that in a profoundly divided country, such as South Africa, defining national interest could be problematic. She furthermore supports Nathan’s (2007) criticism of the lack of public participation. While the White Paper addresses transformation in the form of organisational reform, scant attention is given to altering the cultural and political orientation of the intelligence community.

Matthews (et al, 2008: 11) points out that the while the key strength of the White Paper is that it sets out a democratic philosophy and set of principles on security and intelligence, the leading weakness is conversely the failure to translate the philosophy and principles into meaningful policies. In their estimation the weight is primarily on values and norms. They furthermore found that NIA’s mandate is not only too broadly defined, which could leave the Agency over-extended, but could also create the risk of NIA neglecting its role in forewarning government on threats and potential threats. Matthews (et al, 2008) consequently calls for a new White Paper on Intelligence.

Mufamadi (et al 2018: 20) points out that while the White Paper is somewhat anachronistic, as it refers to matters specific to the time of its creation, the essential vision, values and principles remains relevant to the present day. Marais (2021) agrees on the utility of the White Paper, but supports its redrafting.

2.3.2.2 The Constitution and Intelligence Legislation

Kasrils (in Hutton, 2009a: 11, 12) is adamant that while intelligence services fulfil a vital role, it should be subject to laws, controls and oversight, to limit harmful consequences by enabling accountability and professionalism and ensuring scrutiny of the legality, propriety and effectiveness of their activities.

2.3.2.2.1 The Constitution and Intelligence

Matthews (et al, 2008: 7) states that The Constitution of the Republic of South Africa, 1996[10] is the supreme law of South Africa, which enshrines the principles, culture and values of the democratic state and its citizens. He points out that The Constitution is not restricted to setting out the distribution of power and the peaceful settling of disputes, but also reflects the basic values of the South African democracy as well as the economic and social principles for peaceful co-existence.

The security and intelligence services are specifically provided for in The Constitution and all subsequent intelligence and security legislation stems from it. The Constitution, in making provision for the intelligence services, recognises the significant role of intelligence in building a democratic society. As it imagines the intelligence services as a force for the good of the state and its citizens, The Constitution accords the intelligence services with special powers and capabilities to this end, but also provides for "powerful checks and balances" (Kasrils in Hutton: 2009a: 12; Matthews et al, 2008: 7). Nathan (2010: 94) goes further to state that the security services and intelligence agencies are at all times, and in all respects, bound by The Constitution. Nathan (in Bentley et al, 2013: 180-181) furthermore points out that at the moment of transition in 1994, the intelligence community did not consider the limitations imposed by The Constitution as an encumbrance, but held it as sacrosanct, the product of not only a negotiated settlement, but also the struggle for liberation. It is described as the "normative glue" that holds the newly amalgamated statutory and non-statutory intelligence services, which had formerly been enemies, together.

The security services, which includes intelligence, are addressed in Chapter 11 of The Constitution. In terms of Section 198, national security is governed by four principles: (1) national security must reflect the resolve to live as equals, in peace and harmony, to be free from fear and want and to seek a better life; (2) citizens are precluded from engaging in armed conflict except as provided for in terms of The Constitution and national legislation; (3) national security must be pursued in compliance with national

[10] Hereafter referred to as "The Constitution".

and international law; and (4) national security is subject to the authority of Parliament and the national executive (The Constitution, 1996: 106).

Section 199 of The Constitution addresses the establishment, configuring and conduct of the security services. Security services, other than those established in terms of The Constitution may only be established in terms of national legislation and must be structured and regulated by national legislation. The security services must furthermore teach all members to act in accordance with The Constitution and law while members are also prohibited from obeying a manifestly illegal order. The services and their members must be non-partisan and may not execute their mandate in a manner that either prejudices or advances the interests of any political party. To give effect to transparency and accountability, multi-party party parliamentary committees have oversight of all security services, as prescribed by national legislation or the rules and laws of Parliament (The Constitution, 1996: 106-107).

The last two sections of Chapter 11 specifically deal with intelligence. Section 209 for the establishment and control of intelligence services, and prescribes that intelligence services, other than the intelligence divisions of the national defence force and police service, may only be established by the President, as head of the national executive, and only in terms of national statute. The President must furthermore appoint a head for each intelligence service established and must either assume political responsibility for the control and direction of these services or appoint a minister of cabinet to do so. Section 210 provides for powers, monitoring and control, reflecting that national legislation must regulate the object, powers and functions of the intelligence services, including the intelligence divisions of the defence force and police service. Such legislation must provide for the coordination of intelligence and the civilian monitoring of the intelligence services by an inspector appointed by the President. The appointment of the inspector must be approved by the National Assembly with a supporting vote of at least two-thirds (The Constitution, 1996:111).

Hutton (2007: 7) expressed concern that, while The Constitution provides significant detail on the mandate and functions of the defence force and police service, it is quite silent on the mandate, structure and functions of the civilian intelligence component. O'Brien (in Born et al, 2005: 204-205), perceives the lack of clear expression as a

clear indication of the difficulties which the Constitutional Assembly experienced in debating the role and placement of the intelligence services in The Constitution. In his opinion the role, mandate and functions and related matters should have been more clearly defined in The Constitution, especially because of their special powers and the problems created by the use of intelligence by the executive.

Africa (in Cawthra, 2009: 67-68) points out that the expanded concept of security, as espoused in The Constitution, is, in reality, undermined by continuities in the discourse as well as the practice of security. She points out that secrecy is entrenched in law, as the prerogative of the heads of the intelligence services, but at the same time the Bill of Rights guarantees access to information held by the state. This situation, in her opinion, calls for striking a balance and resolving the legal and constitutional contradictions. The intelligence services' powers of intrusion are similarly raised as an infringement of citizens' rights to privacy.

Despite the formal status of The Constitution, Nathan (in Bentley et al, 2013: 189) points out that its actual authority depends to a large degree on the inclination of government and its departments to treat it as the "supreme law", meet their constitutional imperatives and respect the courts as well as other constitutional bodies. As far as intelligence is concerned, Nathan makes the point that The Constitution's authority is diluted or undermined by what he terms, "intelligence exceptionalism" or the perceived legitimacy of "bending the rules", and an ostensible trend of illegal espionage and domestic political interference by the NIA. To this end Matthews (et al, 2008: 247), is quite adamant that "bending the rules" is not only unconstitutional, but also flouts the rule of law and is subversive of democracy and executive policy while undermining efforts to develop an institutional ethos of respect for the rule of law.

Nathan (in Bentley et al, 2013: 181, 184) none the less found that at a moment of crisis, with the Project Avani incident in 2005, when a senior ANC member was illegally surveilled by the NIA, acting in breach of its domestic intelligence mandate, the constitutional system of checks and balances performed a critical stabilising role.

Mufamadi (et al, 2018: 25), found that the Constitutional provisions regarding intelligence is sufficient and that no changes to The Constitution is required to prevent

wrong-doing by the intelligence community. However, breaches of The Constitution by politicians as well as members of the SSA, of the provisions related to obeying manifestly illegal orders and prohibition on political partisanship, were identified.

Fazel (in Hutton, 2009a: 34), recognises the important role of The Constitution in establishing South Africa's security architecture. In his opinion it caters for the establishment of the intelligence services and does so in the context of a range of governing principles and safeguards which are devised to ensure that the intelligence services and their members ensure national security in compliance with the law, act in accordance with The Constitution, disregard illegal orders and steer clear of political partisanship. Furthermore, The Constitution, according to Fazel (in Hutton, 2009a: 36), not only sets clear parameters and limitations, but also prescribes that the objects powers and functions of the intelligence services be regulated by national legislation. Intelligence is therefore a "regulated industry" as it is conducted in a control or regulatory framework of checks and balances. The regulatory framework consequently serves as basis for oversight and control.

2.3.2.2.2 Legislation and the Mandate, Role and Functions of the Intelligence Services

Flowing from The Constitution and the White Paper on Intelligence, the National Strategic Intelligence Act 39 of 1994 (NSIA), the Intelligence Services Act 65 of 2002 (ISA) and the Intelligence Services Control Act (later the Intelligence Services Oversight Act 40 of 1994 [ISOA]) are the main pieces of legislation governing the intelligence services. The South African Police Service Act 68 of 1995, the 1996 Crime Prevention Strategy, as well as the White Paper on Defence in a Democracy and Defence Act 42 of 2002, contain provisions dealing with Crime Intelligence (CI) and Defence Intelligence (DI), respectively (O'Brien in Born et al, 2005: 204).

O'Brien (in Born et al, 2005: 209, 215) points out that the original legislation has been amended from time to time. Van Den Berg (2014: 105) alludes to the establishment of the SA National Academy of Intelligence (SANAI) through the General Intelligence Laws Amendment Act 66 of 2000 (GILA) and the establishment of the Intelligence Services Council on Conditions of Service (ICCS) through the Intelligence Services

Act 65 of 2002. With the passing of the Regulation of the Interception of Communications and Provision of Communication Related Information Act 70 of 2002 (RICA) and General Intelligence Laws Amendment Act 67 of 2002 (GILA) the interception and monitoring of communications were regulated[11]. The Office of Interception Centres (OIC) which regulates communications interception and the National Communications Centre (NCC) responsible for the coordination of signals and interception activities were consequently established in terms of the Electronic Communications Security Pty Ltd Act 68 of 2002, and amendments.

According to Kasrils (in Hutton 2009a: 13) these acts sets the guidelines and regulate the activities of the intelligence services. They also provide a framework for effective control and oversight. The Intelligence Services Oversight Act 40 of 1994 (ISOA) reinforces this framework.

The purpose of NSIA is to define the functions of the National Intelligence Structures, establish a National Co-ordinating Committee and to define its functions relating to the security of the country and provide for a co-ordinator for intelligence as chairman of NICOC, to define his/her functions and to provide for related matters.

Kasrils (in Hutton, 2009a: 14) and Hutton (2007:8) state that the mandates of the intelligence structure, NIA, SASS, NICOC, DI and CI are set out in the NSIA. Van den Berg (2014: 107-109) indicated that in 2013 NSIA was amended by the General Intelligence Laws Amendment Act 11 of 2013 (GILA) to provide for the amalgamation of the NIA and SASS, OIC, National Communications Security (Pty) Ltd (COMSEC) and SANAI into a single civilian intelligence agency, the State Security Agency (SSA).

The NSIA (as amended) defines national intelligence functions, as any information obtained and processed by a National Intelligence Structure for the purpose of informing any government decision or policy-making process carried out in order to

[11] In 2021 the Constitutional Court, in amaBhungane and Another v Minister of Justice and Correctional Services, Minister of State Security, Minister of Communications and others; Minister of Police v amaBhungane and Another; ruled provisions of RICA unconstitutional and bulk interception unlawful. The Court directed government to take corrective action, suspending the ruling for 3 years, to enable the state to remedy the causes of invalidity (Dolley: 2021).

protect or advance the national security[12] and includes counter-intelligence[13], crime intelligence[14], departmental intelligence[15], domestic intelligence[16], domestic military.

The National Intelligence structures in Section 1 of the NSIA (as amended) refer to NICOC, the intelligence division of the National Defence Force, established in terms of the Defence Act 42, 2002; the intelligence division of the South African Police Service and the Agency (it previously referred to the Agency (NIA) and the Service (SASS) and are depicted in Figure 2.3, p25.

Section 2 of NSIA (as amended) delineates the functions related to intelligence (NSIA, 1994: 4-7; GILA, 2013: 6-10). The functions of the Agency are to collect, correlate, evaluate and analyse domestic and foreign intelligence (excluding foreign military intelligence) to identify any threat or potential threat to national security; provide intelligence regarding any such threat to NICOC; inform the President of any such threat; supply (where necessary) intelligence concerning any such threat to SAPS for the purposes of investigating any offence or alleged offence. The Agency shall furthermore provide intelligence on any such threat to the Department of Home Affairs (DHA) for the purpose of fulfilling its immigration function; supply intelligence relating to national strategic intelligence[17] to NICOC and provide intelligence on any such threat to any other state department to enable such department to meet its departmental responsibilities. The Agency is also responsible for communications and cryptology by identifying, protecting and securing critical electronic communications and infrastructure against unauthorised access or technical electronic or related

[12] " '**National Security**' – the protection of the people of the Republic and the territorial integrity of the republic against the threat of use of force or the use of force; the following acts: hostile acts of foreign intervention directed at undermining the constitutional order of the Republic; terrorism and terrorism related activities; espionage; exposure of a state security matter with the intention to undermine the constitutional order of the Republic; exposure of economic, scientific, or technological secrets vital to the Republic; sabotage; and serious violence directed at overthrowing the constitutional order of the Republic; acts directed at undermining the capacity of the Republic to respond to the use of, or threat of the use of, force and carrying out of the Republic's responsibilities to any foreign country and international organisation in relation to any of the matter referred to in this definition, whether directed from, or committed within the Republic or not."

[13] " **'counter-intelligence'** means measures and activities conducted, instituted or taken to impede and to neutralise the effectiveness of foreign or hostile intelligence operations, to protect intelligence and any classified information, to conduct vetting investigations and to counter any threat or potential threat to national security".

[14] " **'crime intelligence'** means intelligence used in the prevention of crime or to conduct criminal investigations and to prepare evidence for the purpose of law enforcement and the prosecution of offenders".

[15] " **'departmental intelligence'** means intelligence on any threat or potential threat to national security which falls within the functions of a department of State, and includes intelligence needed by such department in order to neutralise such a threat."

[16] " **'domestic intelligence'** means intelligence on any internal threat or potential threat to national security."

[17] " **'national strategic intelligence'** means comprehensive, integrated and estimative intelligence on all the current and long-term aspects of national security which are of special concern to strategic decision-making and the formulation and implementation of policy and strategy at national level."

threats. It is also to provide cryptographic services to other government departments and shall conduct and coordinate research and development on electronic security systems. In this regard the Agency is also responsible for liaison with other intelligence or security services or authorities of other countries and inter-governmental fora of intelligence or security services. It shall furthermore conduct training, development and maintenance of electronic communication systems and shall cooperate with any institution to achieve these ends. The Agency is furthermore to conduct security vetting of its own members, other government departments and, in the case of the SANDF and SAPS, on their request.

CI is mandated, as expressed in Section 2(3), to gather, collate, evaluate and use Crime Intelligence in support of SAPS and to institute counter-intelligence measures in SAPS. It also directs that CI, in relation to national strategic intelligence, be provided to NICOC and that it conducts departmental intelligence. While the South African Police Act 68 of 1995, as well as other related legislation empowers the SAPS to meet its constitutional objectives it does not regulate Crime Intelligence.

In the case of DI, the Defence Act 42 of 2002, reinforces the mandate provided by Section 2 (4) of NSIA (as amended). In terms of the legislation the Intelligence Division of the SANDF is mandated to gather, collate, evaluate and use foreign and domestic military intelligence in support of the SANDF and to institute counter-intelligence measures in the Department of Defence (DOD). It also directs that military intelligence, in relation to national strategic intelligence, be provided to NICOC and that it conducts departmental intelligence. DI is mandated to conduct strategic intelligence for purpose of ensuring national security; assisting in formulating defence policy; assisting in the determination of defence strategy; assisting in the execution of defence and foreign policy; ensuring the security of defence assets of whatever description; and assisting in the co-ordination of foreign military assistance; as well as operational intelligence for purposes of assisting in the execution of operations in line with defence strategy; assisting in force preparation to get them combat ready; providing support for combat forces; and ensuring the security of forces. O'Brien (in Born et al, 2005: 208-209) highlights the fact that the Act specifically prohibits DI from the covert collection of non-military intelligence.

In terms of Section 3 of NSIA (as amended) other government departments may also be authorised to conduct departmental intelligence if, and when, required to counter threats to national security (NSIA, 1994: 8-9; GILA, 2013: 10).

Section 4 of NSIA, as amended, (NSIA, 1994: 9-10) provides for the establishment of NICOC. The functions of NICOC, are to co-ordinate the intelligence provided by the various agencies and interpret such intelligence for use by the State and Cabinet to enable the detection or identification of threats and to protect and promote national interests; to produce and disseminate intelligence that may have an influence on any state policy; to co-ordinate the flow of national strategic intelligence between departments; to co-ordinate the collection of intelligence at the request of any department and to evaluate and transmit such intelligence to the department concerned; and to make recommendations to Cabinet on intelligence priorities.

The NSIA (as amended) specifically states that in the performance of these functions, as contemplated in the Act, the Constitution must be complied with (GILA, 2013: 12).

Section 6 establishes that the Minister may, after consultation with the JSCI, subject to consultation with the Ministers of Defence and Police (where matters affect DI and CI respectively), make regulations regarding the protection of information; vetting investigations; conducting of counter-intelligence operations, counter-measures and intrusive operations, production and dissemination of intelligence for consideration by cabinet and the executive, co-ordination of counter-intelligence by the Agency; supply of intelligence to the Minister; provision of departmental intelligence to other government departments, tasking of NICOC and other administrative matters (NSIA, 1994: 11; GILA, 2013: 12).

Fazel (in Hutton, 2009a: 34) found that this legal framework affords for clearly defined mandates, powers, functions, mechanisms for co-ordination, oversight and control as well as accountability. Along with the White Paper on Intelligence it provides for the overall framework of understanding the philosophy as well as the role of intelligence in a democratic South Africa.

According to Hutton (2007: 10, 11) the rule of law is the most basic mechanism of controlling the security mechanisms of the state. Legislation governing the intelligence services should therefore be sensitive to the competing dynamics of secrecy and accountability. Hutton states that the legal framework earths the work of the intelligence services within a system of legal controls. She cautions that despite the legal mandate, compliance by the intelligence services with the Constitution and the rule of law, is only partially connected to existing laws as any subset of intelligence services can abuse its mandate. According to Hutton the strength of legislative sanction lies in the oversight and keeping to account of intelligence structures by the various levels of authority. She consequently expresses concern that legislation does not patently define the role of the Minister in terms of the conduct of politically sensitive intelligence operations or intrusive activities such as surveillance and interception of communication. While the Minister may make regulations, Hutton decries the dearth of specificity relating to exercising executive powers in terms of domestic intelligence, especially where it relates to politically sensitive intelligence. She points out that NSIA is broad enough to ensure sufficient executive control, but not specific enough to avoid plausible denial! Matthews (et al, 2008: 12) expresses similar sentiments referring to it as “critical issues are not covered adequately”.

Africa (in Cawthra, 2009: 66, 67) expressed concern about the entrenching of secrecy in legislation as well as the extent that intelligence services could legally infringe on the rights of others. Hutton (2007: 7) similarly points out that in the domestic setting, intelligence services run the risk of infringing on civil liberties and civil rights given the extensive powers of covert intelligence operations and she argues for circumscribing their domestic roles and powers.

Securitisation of the state is raised as a concern given the broad mandate of intelligence. Kasrils in Hutton (2009a: 15-16) cites Williams (2004) in cautioning against the securitisation of the state. They expressed concern that “human security” could be interpreted in such a way that intelligence could potentially be involved in every area of public life. In the estimation of Kasrils national security policy, directed by a human security perspective, cannot imply that the intelligence services are involved in virtually all aspects of public life. Other government departments, research institutes and academic institutions are better positioned to offer expert advice and

opinion on matters such as service delivery and the well-being of the population. Kasrils regards such a scenario as not only a waste of intelligence resources, but that it could create perceptions of the intelligence services being “unduly intrusive”.

2.4 Review of the Intelligence Regime and Conduct of the Services

Hutton (2007: 8-9) reflects that the coordination of intelligence is a challenge to most states. In this regard she found that NICOC has faced its fair share of challenges, but that it had built significant capacity to fulfil its mandate by building institutional capacity, building relationships with civil society experts, benchmarking and establishment of inter-departmental intelligence task teams focussing on intelligence priorities. While scandals have occurred in the intelligence community since 1994, none have negatively impacted on NICOC, although the requirement of intelligence products passing through NICOC to the President, Cabinet and other clients have not been rigorously enforced or complied with. She sites Dlomo (2005), in referencing the Meiring Report and Project Avani as examples of intelligence services with politically sensitive information, on occasion engaging directly with the President, bypassing the coordination mechanism and thus undermining the ability of key role players to ensure proper governance and prevent politicised intelligence products.

According to Dlomo (2005), cited by Hutton (2007: 9) concerns have been raised that the intelligence services still seem uncoordinated and duplicating work. In his opinion duplication and coordination will always remain a problem while the civilian intelligence services are split into two structures. Hutton (2007: 9) opines that given the increasingly multifaceted, trans-national and cross-border nature of threats to national security, in the modern era, it is becoming progressively difficult to separate domestic and foreign intelligence activities. NICOC’s use of interdepartmental task teams is regarded as a reflection of this reality which mitigates towards a single national intelligence agency. She suggests that all state agencies involved in the collection and evaluation of security related information should be incorporated into NICOC structures through regulation or legislation.

Nathan (in Bentley et al, 2013: 185), reflecting on the findings of the 2008 MRC, furthermore points out that as most intelligence officials, across the political divide, had a Cold War background, their training and experience had inculcated "a culture of non-accountability of intelligence and security services, and a no-holds-barred approach to intelligence operations" which permeated the intelligence services in a democratic South Africa.

O'Brien (in Born et al, 2005: 216) captures the almost universal concern expressed (later) by Hutton (2007/ 2009), Kasrils (2009), Sole (2009), Africa (2019), Matthews et al (2008), Mufamadi et al (2018) and Marais (2021) about the politicization of intelligence in South Africa. He argues that while the intelligence services in South Africa face many challenges, "the greatest appears to be the ongoing concerns over the politicization of the intelligence process and the development of parallel (political) intelligence structures."

O'Brien (in Born et al, 2005: 217-218) describes the South African intelligence services as in crisis and showing very little sign of recovery. He argues that while the new intelligence dispensation is the product of negotiation and discussion, while initially appearing to be successful, it has been overtaken by successive scandals, questionable activities and ongoing failure to secure all oversight instruments. In the same vein, he alludes to the rise of the re-emergence of (ANC) "securocrats" and expresses concern about the possibility of parallel intelligence structures being developed for party political purposes to circumvent national intelligence structures. Mufamadi (et al, 2018: 15) also found the intelligence services to be in crisis, by pointing out that, since 2005, the civilian intelligence community has been the subject of numerous scandals, starting with the 2005 hoax email saga that led to the dismissal of then NIA DG, through to more recent allegations against the SSA relating to its Principal Agent Network (PAN) programme and other suspected abuses.

In 2005 the NIA unlawfully spied on, and intercepted the communications of prominent ANC politician and businessman, Mr Vusi Mavimbela, and several ANC and opposition party politicians in Project Avani. The debacle was regarded by many as a manifestation of the intense intra-party conflict in the ruling party and was part of a political intelligence project established to assess the impact of the presidential

succession battle in the ruling ANC, on the country. As a consequence, the Minister for Intelligence, Mr Ronnie Kasrils, tasked the IGI to investigate while he also established a Ministerial Review Commission (MRC), the Matthews Commission, to use the incident to initiate fundamental reforms in order to avoid future abuse (Nathan, 2010: 91, 92).

NIA established the Principal Agent Network (PAN) Programme in 2007, to serve as a "force multiplier" as it envisaged a range of covert human intelligence (HUMINT) networks reporting to the NIA. By the time the project was suspended in 2011 it had become evident that it was subject to abuse involving illegal surveillance, fraud, corruption and maladministration (Mufamadi et al; 2018, 54-55). The Director-General (DG) of NIA, Mr Manala Manzini, consequently left in 2009 and the Deputy Director General (DDG) responsible for the programme, Mr Arthur Fraser, resigned in 2010 (Morningside News, 2017). The NIA and the IGI conducted a number of investigations, but despite evidence of malfeasance, in the words of Mufamadi (et al; 2018: 55) "no formal action or consequence management" was initiated by either the Minister for Intelligence or NIA Management.

Mr Fraser was appointed as DG of SSA in 2016 by the then President, Mr Jacob Zuma, which prompted the DA to lodge a complaint with the IGI (Steenhuisen, 2018). The SSA subsequently withdrew the security clearance of the IGI, Dr Setlhomamaru Dintwe. This in turn prompted legal action against the withdrawal of the security clearance. Dr Dintwe's security clearance was eventually reinstated and Mr Fraser transferred to the Department of Correctional Services by the President, Mr Cyril Ramaphosa, in 2018 (Merten, 2019).

A Special Operations (SO) unit was first established in the then NIA in, or around 1997, mainly dealing with highly sensitive strategic projects. It was subsequently closed down and re-opened again in, or around 2002/03, when it was ostensibly carried over into the SSA (Mufamadi et al, 2018: 64). From 2012 onwards, it operated under a different mandate; that of counter-intelligence, VIP protection and support to the then President, Mr Jacob Zuma (Mvumvu, 2020).

While, like PAN, the use of a SO unit in intelligence, military and police services is not unusual, in this instance, it was however again subject to abuse. Mufamadi (et al, 2018) found that SO and SSA were significantly politicised by the head of the unit and that it was a law unto itself, directly serving the political interests of the executive. SO undertook intelligence operations which are regarded as unconstitutional and illegal. The unit conducted training of undercover agents in VIP protection and assigned some to provide protection to the then President, Mr Jacob Zuma, as well as to others who were not entitled to such protection, such as the former Chair of the South African Airways (SAA) Board; the former National Director of Public Prosecutions (NDPP); the ANC Youth League (ANCYL) President as well as the former Acting Head of the Directorate for Priority Crimes Investigation (DPCI) (the Hawks). It Infiltrated and influenced the media in order, ostensibly, counter bad publicity for the country, the then President and the SSA. SO supported the establishment of a trade union (the Workers' Association Union) apparently to neutralise the instability in the platinum belt and conducted surveillance on unions that were disparaging of the then President. The unit intervened and influenced the #FeesMustFall protests. It was involved in intra-party factionalism in the ANC during the 2016 ANC January 8 statement in Rustenburg, where it conducted counter actions against the CR17 campaign; during the February 2016 State of the Nation Address the unit infiltrated the leadership of the movement against the then President and conducted counter actions against protest marches; with the ANC's manifesto launch in Port Elizabeth in 2016, the unit launched a media campaign to provide positive media feedback. It furthermore actively monitored the South Africa First, Right2Know, SAVESA, Council for the Advancement of the Constitution (CASAC) and Green Peace. Mufamadi (et al, 2018) concludes that SO had largely become a parallel intelligence structure serving a faction of the ruling ANC and, in particular, the personal political interests of the sitting President of the party and country. This is in direct breach of the Constitution, the White Paper on Intelligence, relevant legislation and proper statutory intelligence functioning. The Minister of State Security, contrary to the Constitution, NSIA and SSA Operational Directives, became increasingly involved in operational intelligence matters (Mufamadi et al, 2018: 64-66; Felix, 2020).

SO was headed by Mr Thulani Dlomo, a close confidant of Pres Jacob Zuma, who was appointed to SSA in 2012, despite him being implicated in corruption at the

Department of Social Development in KwaZulu-Natal (Head, 2019). After being absent from SSA for more than 8 months in 2019 Mr Dlomo's services were unilaterally terminated by the Minister of State Security in September 2019 (Merten, 2019).

The threat posed by parallel intelligence structures was brought into sharp focus when SO and Mr Dlomo were suspected of planning, organising and executing the unrest which erupted in KwaZulu-Natal and parts of Gauteng, during June/July 2021, in the aftermath of the sentencing and incarceration of Mr Zuma, for refusing to appear before the State Capture Commission (Mkokeli and Jika, 2021; TimesLive, 2021a). SSA and SAPS investigated the suspected involvement of past and serving members of the intelligence and security services in planning and directing the violence (De Villiers: 2021a).

The Secret Service Account of CI, is a fund used for the funding of CI agents and the purchase of assets and investigative work (Mahlati, 2019). During the tenure of Lt Gen Richard Mdluli, as Commissioner of CI, the fund was abused for personal gain with the appointment of family members as agents, acquisition and rental of houses, purchase of luxury vehicles, holidays, purchase of flight tickets for personal use and renovations to private properties (Mabuza, 2020; Davis, 2019). Lt Gen Mdluli pledged his support to the ANC and the former President, Mr Jacob Zuma, ostensibly promising to work towards his re-election (Nkomo, 2012; Evans 2019). CI also became politicised with the Division being used in intra-party faction struggles during both the 2007 and 2012 ANC conferences to influence their outcome (Potgieter, 2012; Evans 2019). The Division furthermore conducted operations on opposition political parties and influencing of the media (Evans, 2019; wa Afrika et al, 2012). In 2011 the abuse was reported to the Minister of Safety and Security as well as the IGI, who investigated it (Nkomo, 2012). The DPCI (the Hawks), also conducted a criminal investigation into fraud and corruption, but they were stymied by refusal or delays by SAPS command and management to declassify documents required in their investigation (Mabuza, 2020, Mahlati, 2019). Although Lt Gen Mdluli was arrested on fraud and corruption charges they were dropped in 2011 and only re-instated in 2015 (Corruption Watch, 2018; Mabuza, 2020).

This state of CI dysfunction, according to Haffajee (2021), contributed to the poor response of SAPS in responding to the outbreak of unrest in the wake of the incarceration of Mr Zuma in July 2021, as CI failed to detect and provide timely intelligence to direct SAPS operations to contain and counter the unrest (Newman, 2021).

In DI allegations of abuse of the Secret Service Account have also been made. According to a submission to the State Capture Commission, by Maj Gen Sandile Sizani, retired Chief Director Counter-intelligence at DI, secret funds at DI were used to purchase service vehicles for generals, who misuse it for own and private purposes; service providers, acquisition officials and general officers collude to inflate prices while officials who are not suitably qualified in financial management are appointed to oversee the secret accounts. lT systems and hardware have furthermore been acquired and paid for, but never delivered (DefenceWeb,2020; Puren: 2020; Wa Afrika and Ngoepe, 2020). The Minister of Defence and Military Veterans, Ms N.N. Mapisa-Nqakula, appointed an external task team led by retired IGI, Mr Z. Ngcakani, to investigate these allegations (DOD, 2021).

According to Tshabalala (2020: 21), the invitation by former Chief Defence Intelligence (CDI), Lt Gen Mojo Motau, who was also the last head of MK Military Intelligence, to retired SANDF general officers and cadres to an ANC cadre's assembly to take stock of the state of the party, reflects the extent to which not only the SSA, but also DI and CI may have been politicised. He references Rev Frank Chikane's book, "Eight Days in September" which details the role the intelligence services played in an intra-ANC factional power struggle which led to the recall of Mr Thabo Mbeki as President.

Van den Berg (2014: 111, 135, 143) points out that it is apparent that intelligence mirrors the state and its political regime and displays the effect of its culture, society and historical scars. It is palpable that former and current links in partnership and training, with non-democracies is present and it reflects similarities between these countries and South Africa. He cites Dombroski (2007) in pointing out that intelligence is dominated by ANC members trained in the former Soviet Union, Republic of Cuba and DDR while Africa (in Africa and Kwadjo [eds], 2009: 77) points out that while there was initially an element of political inclusion in the appointment of senior management,

the senior positions in the intelligence services have subsequently been occupied by "cadres of the former liberation movements". In both the Russian Federation and South Africa, the intelligence services went through periods of re-organising, restructuring and change, to, constitute a single "super intelligence department" (Van den Berg, 2014: 151).

According to Africa (2011: 27-28) the South African security services have far greater legitimacy than it did under apartheid. She however points out that since the country's democratic transition, the changes in the security sector have been necessary, but insufficient in providing security for all. She specifically points to a lack of capacity as well as structural and leadership deficiencies. In addition, the link between development, poverty alleviation and security, whilst featuring in government policy and strategies, has been weakened due to the utter scale of the challenges. Finally, the failure of the state to address the problem of crime in the country has resulted in the mounting sense of insecurity amongst many citizens. She concludes that "the journey towards democratic governance of the security sector is not complete". She goes on to contend that a state of stagnation has in fact been reached and that the country is still in search of solutions towards improved security for citizens, Southern Africa and the continent.

2.5 Review of the Intelligence Regime

Hutton (2007: 7) reflects that the role of intelligence in South Africa should be continuously questioned and evaluated to ensure that the intelligence services are able to react to the strategic political realities of the time.

Given the problems and challenges that have emerged since the foundational restructuring of the intelligence services in 1994, Africa (2012), as cited in Van den Berg (2014: 104) identified three waves of restructuring; the first wave after 1994; the second wave (during the Mbeki presidency) from 2002 and the third wave from 2009 (during the Zuma presidency).

The Pikoli Review Commission in 1996, according to Farson and Phythian (2011: 234), reviewed progress and made recommendations. The organisation, functions,

resources, personnel and capacity was addressed and this led to the amendment of legislation with a number of amendments passed by Parliament between 1998 and 2005. These amendments clarified the position of the JSCI, reduced the number of Inspectors-General to one and led to the creation of the Ministry of Intelligence with a Minister for Intelligence (Van den Berg, 2014: 104).

In 2008 the review by the MRC covered NIA, SASS, NICOC, NCC, OIC and COMSEC and addressed the executive control of the intelligence services, control mechanisms relating to intelligence operations, control over intrusive methods of investigation, political and economic intelligence, political non-partisanship of the services, the balance between secrecy and transparency, and controls over the funding of covert operations (Matthews et al, 2008:9).

In 2009, with the advent of the Zuma presidency, the Minister of State Security was tasked to review the civilian intelligence services to develop a more effective and efficient intelligence architecture (Van den Berg, 2014: 107). Although the restructuring of the civilian intelligence services was not accompanied by an overall review of the intelligence dispensation it nonetheless led to the establishment of the SSA (through Proclamation 59 of 2009) with the amalgamation of NIA, SASS, NCC, OIC, COMSEC and IA into one structure (Africa, 2019: 14; Van den Berg, 2014: 107-108). This process lasted several years and the SSA was only legislated in 2013 with the passing of the General Intelligence Laws Amendment Act 11 of 2013 (Van den Berg, 2014: 108-109; Mufamadi et al, 2018:28-29). To give effect to the restructuring, Mufamadi (et al, 2018: 35-38) state that the Strategic Development Programme (SDP) was launched in 2017 which envisaged the SSA as a completely covert organisation. The period since has been characterised by significant instability in the Agency with changes in mandate, turnover of senior personnel, differences between the Minister and executive management and, according to Van den Berg (2014: 108) increased perceptions, with the name change from “intelligence” to “state security”, of greater authoritarianism. Mufamadi (et al, 2018: 2) found that the consequence of this process, was increased politicisation and political factionalism as a result of intra-party polarisation in the ANC, a doctrinal shift in the intelligence community, away from The Constitution, White Paper on Intelligence and the concept of human security, to a narrower state security orientation. Furthermore, the amalgamation of NIA and SASS

into the SSA did not lead to the desired results and was also in contradiction of existing policy. The SSA's disproportionate focus on secrecy also had a detrimental effect on accountability while the SSA became a source of ready cash for many in-and outside the Agency. In this regard, it is instructive that the IGI, Dr S.I. Dintwe, in testimony at the State Capture Commission, pointed out that the pervasive nature of secrecy and non-accountability in the intelligence services even led to one of the services proposing that the access of the AG be limited in the same way as in another African country, where the AG plays no role in the audit of intelligence funds. Dr Dintwe pointed out that the country placed last in Africa on Transparency International's corruption perception index (Nicholson, 2021). A member of the JSCI, Mrs Diane Kohler-Barnard, also ascribes much of the problems in the intelligence services to excessive secrecy (Hansard, 2021: 35).

With the election of Mr Cyril Ramaphosa as President of South Africa he undertook to address corruption. In his 2018 State of the Nation Address, Pres Ramaphosa subsequently indicated that government would address corruption in the public sector (Hansard, 2018a: 32). To this end the security and law enforcement sector was also prioritised. The Minister of Police, Gen Bheki Cele, was consequently tasked to undertake measures to address the challenges in the Crime Intelligence Division of the SAPS (which included the appointment of Lt Gen Anthony Jacobs as the new Divisional Commissioner for CI). Similarly, given the concerns about allegations of corruption and wrongdoing in SSA, the HLRP on SSA was established (Hansard, 2018b: 19). At that time the President also emphasised the importance of improving the effectiveness of JSCI and OIGI as oversight bodies (Hansard, 2018b: 20).

A fourth review was thus initiated with the appointment of the 2018 HLRP on SSA, chaired by Dr Sydney Mufamadi, to "enable the reconstruction of a professional national intelligence capability for South Africa that will respect and uphold the Constitution, and relevant legislative prescripts". The recommendations of the HLRP is summarised in Appendix A, p A-i to A-ix. In the process the implementation of the SDP was halted and the Minister instructed the Agency in 2018 to revert back to the pre-SDP structure. This caused significant disruption (Mufamadi et al, 2018: 1, 35, 36, 38).

The findings of the HLRP on SSA, and the slow rate of its implementation, was brought into focus with the apparent failure of the intelligence services to predict the outbreak of unrest and instability in the wake of the sentencing and incarceration of Mr Zuma. According to Prof Jane Duncan many of the ills identified in the HLRP informed the apparent failure of the intelligence services to predict the turn of events and provide intelligence for intelligence driven operations by the SAPS and the SANDF (deployed in support) (De Villiers, 2021b). In this regard Kasrils (Tsotetsi, 2021), Duncan (de Villiers, 2021b) and Cilliers (2021), amongst others, are adamant that action needs to be taken on the HLRP report as soon as possible in order to address the dysfunction in the intelligence services. Cilliers (2021), in fact, proposes a complete overhaul of the civilian and crime intelligence architecture to address the issues debilitating intelligence.

Heinecken (2021), quite rightly points out that the deployment of the SANDF cannot provide a long term solution as it can at best only create a more stable and secure environment in the short term. Apart from calling for addressing inefficiencies in the security cluster she points out that a lack of effective intelligence precluded the SANDF and SAPS from putting effective defensive measures in place to neutralize the violence and looting.

In acknowledging that the security services were found wanting, and as part of the critical measures being undertaken to strengthen the security services to prevent a recurrence, Pres Ramaphosa appointed an Expert Panel in August 2021, chaired by Prof Sandy Africa, to conduct a thorough and critical review of preparedness and the shortcomings in the state's response to the unrest. To this end the Panel will examine all aspects of the security response and will make recommendations on strengthening capabilities. Furthermore, State Security was moved under a deputy minister in the Presidency while a National Security Advisor was also appointed to fill the position which has been vacant since early 2021 (Presidency 2021).

According to Africa (2019: 2) the HLRP on SSA underlined the need for an overhaul of the intelligence services. She points out that the Panel found that SSA had deviated from its original mandate and she quotes the Presidency as stating that the Panel found that there had been political "malpurposing" and factionalising of the intelligence

community for more than 10 years in almost total disregard of the Constitution, policy, legislation and other prescripts. In the light of the findings of the HLRP, Marais (2021) supports Africa (2019) in proposing a departure from the highly secretive and overstaffed intelligence design, which in his opinion promotes delinquency and tempts political interference, to a “lean and mean” organisation focussed on fewer priorities and led by skilled management who can exercise control. Tshabalala (2020:21) is however critical of the limited scope of the HLRP. In his opinion it should have been extended to include DI and CI to address the ills in the intelligence community across the board.

The Commission into State Capture, instituted by the President to investigate the extent of “state capture” has in the course of its investigations also received representations on the extent of “state capture” as it relates to the intelligence services (Corruption Watch, 2019). In this regard SO, PAN, the dismissal of SASS and NIA Directors General as a result of an investigation into the Gupta brothers (Qukula, 2019), the abuse of the Secret Service Account by CI (Mahlati, 2019) and corruption in the SANDF and DI (DefenceWeb, 2020) have been raised at the Commission.

Africa (in Africa and Kwadjo [eds], 2009: 89) found that the legacy of the intelligence services under apartheid along with the purported notorious role of the security elements of the liberation movements gave intelligence a bad reputation. As a consequence, it has proven difficult to develop public trust despite initiatives to improve the image of the intelligence services. O’Brien (in Born et al, 2005: 218) in the same vein, alludes to the rise of the re-emergence of (ANC) “securocrats”.

Van Den Berg (2014: 151) concludes that South Africa made a successful transition to an intelligence service in a democracy by shaping a legal framework, establishing intelligence control, oversight, accountability and transparency as well as imposing some level of transparency and accountability to its people. These democratic practices have however been eroded and have come to reflect more non-democratic tendencies. South Africa was regarded as the only democratic country with an Intelligence Minister (Minister of State Security) with its own political bureaucracy and political institutions. In other established democracies these appointed secretaries or ministers form part of either the judiciary or executive. Furthermore, with the drafting

of the General Intelligence Laws Amendment Act in 2013, not only was the SSA established as the only civilian intelligence service, but its functions were reduced from intelligence for policy-making and identifying threats and potential threats to national security, to only identifying threats and potential threats. Ultimately this led to transforming two intelligence services (NIA and SASS) into a single security service, more closely resembling practice in non-democratic regime types than democratic regime types.

Africa (2011: 27-28) concurs with Van den Berg (2014) that, while South Africa successfully made the transition from authoritarian state to democracy, it then stagnated. She concludes that "the journey towards democratic governance of the security sector is not complete".

2.6 Conclusion

Intelligence has, through the ages, been an instrument of state power. It is regarded as a tool to ensure security by warning against threats and identifying opportunities while ensuring that security is maintained. Security has evolved from its initial narrow interpretation of state or regime security, to a broad concept of "human security". Security is however still regarded as relative and interpreted in terms of national security or national interest. In the modern idiom the contradiction between secrecy and accountability has also been brought to the fore to a far greater extent, which led to the questioning of the utility of intelligence. Despite this challenge, the utility of intelligence in the modern state is universally accepted, subject to a system of checks and balances or safeguards.

Countries have distinctive characteristics as far as culture, society, economy as well as politics is concerned, which impact on the form and type of intelligence and its subsequent role and functions, whether the form of government is less or more democratic. Intelligence is consequently a reflection of a state and nation and is structured and mandated according to its needs.

An internal security service, foreign intelligence service, technical service for government communications, police intelligence structure, military intelligence

structure, foreign affairs; and a joint intelligence coordinating body are the universal components of state intelligence communities. The South African intelligence community complies with this norm.

Van den Berg's typology of regime types and political systems, which classifies states as democratic or non-democratic and intelligence systems, provides a useful aid in classifying the South African system. Since 1990 South Africa transitioned from an authoritarian state towards democracy through a period of democratic transition into an unconsolidated democracy. South Africa is consequently regarded as a hybrid regime instead of a consolidated democracy. This has direct consequences for the role and function of intelligence as the South African intelligence regime evolved from being classified as a State Security and Political Police Service to an Intelligence Bureau in a democracy, bound by the Constitution, rule of law and under democratic control to Intelligence Police (floating between Political Intelligence and Political Police) in a hybrid state displaying both democratic and authoritarian features (see Figure 2.1, p18).

South Africa made a successful transition to an intelligence service in a democracy by fashioning a legal framework, instituting intelligence control, oversight, accountability and transparency. These democratic practices have however been eroded and have come to reflect more non-democratic tendencies such as securitization by the political regime and reduced political impartiality of intelligence services. It is evident that past/present links between the ruling party, its intelligence structures, and non-democratic regime types and their intelligence services, informs this erosion and apparent contradiction in South Africa as a democratic state. This may, at least partially, explain the shielding or level of insulation from scrutiny, of the intelligence services, which consequently enabled abuse.

The initiatives announced by Pres Ramaphosa, in relocating State Security under a deputy minister in the Presidency, appointing a Security Advisor and commissioning an Expert Panel to investigate the shortcomings in the security services response to the unrest, reflects a change, and a possible departure from this trend. It may very well represent a return to security management reflective of a constitutional democracy.

The intelligence regime has been the subject of periodic review which sought to address some of the ills, such as the broad domestic mandate, duplication in mandate, role and functions, undue secrecy, abuse of power, corruption and politicization. Limitations in the control and oversight regime has also been addressed. A concerning trend has however been the inconsistent implementation of the redress proposed or the complete failure to implement recommendations. As a consequence, given the slow and limited implementation of the recommendations of especially the HLRP on SSA, the SSA and CI apparently failed to provide early warning and timely intelligence leading up to and during the unrest in June/July 2021. It is important to determine whether, as is claimed, that there was indeed an intelligence failure, or whether it was not an operational failure, where intelligence was available and provided, but not acted upon.

This chapter focused on defining intelligence and establishing the role and form of intelligence services in the state and explained the development, regulatory framework, philosophy, mandate, role and functions of the South African intelligence services. It furthermore highlighted the challenges that have emerged in controlling and holding the intelligence services to account in an evolving democratic (hybrid) state such as South Africa. It establishes the context for the next chapter which examines intelligence oversight in South Africa.

CHAPTER 3

THE 1994 INTELLIGENCE OVERSIGHT REGIME

3.1 Introduction

The purpose of this chapter is to develop an understanding of the South African intelligence oversight regime by explaining the development, legislative framework, mandate, role and functions of the oversight mechanisms. The development of intelligence oversight in South Africa will be explained and the performance of intelligence oversight addressed based on the understanding of the concept of oversight and control which was established in Chapter 1.

3.2 The Development of Oversight in South Africa

O'Brien (in Born et al, 2005: 200) found that the evolution of intelligence oversight and accountability parameters and structures in South Africa was neither linear nor constant. He points out that since 1961, when South Africa became a republic, it had, at times strong and clear executive accountability, while at others the executive deliberately sought to obscure the line between its command-authority and command-responsibility and the actions of the intelligence services.

Fazel (in Hutton, 2009a: 32) found that while intelligence priorities were of interest to the executive some of the other areas of control and oversight was mostly absent from intelligence governance.

Africa (in Africa and Kwadjo [eds], 2009: 84) points out that intelligence oversight, particularly parliamentary oversight, was absent from the pre-1994 democratic dispensation in South Africa. According to Venter (1989: 50, 52-53), Parliament had standing committees on finance and public accounts and could institute joint standing parliamentary committees. He points out that while Parliament could hold government ministers to account, due to the strong party caucus system many of the controls over government was actually effected by the ruling party and not Parliament. Furthermore,

as caucus met in confidence, government actions were not subject to public scrutiny and O'Brien (in Born et al, 2005: 212) points out that not only were committees closed to the public, their proceedings were secret and their decisions only made public once they had been taken.

O'Brien (in Born et al, 2005: 200) found that the relationship between Parliament and Intelligence was virtually non-existent. Given the National Party (NP) dominance, O'Brien largely concurs with Africa (2009) that there was essentially no parliamentary oversight of intelligence during the pre-democratic dispensation.

Between 1978 and 1990, starting under the government of Mr P.W. Botha, and later Mr F.W. de Klerk, South Africa was regarded as a security state. During this time elected minister's held nominal political authority while the SSC, as real centre of power, exercised executive/cabinet responsibility for intelligence and the three services connected with it; the Security Branch, Directorate (sic) Military Intelligence and BOSS (later NIS). Intelligence governance and the role of the SSC was enabled through legislation such as the Security Intelligence and State Security Council Act 64 of 1972. While the intelligence system was imperfect and had many failings, in other ways, a decidedly efficient intelligence and national security system was established (O'Brien in Born et al, 2005: 200).

According to Ahmed (1999: 192) while democracy might not have been the motivation, the process of civilianising the intelligence services commenced during the tenure of Mr P.W. Botha, who initiated the process with the reform of the intelligence community following the 1978 Information Scandal and the subsequent replacement of BOSS by NIS as the pre-eminent civilian intelligence service. According to Faki (in IRAC, 2006: 82) audit expenditure relating to the intelligence services was limited and regulated either by special Acts or the audit legislation of the time. Given the public outcry in the wake of the Information Scandal a more comprehensive approach to auditing the accounts of the intelligence services was called for and legislation was consequently introduced that attempted to strike a balance between transparency and secrecy. Africa (2009: 61), however found that legislation, such as the Protection of Information Act 84 of 1982, actually tightened control of information and consolidated secrecy, further restricting opposition to government policies.

Hutton (2007: 3) citing Dombroski (2006), furthermore points out that during the tenure of Mr P.W. Botha, the militarised security intelligence services became insulated from legislative and judicial scrutiny and secured a significantly high degree of autonomy from policy makers.

When Mr F.W. de Klerk took office in 1989, he embarked on a transformation of the intelligence services, which involved the establishment of ministerial-level oversight and control of the intelligence sector. This significant departure from his predecessor meant that intelligence was no longer under the direct control of the State President and the NSC (Hutton, 2007: 3). Africa (2009: 65) also refers to these developments and points out that in the early 1990's the government's discourse around security began to change.

Despite these reforms, Fazel (in Hutton, 2009a: 33) points out that although Secret Service Evaluation Committees were employed after 1991 to oversee the administration of covert operations, the impervious culture of the intelligence community, along with the indulgence of those responsible for oversight, rendered these mechanisms inadequate. As a case in point he states that financial auditing by the Auditor-General of Secret Services, on the insistence of Parliament, following the 1979 Information Scandal, was restricted for extended periods. In his opinion it was also slightly farcical to some extent, only making a partial recovery with the adoption of the Auditor-General Act 52 of 1989. The use of legislated secret funding instruments still effectively evaded organizational administrative control. The regulation of communications interceptions through the introduction of the Interception and Monitoring Prohibition Act 127 of 1992 was, according to Fazel, one of the rare promising elements of the governance of the intelligence sector at the time.

Intelligence governance as a whole, according to Fazel (in Hutton, 2009a: 32) was characterised by a dearth of clearly defined mandates and laws governing the employment of intrusive powers, selective executive control, indulgent judicial control and a lack of proper coordination mechanisms. Control systems in the intelligence community evolved largely from practice and, while not only ambiguous and instructive in nature, designed to secure effective performance rather than the responsible use of the invasive or coercive powers of intelligence.

In the estimation of Ahmed (1999, 191) the control of intelligence pre-1994 was characterised by negligence through bureaucratic design, ignorance through racial prejudice, and apathy through political and social expediency. The advent of democracy in post-apartheid South Africa was consequently moulded by the legacy of the liberation struggle and a commitment to democratic rights and the rule of law. As a result, the post-1994 democratically elected government envisioned shaping control over the intelligence community through democratic norms and values. In contrast, O'Brien (in Born et al, 2005:199-200) is of the opinion that South Africa's oversight and accountability mechanisms evolved from the intelligence dispensation which existed pre-1994 and as such have both the characteristics of a democratic system and the flaws and idiosyncrasies of a transitional state following liberation.

The new approach to intelligence and the subsequent new policies and legislation governing intelligence emerged from negotiations and deliberations between NIS and ANC DIS during the time of the TEC and its SCI. During the transition period the TEC had oversight of the intelligence services through the Joint Coordinating Intelligence Committee (JCIC). The JCIC agreed on a future philosophy of intelligence which should include particular principles of control and accountability in the mandate of the services namely; allegiance to the Constitution, subordination to the rule of law, clearly defined legal mandate, budgetary control and external audit, integrated national intelligence capability, political neutrality, the separation of intelligence from policy-making, a balance between secrecy and accountability, and the absence of law-enforcement powers. Furthermore, four principle mechanisms for the control and oversight of the intelligence services would be incorporated in the new intelligence architecture. These are: the appointment inspector(s)-general by the President to oversee the intelligence services, the establishment of a parliamentary committee on intelligence, the implementing of a code of conduct for the intelligence services, and a strict definition and delineation of the mandate of each of the services (O'Brien in Born et al, 2005: 202; Africa, 2009: 66-67).

According to Baldino (2010: 9) one of the most trying questions, apart from whether to trust the intelligence community and consequently, which special powers to allocate to it, is what kind of oversight system can ensure fiscal control, improve the quality and integrity of intelligence and make sure that there are no allegations of impropriety,

failure and miscommunication in the responsibilities of the intelligence services. In order to craft, not only a new intelligence dispensation, but specifically an intelligence oversight regime, South Africa, as pointed out by O'Brien (in Born et al, 2005: 202-203) and Netshitenzhe (2005: 65), studied a number of mainly Western intelligence systems; Canada, Australia, New Zealand, the UK and the USA, finding Canada and Australia the most favourable models to emulate. Although O'Brien found this curious given the Socialist and Communist ideological base of the ANC/ SACP alliance, Africa (2009: 67) points out that the ANC's framework for security policy was quite alike to that of many liberal democracies in the post-Cold War era.

3.3 The Post 1994 Intelligence Oversight Dispensation

Intelligence oversight in South Africa, like the security and intelligence architecture of the state, is the result of constitutional reform brought about by the post-1994 political dispensation. According to Fazel (in Hutton, 2009a: 33-34) the conceptual framework for intelligence oversight in South Africa therefore finds its basis in the rule of law and constitutionally enshrined human rights. In South Africa, intelligence oversight, as depicted in Figure 3.1 (p62), is a shared responsibility of the executive, legislature, judiciary and a civilian Inspector-General of Intelligence; with Africa (in Africa and Kwadjo [eds], 2009: 84) pointing out that several structures have oversight of the intelligence services.

3.3.1 Regulatory Framework of Intelligence Oversight

Dube (2013: 91) points out that international experience reflects that a requirement for effective accountability and oversight is a rigorous and comprehensive legislative framework. He found that in this regard South Africa had developed a comprehensive White Paper on Intelligence, produced a world class constitution, and enacted key intelligence specific legislation to direct the establishment, management and operation of intelligence services (as reflected in Figure 3.1 on p62).

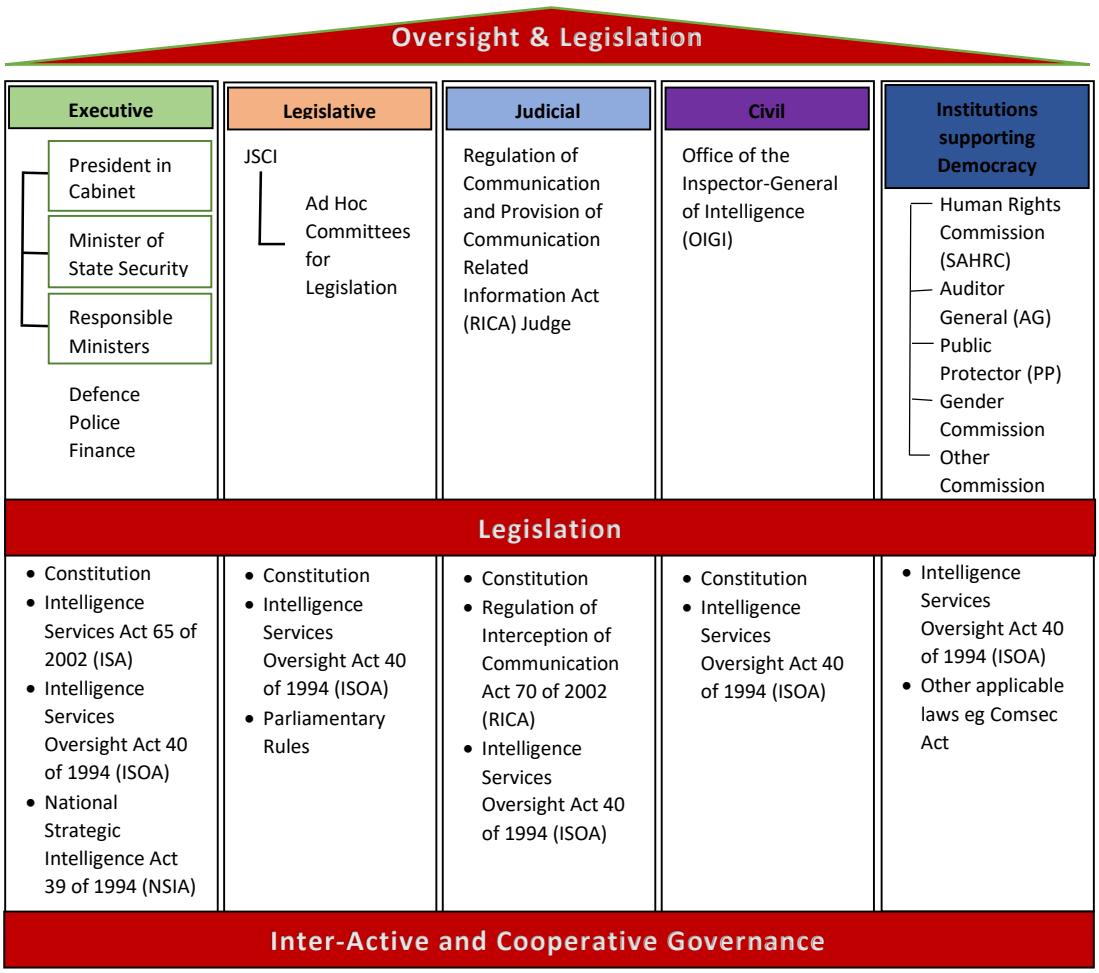

Figure 3.1: South African Intelligence Oversight Dispensation (www.ssa.gov.za, 2011, as cited by Van Den Berg, 2014: 158; Masiopato, 2018: 107)

3.3.1.1 White Paper on Intelligence

The White Paper on Intelligence provides for a number of control measures to regulate the activities of the civilian intelligence community. These control measures are based on the principles and measures of allegiance to The Constitution, subordination to the rule of law, a clearly defined legal mandate, a mechanism for parliamentary oversight, budgetary control and external auditing, an independent inspector-general for intelligence, ministerial accountability, and the absence of law enforcement powers (White Paper, 1994: 6).

According to the White Paper the most important measure is the mechanism for parliamentary oversight of the different services with intelligence functions. In this regard the White Paper points out that legislation will provide for a Joint Standing

Committee of Parliament and IGI. The Joint Standing Committee will have functions and powers that will permit it to receive reports, make recommendations, order investigations and hold hearings on matters relating to intelligence and national security. The committee is moreover to prepare and submit reports to Parliament on the performance of its functions. The inspectors-general, one for each of the civilian intelligence services, will review the activities of the intelligence services and monitor compliance with policy guidelines. The inspectors-general are to have unfettered access to classified information (White Paper, 1994: 6).

Matthews et al (2008: 11) and DefenceWeb (2010) points out that the White Paper is outdated and in his 2010 budget speech (Hansard, Budget Vote 10, 2010: 7) the Minister for Intelligence, Dr Siyabonga Cwele, indicated that the White Paper is set for review. Nathan (2010: 95) echoes the findings of Matthews (et al, 2008), stating that a new White Paper on Intelligence is needed, as the proposals stemming from several intelligence reviews need to be consolidated given changes in the intelligence and security environments over time. He mentions executive control, responsibility, accountability and intelligence oversight as some of the areas that must be addressed by a new White Paper on Intelligence.

Dube (2013: 91-92, 94), found that the White Paper on Intelligence was a crucial policy framework as South Africa was transitioning from an apartheid state to a democratic state where the role and importance of the intelligence function was to change. He opines that the White Paper consequently served as a significant mind-set change for a new intelligence dispensation that was to be constituted of erstwhile opponents under a new government. In this regard the White Paper introduced a new intelligence philosophy which serves as a reference point for the new dispensation and a foundation for subsequent intelligence legislation. Citing O'Brien (1996), Dube states that the new philosophy of intelligence emphasised defining a new vision that is rooted in a human rights approach. He points out that the White Paper not only provided clarity on the need for legislative control of the intelligence structures, but also for parliamentary oversight, civilian oversight by an inspector general as well as a various control measures to regulate the intelligence services.

3.3.1.2 The Constitution of the Republic of South Africa, 1996

According to Fazel (in Hutton, 2009a: 34) the conceptual framework for intelligence oversight is firmly based in the constitutional protection of human rights and the rule of law. Chapter 2 of The Constitution enshrines the Bill of Rights as a keystone of democracy in South Africa. It not only safeguards the rights of people in the country, but also upholds the democratic values of human dignity, equality and freedom. It enjoins the State to respect, protect, promote and fulfil the rights in the Bill of Rights. The Bill of Rights furthermore applies to all legislation and binds the legislature, executive, judiciary and all state organs (The Constitution, 1996: 5; Freedman, 2013: 303).

As consequence, Chapter 9, Section 181 of The Constitution provides for institutions that strengthen constitutional democracy in South Africa (see Figure 3.1). These institutions are the Public Protector (PP), South African Human Rights Commission (SAHRC) and Auditor General (AG), amongst others, and all other state organs are enjoined to support them (Constitution, 1996: 94). According to Dlomo (2004: 104); Netshitenzhe (2005:24-25); Dube (2013: 52), and Masiopato (2018:120) the PP, SAHRC and AG are democracy supporting institutions which play a role in intelligence oversight.

In terms of Chapter 9, Section 182 the PP has the power, as delimited by national legislation, to investigate, report on, and take appropriate corrective action on any conduct in state affairs, public administration and sphere of government, suspected of improper conduct, impropriety or prejudice (The Constitution, 1996: 94-95). The SAHRC must in terms of Chapter 9, Section 184, not only protect human rights but also monitor and assess adherence to respect for human rights. It is empowered to investigate and report on non-adherence and violation of human rights (The Constitution, 1996: 95; Freedman, 2013: 298). Section 188 of Chapter 9 establishes that the AG must audit and report on the accounts, financial statements and financial management of all national and provincial departments and administrations, municipalities as well as any institution or accounting entity which it is obliged by legislation to audit (The Constitution, 1996: 97). Both Africa (2019: 3, 4) and Matthews

(et al 2008: 20) concur that the financial oversight of the intelligence services is thus provided by The Constitution.

Chapter 11, Section 198(d) states that national security is subject to Parliament and the National Executive (The Constitution, 1996: 106). The Constitution makes provision for intelligence oversight in Chapter 11, Section 199 and Section 210, to give effect to the principles of accountability and transparency. Section 199 (8) provides for a multi-party parliamentary committee to have oversight of all security services in a manner as provided for in national legislation or the rules and orders of Parliament (The Constitution, 1996: 107). Control of the intelligence services is provided for in Section 209(2) which requires the President to appoint heads for the intelligence services and either assume political responsibility for the direction and control of the services, or appoint a member of cabinet to assume such responsibility. Civilian oversight is provided for in Section 210(b). It provides for civilian monitoring of the intelligence services by an Inspector-General of Intelligence who is appointed by the President, as head of the national executive, on approval of the National Assembly by a two-thirds majority. The Constitution is furthermore explicit in its injunction that national legislation must regulate the objects, powers and functions of the intelligence services (The Constitution, 1996: 111).

Dube (2013: 76) found that while The Constitution affords sufficient guidance in terms of principles and specific requirements, the various role players in the intelligence community will continue to attach their own meaning to the provisos of The Constitution and he opines that, as a consequence, the provisions will be the focus of spirited debate, particularly on matters of control and oversight.

Matthews et al (2008: 20) points out that The Constitution actually requires that all reports should be made public and not only submitted to the JSCI, as is the practice with the intelligence services.

3.3.1.3 Intelligence Services Oversight Act 40 of 1994 (ISOA)

The Intelligence Services Oversight Act 40 of 1994 (ISOA), as amended, is the main legislation giving effect to the constitutional requirement of oversight of the intelligence

services (Netshitenzhe, 2005: 60-62; O'Brien in Born et al, 2005: 204). ISOA has been amended over time by the Committee of Members of Parliament on Intelligence and Inspectors-General of Intelligence Amendment Act 31 of 1995, Intelligence Services Control Amendment Act 42 of 1999, Intelligence Services Control Amendment Act 66 of 2002, General Intelligence Laws Amendment Act 52 of 2003, Prevention of Combatting of Corrupt Activities Act 12 of 2004 and General Intelligence Laws Amendment Act 11 of 2013 (ISOA, 1994: 1).

The purpose of ISOA is to provide for the establishment of a Committee of Members of Parliament on intelligence and to define its functions. It furthermore provides for the appointment of Inspectors-General of Intelligence and to define their functions as well as provide for other related matters (ISOA, 1994: 1).

Section 2 provides for the establishment of the JSCI which, subject to The Constitution, shall perform oversight of the intelligence and counter-intelligence functions of the Services[18]. Oversight includes administration, financial management and expenditure of the Services and Office[19] (ISOA, 1994: 4; GILA, 2013: 14).

The JSCI consists of 15 members appointed on the basis of proportional representation. All the members must be issued with security clearances before they can take up their seats on the committee. All the members must be members of parliament and can be replaced by a member of their party on request of the party leader or if they behave in a manner detrimental to national security, provided that specific parliamentary procedures have been met. Members may also resign from the JSCI provided that particular parliamentary procedures have been complied with. The Speaker or Chairman of the National Council of Provinces shall appoint a chairperson on agreement of the President and party leader. The JSCI shall make its own rules and procedures for meetings in compliance with Constitutional provisions. JSCI meetings may only be attended by JSCI members or members of staff unless approved by the Committee. Designated parliamentary officers and personnel

[18] In terms of Section 1 of ISOA, "Services" refer to the State Security Agency, the Defence Intelligence Division of the SANDF (DI) and the Crime Intelligence Division of the SAPS (CI).
[19] In terms of Section 1 of ISOA "Office" refers to "Office" as defined in Section 1 of RICA – Office for Interception Centres (OIC).

designated by the Minister[20] may assist the Committee in the performance of its functions (ISOA, 1994: 4-6).

Section 3 (ISOA, 1994: 6-8; GILA, 2013: 14-16) enumerates the functions of the Committee:

- Obtain an audit report on the financial statements of the intelligence services and Office from the AG; consider the financial statements, any audit reports on the statements and reports issued by the AG on the intelligence services and Office and report to Parliament.
- Obtain a report from the Evaluations Committee[21] on the secret services and intended secret services evaluated and reviewed projects reviewed and evaluated by the Evaluations Committee; obtain a report about the functions performed by the designated judge, defined in RICA[22], as well as statistics, comments or recommendations which the designated judge considers appropriate;
- Consider and make recommendations on the report and certificate of the IGI. Consider, initiate and make recommendations on all legislation concerning the intelligence services.
- Review and make recommendations pertaining to regulations in terms of Section 6 of NSIA and regulations pertaining to intelligence and counter-intelligence functions of the respective intelligence services.

[20] **Minister**, defined in ISOA Section 1, refers to the President, or the member of Cabinet, designated by the President in terms of Section 209(2) of the Constitution to assume political responsibility for the control and direction of the intelligence services established in terms of Section 209(1) of the Constitution.

[21] **Secret Services Evaluation Committee -** established by Section 2 of the Secret Services Act 56 of 1978.

[22] **Regulation of the Interception of Communication (RIC) Act, Act 70 of 2002**. RICA regulates "the interception of certain communications, the monitoring of certain signals and radio frequency spectrums and the provision of certain communication-related information; to regulate the making of applications for, and the issuing of, directions authorising the interception of communications and the provision of communication-related information under certain circumstances; to regulate the execution of directions and entry warrants by law enforcement officers and the assistance to be given by postal service providers, telecommunication service providers and decryption key holders in the execution of such directions and entry warrants; to prohibit the provision of telecommunication services which do not have the capability to be intercepted; to provide for certain costs to be borne by certain telecommunication service providers; to provide for the establishment of interception centres, the Office for Interception Centres and the Internet Service Providers Assistance Fund; to prohibit the manufacturing, assembling, possessing, selling, purchasing or advertising of certain equipment; to create offences and to prescribe penalties for such offences; and to provide for matters connected therewith" (RICA, 2002:1). On 4 February 2021, the Constitutional Court ruled certain provisions of RICA unconstitutional (AmaBungane and Another v Minister of Justice and Correctional Services, Minister of State Security, Minister of Communication and others; Minister of Police v Amabungane and Another, 2021)

- Review and make recommendations concerning interdepartmental cooperation and the rationalisation and delineation of functions regarding intelligence and counter-intelligence between the intelligence services.
- Order investigations and receive reports by the Head of a Service[23] or the IGI into complaints from the public.
- Refer any matter relating to a service or intelligence activity, which is relevant to the promotion, respect for, or protection of rights entrenched in Chapter 2 of the Constitution, to the SAHRC referred to in Section 184 of the Constitution.
- Consider and make recommendations regarding any matter falling under ISOA to the President, any Minister responsible for a Service or Parliament.
- Request explanations from any official or body regarding any aspects of any of the reports submitted to the Committee
- Deliberate, hold hearings and subpoena witnesses on matters concerning intelligence and national security, including financial expenditure and administration.
- Consult with any Cabinet member regarding the performance of the Committee and to consider and report regarding the appropriation of funds for the Services and the Office.

Section 4 (ISOA, 1994: 8-9; GILA, 2013: 16) provides for access to intelligence, information and documents. The Committee shall have access to intelligence, information and documents in possession of, or under the control of the Services. Such information must be handled in accordance with prescribed security guidelines and measures, and shall be returned to the Services as determined by the Head of a Service. Services are however not obligated to reveal the names or identities of any person or bodies involved in intelligence and counter-intelligence activities; information or documentation which may expose the identity of any source; intelligence or counter-intelligence methods which may reveal the identity of sources or intelligence. It is however made clear that this provision cannot be used to deny the disclosure of information to the Committee.

[23] **Head of a Service** – defined by Section 1 of ISOA as the Director General of the Agency, the head of the intelligence division of the SANDF or the head of the intelligence division of the SAPS. For financial and administrative accounting, the head of DI is the Secretary for Defence and the SAPS the National Commissioner of SAPS".

In the case of a dispute regarding access to information or disclosure of information it shall be referred to a committee comprised of the IGI, the Head of the Service in question, Chair of the Committee and Minister responsible for the Service in question.

Any Minister responsible for a Service or the Office, any Head of a Service, the Director or IGI may be called by the Committee to give evidence, submit any document or thing and answer questions to enable it to perform its functions.

Section 5 (ISOA, 1994: 10) establishes that the Committee shall perform its functions in a manner consistent with the protection of national security. It places a prohibition on the disclosure of information obtained in the course of the activities of the Committee except where necessary for the proper administration of ISOA, necessary for the performance of functions in terms of ISOA, with the permission of the Chairman, Head of a Service and the IGI or, as prescribed by regulation.

Section 6 (ISOA, 1994: 10) addresses reporting to Parliament. The Committee is obliged to report to Parliament within 5 months of its first appointment and thereafter annually within 2 months of 31 March of a year. The report shall cover the activities of the Committee, findings and recommendations and copies are to be provided to the President and the Ministers responsible for the Services. The Committee may also, at the request of Parliament, the President, the Minister responsible for a Service or whenever it deems necessary submit a special report on any matter relating to its functions, to the aforementioned. Nothing should be included in any report, the inclusion of which, may be more harmful to national security that its exclusion will be to national interest.

Section 7 provides for the IGI (ISOA: 1994: 10-14; GILA, 2013: 18).

The President shall appoint an IGI nominated by Parliament and approved by a two-third majority of Parliament. If a nomination fails another person may be nominated. The IGI must be a South African citizen, who is fit to hold office and who has knowledge of intelligence. The conditions of service and remuneration of the IGI shall be determined by the President in concurrence of the Committee. The IGI may be removed from office, but only on the grounds of misconduct, incapacity, withdrawal of

security clearance, poor performance or incompetence. The IGI may be suspended if they are the subject of an investigation by the Committee. The IGI shall furthermore be accountable to the Committee for the overall functioning of the Office of the IGI and shall report on their activities and performance of their functions to the Committee at least once per annum.

The functions of the IGI in terms of Section 7(7) are to monitor compliance by any Service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence; to review intelligence and counterintelligence activities of the Services; to perform all functions designated by the President or Minister responsible for any of the Services; to receive and investigate complaints from the public or members of the intelligence services on alleged maladministration; abuse of power; transgressions of the Constitution, laws or policies; the commission of an offense referred to in Chapter 2 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004, and improper enrichment; to submit certificates on each of the Services to the respective Ministers responsible for the Services; to submit reports on taskings and investigations conducted as requested or instructed by the Committee; to submit reports to every Minister responsible for the Services on the monitoring of compliance with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence, review of the intelligence and counter-intelligence activities of any service as well as complaints investigated.

In respect of monitoring and review, these reports shall contain findings and recommendations. In instances where the IGI performs functions designated by the President the IGI shall report to the President.

The IGI shall have access to any information, intelligence or premises under the control of any of the Services in the conduct of their functions and shall be entitled to demand from the Head of a Service and the employees of the services any intelligence, information, reports and explanations as necessary for the performance of their functions. In order to access premises under control of a Service the IGI is required to inform a Head of Service prior to their access to the premises of a service (in writing), stipulating the date and nature of access required. Information obtained by the IGI may only be disclosed after consultation with the President or Minister

responsible for a Service subject to certain restrictions and provided that such disclosure is not harmful to national security. The IGI shall also have access to information, intelligence or premises not under control of any of the Services provided that it is required in the execution of their functions and only once the IGI first obtained a warrant issued in terms of the Criminal Procedure Act 51 of 1977. Intelligence or information obtained in this instance may only be disclosed once the IGI has informed the lawful owner of such intention, after consultation with the President or Minister responsible for the Service in question, subject to relevant restrictions and to the extent that it is not harmful to national security. No access to information or access to premises may be denied to the IGI on any grounds.

The IGI is furthermore enjoined to comply with all security requirements applicable to employees of the intelligence services. The IGI is expected to serve impartially and independently and perform their functions in good faith and without fear, favour or prejudice.

Heads of Intelligence Services are to provide the Minister responsible for their particular Service with a report on the activities of their Service in respect of every period of 12 months or lesser period (if so specified by the Minister). The Heads of Services must submit a copy of the report to the IGI. Heads of Services must report unlawful intelligence activity or significant intelligence failure of their particular service as well as remedial action undertaken to the IGI.

The IGI shall submit a certificate to the Minister responsible for a Service stating the extent to which the IGI is satisfied with the report and whether anything done by the Service during the period covered by the report, in the opinion of the IGI, is unlawful or contravenes any directions issued by the Minister responsible for that Service or involves any unnecessary or unreasonable exercise of its powers by that Service. Once the Minister responsible for a Service receives the certificate and report, they must, as soon as practically possible, transmit it to the Committee.

The Minister may, after consultation with the IGI, appoint personnel in the Office of the IGI, as may be required for the performance of the functions of the Office, on the same conditions of service as pertinent to members of the Agency. The IGI may request that

the National Commissioner of SAPS and the Chief of the SANDF second members to the OIGI.

The budget of the Office of the IGI shall be appropriated by Parliament as part of the budget vote of the intelligence services and shall be expended as accorded by the Public Finance Management Act 1 of 1999. The IGI may delegate, in writing, functions to any employee in the Office, and any function performed in terms of such delegation, is deemed to be performed by the IGI.

Section 7A provides for offences and penalties and determines that any person who contravenes Section 5(2), or 7(9) or fails to comply with Section 7(8) shall be guilty of an offence. On conviction such a person shall be liable for a fine or imprisonment not exceeding five years (ISOA, 1994: 14).

Section 8 (ISOA, 1994: 14-15) establishes that the Minister, acting in concurrence with the Committee, may make regulations about any matter required or permitted in terms of ISOA; the performance of the functions of the IGI; reports to be submitted by the IGI and the Heads of Services; the suspension or removal from office of the IGI and termination of employment of the IGI; an oath of affirmation or secrecy to be subscribed by the IGI or staff and members of the Committee as well as leaders of political parties represented on the Committee; security clearance for Committee members and the IGI; the conditions of employment for members appointed to the Office of the IGI; and procedures for the lodging and investigation of complaints.

Section 9 indicates that the title of the Act is the “Intelligence Services Oversight Act, 1994” (ISOA, 1994: 15).

Dube (2013: 94) found that “a clear, sound and express legislative environment exists in South Africa” and that this framework establishes a firm foundation for an accountability and oversight model that has tremendous potential to be effective and efficient. Dube however, points out that, given the consequence of time and changes in the way in which intelligence is conducted, there is a need to amend legislation to provide for legal certainty and address ambiguity or a vacuum on issues of management and oversight.

Matthews (et al, 2008: 13, 113) recommended that ISOA should be amended so that the IGI's mandate be confined to that of an ombudsman. As an ombud the IGI would be restricted to only monitoring compliance by the intelligence services with the Constitution and the regulatory framework; investigating complaints of illegality, non-compliance, abuse of power and misconduct by the services; as well as certifying the activity reports submitted by the heads of the intelligence services. The mandate should furthermore not extend to significant intelligence failures, the effectiveness and efficiency of intelligence and counter-intelligence operations, and human resource complaints.

In April 2018 the IGI, Dr Dintwe, approached the Pretoria High Court to have several section of ISOA declared unconstitutional (Maromo, 2018). In her 2018 budget speech in Parliament (Hansard, Budget Vote 7, 2018: 6), the Minister of State Security, Mrs Letsatsi-Dube, subsequently indicated that a review of legislation governing oversight of the intelligence services was required to enforce greater independence of the IGI and address the issue of a deputy IGI while oversight regulations should also be reviewed.

Mufamadi (et al, 2018: 89) found that while the Constitution and legislation created an oversight system which is akin to the best in the World, the question is whether, given the failures and abuses that have occurred since inception, these oversight mechanisms function effectively and if not, why?

According to O'Brien (in Born et al, 2005:214-215) successive amendments to legislation had changed the role of the IGI. Whereas ISOA had initially provided for an inspector-general for each service this had changed to a single IGI by 2002. In 1999 the requirement of a 75% majority in approving an inspector-general's appointment had been reduced to 66% majority in the legislature. The mandate of the IGI had furthermore been expanded to receive and investigate complaints from members of the public as well as members of the services relating to abuse of power, maladministration, transgression of laws and policies, corruption and improper enrichment. Significantly the IGI was also provided with unhindered access to information, intelligence and premises of the intelligence services. In addition, in 2002 the mandate of the IGI was expanded to include monitoring of compliance with the

regulatory framework, review of intelligence and counter-intelligence activities and to perform functions that may be designated by the Minister or President. The complaints function was strengthened to provide for ordering investigations by, and receive reports from the heads of services. The IGI is also required to submit certificates and reports to the Minister relating to their functions while heads of services have to submit reports on their annual activities to the Minister responsible for the service in question, as well as the IGI. Heads of services are furthermore required to report unlawful intelligence activities as well as significant intelligence failures as well as any corrective action to the IGI.

According to Fazel (in Hutton, 2009a: 36), it is important to understand that intelligence business is a "Regulated Industry" as it is conducted in "a control or regulatory framework of checks and balances". These checks and balances encompass The Constitution, primary legislation, ministerial directives and standard operating procedures.

3.3.1.4 The Auditor General Act 12 of 1995 (AGA)[24] and the Public Audit Act 25 of 2004 (PAA)

The Financial statements of the Intelligence Services are audited on a yearly basis by the AG's office as enjoined by the Constitution (Africa, 2019: 5). The PAA (and its predecessor the AGA) determines that the AG shall report on the accounts established by the Security Services Special Account Act 81 of 1969[25]; the Defence Special Account Act 6 of 1974[26] and the Secret Services Account Act 56 of 1978[27]. Reporting is to take place in proper regard for the special nature of the accounts and that reporting shall only be limited after consultation with the President, Minister of Finance and the respective Ministers responsible for the Services (AGA, 1995: 6, 7; PAA, 2004: 11, 14, 18, 22, 24). Both Africa (2019: 5-6) and Faki (in IRAC, 2006: 83) point out that the Acts place an important caveat on limitations (if any) as reporting of irregularities

[24] The **Auditor General Act 12 of 1995** was repealed by the **Public Audit Act 25 of 2004**.
[25] **Security Services Special Account Act, Act 81 of 1969.** The Act provides for the establishment of a Security Services Special Account, for the control and use of funds standing to the credit of such account and for other incidental matters.
[26] **Defence Special Account Act 6 of 1974.** The Act provides for the establishment of a Special Defence Account for the control and use of money credited to the account as well as matters related to it.
[27] **Secret Services Act, Act 56 of 1978** provides for the establishment of an account for secret services, for the evaluation of and control over secret services and for matters connected therewith.

or any unauthorised expenditure may not be so limited unless disclosure of facts may be detrimental to national interest. As indicated previously on page 67 of this study, ISOA, Section 3, empowers the JSCI to obtain and consider the audit reports of the intelligence services.

According to Faki (in IRAC, 2006:81), the Public Finance Management Act 1 of 1999 (PFMA) presents a break from the past regime of "opacity, poor information and weak accountability" as it sets a new basis for a more effective framework of corporate governance in the public sector. He furthermore states that all secret service accounts are subject to, and must comply with the provisions of the PFMA. Africa (2019: 5) points out that the intelligence services "are not exempt from none of the requirements of the PFMA." She furthermore laments the fact that while the PFMA sought to promote accountability and transparency, the other three acts[28] "effectively retain the cloak of financial secrecy…".

Masiopato (2018: 123) consequently states "the intelligence services are not immune from this constitutional mandate" (of the AG) which is confirmed in both the AGA and PAA. Masiopato points out that the PAA in fact confirms the AG as "the supreme audit institution" in South Africa, which strengthens democracy through oversight and enforcing accountability across the public sector.

O'Brien (in Born et al, 2005: 215) found that amendments to legislation furthermore provided for more stringent financial oversight by the AG.

Africa (2019: 4) opines that, given the extent of constitutional and legislative provisions in place, a far more significant degree of transparency on the intelligence service's budget should have been expected. She expresses disappointment at it not being the case.

[28] Security Services Special Account Act 81 of 1969; the Defence Special Account Act 6 of 1974 and the Secret Services Account Act 56 of 1978.

3.3.1.5 Public Protector Act 23 of 1994 (PPA)

In terms of the Act, in giving effect to the Constitution, (as discussed on page 64 of this study), the PP is empowered to investigate, on their own initiative or on receipt of a complaint, any alleged maladministration, abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity of state; improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution or entity of state; or an act or omission by a person in the employ of an institution or entity of state which results in unlawful or improper prejudice to any other person. The PP shall furthermore be able to investigate, any alleged attempt to do anything which he or she may investigate under section 112 of the Constitution (PPA, 1994: 1, 10, 11).

The PP may request any person at any level of government; performing a public function, subject to the jurisdiction of the PP, to assist in the performance its functions with regard to any investigation (PPA, 1994: 11).

Masiopato (2018: 122) found that the PP mandate extends across various organs of state and that the PP is empowered by statute to also protect the public from abuse by the intelligence services. He points out that, in terms of oversight, the law requires the PP to refer intelligence related complaints to the Inspector-General of Intelligence.

3.3.1.6 South African Human Rights Commission Act 40 of 2013 (SAHRCA)

The Act provides for the composition, powers and functioning of the South African Human Rights Commission (SAHRC) and the repeal of the Human Rights Commission Act 54 of 1994 as well as matters connected to the Act (SAHRCA, 2013: 1).

The Act gives effect to the provisions of the Constitution in Section 181 and 182 (see page 63 of this study). To this end Section 13 empowers the Commission to investigate any abuse or alleged abuse of human rights. All organs of state must provide the

Commission assistance in the execution of its powers and functions (SAHRCA, 2013: 14).

In terms of Section 18 the SAHRC must annually report on its functions and the achievements of its objectives to the National Assembly. Reports on functions and investigations of a serious nature must be submitted as soon as possible (SAHRCA, 2013: 20).

O'Brien (in Born et al, 2005: 215) reflects that amendments to legislation provided for more stringent protection against state abuse through the PP and the SAHRC.

Masiopato (2018: 123) found that statutes and regulations does not make provision for cooperation between the intelligence oversight structures and SAHRC, save for the ISOA, which enjoins the JSCI to report human rights matters to the SAHRC and receive reports on such matters from the SAHRC. Masiopato describes this state of affairs as "a problematic constraint".

3.3.2 Oversight Architecture and Oversight Role Players

The South African oversight architecture is constituted of various oversight bodies functioning at different governance levels (see Figure 3.1, p62). Dube (2013: 25) describes the South African oversight model as built on four pillars; judicial, executive, legislative and administrative. Landers (in IRAC, 2006: 21) similarly to Africa (2011: 24), Fazel (in Hutton, 2009a: 34), Masiopato, (2018: 106) and Mufamadi (et al: 2018: 89) found that judicial oversight is exercised by the Judge designated to enforce RICA compliance, executive oversight by the Ministers responsible for the intelligence services while legislative oversight is constituted by Parliament through the JSCI. civilian or administrative oversight is the purview of the IGI and the Chapter 9 institutions[29] (see Figure 3.1, p62) and civil society.

Netshitenzhe (2005: 24) refers to the complimentary nature of the oversight mechanisms while Mufamadi (et al, 2018: 89) states that oversight responsibilities are

[29] Public Protector, Auditor-General and South African Human Rights Commission

distributed between various executive, legislative, judicial and administrative role players. Masiopato (2018: 69) points out that the South African oversight model reflects both an institutional and investigative posture with oversight structures conducting oversight in the services and ministers exercising control of the intelligence services.

3.3.2.1 Executive Oversight

The executive, as depicted in Figure 3.1 (p62), is responsible for tasking and directing the intelligence services. The mechanisms of control include ministerial directives and policy guidelines. As ministers are most directly responsible for oversight, becoming too closely involved in day-to-day management may impede their oversight and may, if the relationship is too close, lead to the pollicisation of intelligence (Caparini in Born and Caparini [eds], 2016: 10-11).

In South Africa, as found by Dube, (2013: 25-26), Matthews (et al, 2008: 12, 83-84) and Hutton (2007: 11), and graphically depicted in Figure 3.1 (p62), executive control of the intelligence services is firmly grounded in legislation and ministers are empowered to ensure the effective functioning, control and supervision of the conduct of intelligence.

The Minister of State Security[30] has primary responsibility for intelligence, but must act in consultation with the Ministers of Defence and Police where it affects DI and CI as discussed on page 40 of this study. Dube (2013: 52), Africa (2011: 24) and Matthews (et al, 2008: 77) point out that these ministers have political responsibility for the intelligence services and they define the policy framework for intelligence activities. Matthews (et al, 2008: 77) states that the Minister is an important functionary not only because they exercise executive control of the intelligence services but also because of the doctrine of ministerial accountability. The Minister is accountable to the President, Cabinet and Parliament for the exercise of their powers and functions. Netshitenzhe, (2004: 16) found that, unlike other democracies, the South African President does not head or sit on a formal structure overseeing the intelligence

[30] The Ministry of State Security was done away with on 5 August 2021 and the political responsibility for SSA was placed in the Presidency under a deputy minister (Presidency, 2021).

services. However, in 2020 Pres Ramaphosa re-established the NSC, which is chaired by the President and is, amongst others, responsible for coordinating the work of the security services (RSA, 2020: 3-4).

According to Hutton (2009:10) the control of the intelligence services, as far as actual management and supervision are concerned, takes place at the executive and administrative level. Matthews (et al, 2008:77), emphasises that ministerial control and responsibility resides at the political and executive levels while operational control and responsibility, rests with the heads of the intelligence services. He states that a Minister is the political head of a government department, responsible for policy matters and overall policy outcomes, while a DG is the administrative head and accounting officer of a department, responsible for the implementation of government programmes and for outputs towards the achievement of policy outcomes. Masiopato (2018: 110, 112) supports this notion, arguing that the ministers are responsible for political control and should not be involved in “intelligence production”.

Dube (2013: 25) found that executive control of intelligence services is a vital component of the South African oversight model. He states that if there are significant weaknesses at this level, the other elements of the model will also experience severe challenges, resulting in a weakened and ineffective oversight model. In this regard he raises concerns about the separation of intelligence and politics, citing the concerns raised by both the MRC (2008) and the IGI (2006) on superintendence and control of politically sensitive intelligence and the use of intrusive measures.

Both Hutton (2007: 11) and Matthews (et al, 2008: 83) found that while the Minister of State Security has adequate powers, there is a lack of specificity in the exercise of executive powers relating to politically sensitive domestic intelligence matters.

Africa (2019: 13) found that the control systems in place does not provide ministers with a high enough level of control over the intelligence services to detect incidences of wrongdoing, especially in the covert environment and that while the tightening of controls is a popular notion, it may instead raise questions about the extent to which ministers should engage in the operations of the services. The restructuring of the intelligence services since 2009 under the auspices of Minister Cwele, based on a

presidential proclamation, ostensibly to “better coordinate the structures” as found by Mufamadi (et al, 2018: 2, 28, 29, 66, 69) serves as a case in point, especially with subsequent findings by the HLRP on SSA (see Appendix A, p A-i to A-ix) and revelations at the State Capture Commission about the role of Ministers Cwele, Mahlobo and Bongo in the operations of SSA, as pointed out by Ngatane (2021) and Sidimba (2021), and stated in the submissions of Mr Riaz Shaik, former Head of SSA Foreign Branch (Shaik 2019: 4, 7-8) and Mr Lizo Njenje, former Head of SSA Domestic Branch (Njenje, 2019: 3, 6). This stands in sharp contrast to the role that Minister Kasrils played in the wake of Project Avani[31] when he exercised his superintendence by commissioning a ministerial review, tasked the IGI to investigate and initiated an internal training programme aimed at promoting intelligence professionalism (Dube, 2013: 75, 79-80).

Dube (2013: 76-78) furthermore expresses concern about how the intelligence services in South Africa can be insulated from gratuitous political interference and abuse at the highest levels, which may manifest as political manipulation of the intelligence system or personal gain. In his estimation, citing Born and Leigh (2005), “the key is to strike a delicate balance between ‘ensuring proper democratic control of the intelligence services and preventing democratic political manipulation’ ”.

Dube (2013, 79-80) found that while political direction and control of intelligence services are crucial for the effective functioning of the South African oversight model, their political independence is equally vital in affirming to the public that they exist to safeguard the constitutional democracy with no narrow party political interests driving the agenda of government. He argues that, notwithstanding the problems that have been reported since the inception of democracy, in terms of accountability and oversight of the intelligence services, the existence of a sound constitutional order and strong legislative provisions have afforded the necessary protection which has enabled the intelligence services to escape a total collapse. The revelations at the State Capture Commission regarding executive abuse and involvement in operations, politicisation of the intelligence services as well as failed executive control and

[31] As elaborated in Chapter 2 page 43..

accountability, as reported by Thamm (2021a) and deposed by Shaik (2019) and Njenje (2019), however calls this notion into question.

As far as policy and direction is concerned, Africa (2012: 126-127) found that successive ministers have failed to address important policy issues, such as the development of a national security strategy and to review the White Paper on Intelligence. She points out that, as a result, important policy issues such as appropriate and effective controls over intelligence in the domestic environment, supervision and oversight of both domestic and foreign covert and intrusive intelligence, and protecting the services from political abuse, have not been addressed over the years.

As a consequence of the unrest in June/July 2021 the President made changes to the National Executive to improve the capacity of government to effectively work to ensure peace and stability. To this end the Ministry of State Security was done away with and the political responsibility for SSA was placed in the Presidency as it would ensure that the domestic and foreign intelligence services enable the President to better deal with safety and security matters (Presidency, 2021). To improve support to the President and the NSC, in strategic security management, Dr Sydney Mufamadi (who chaired the HLRP on SSA) was appointed as National Security Adviser (Presidency, 2021).

3.3.2.2 Legislative Oversight

The legislature in a democracy oversees and scrutinises intelligence services through a specialised committee with clearly defined powers. Oversight is exercised by holding the services and ministers to account by voting on the plans and budget of intelligence services, scrutinising reports, debating issues relating to the intelligence services and issuing reports. Apart from politicising intelligence and limited scrutiny, in extreme situations, where there is strong partisanship and strict party discipline, political deference could impede holding ministers and the executive to account (Caparini in Born and Caparini [eds], 2016: 13-14). Born and Wetzling (in Johnson, 2007: 318) elaborates by pointing out that legislative oversight may be hindered by a mixture of insufficient cooperation from the executive and the intelligence agencies; inadequate

and vague mandates of oversight committees; insufficient motivation of parliamentarians to engage in pro-active oversight; insufficient resources; and lack of access to classified information by overseers in parliament. According to Netshitenzhe (2005: 14) the scope of oversight differs from country to country and that parliamentary oversight of intelligence is generally exercised by legislative committees. These committees usually focus on the budget, hold hearings or conduct investigations. Born (2004) as cited by Masiopato (2018: 108) points out that legislative oversight does not include the routine day-to-day management of the intelligence services, but monitoring the executive and the intelligence services in their compliance with the legislative framework.

Multi-party intelligence oversight by a parliamentary committee is regarded as a definitive feature of the post-Apartheid intelligence dispensation (Hutton, 2007: 12). O'Brien (in Born et al, 2005: 212) describes this move to openness and transparency as remarkable, while Dube (2013: 59) points out that in the light of Parliament's important role as an institution of democracy, parliamentary oversight, exercised by the JSCI, as reflected in Figure 3.1 (p62), is a key pillar of the South African oversight model. The JSCI mandate, as derived from ISOA, as elaborated on page 66-69 of this chapter, is quite extensive.

The JSCI is a mechanism through which the intelligence services are accountable to parliament, like other state departments, taking into account the sensitive nature of intelligence work (Mufamadi et al, 2018: 95). According to Hutton (2007: 10) given its legislative mandate, the JSCI occupies a very influential position in the conduct of oversight of the intelligence services. Masiopato (2018: 141) identifies the JSCI as the primary client of all oversight as it is the custodian of public accountability. To this end the IGI submits reports and certificates to the JSCI while the AG submits its audit reports on the intelligence services to the JSCI.

Dlomo (2004: 115-116) found that the JSCI has sound relationships with other state institutions responsible for oversight, making parliamentary oversight quite effective. He states that the JSCI embraced the concept of "parliament as one oversight business process" specialises, share responsibilities and cooperate with notably; the Standing Committee on Public Accounts (SCOPA) and the Justice Portfolio

Committee. The relationship with the AG is described as good while the relationship with the IGI is describe as 'interdependent", with the JSCI referring matters for investigation to the IGI. Media relations is found to be satisfactorily while relations with civil society and the public needs improvement.

Hutton (2007: 10) describes parliamentary oversight as an *ex post facto* exercise which concerns itself with the review of intelligence activities. Similarly, Dube (2013, 28) states that the powers and functions of the JSCI, seemingly provides for a more reactive than proactive approach to oversight.

Swart (in IRAC, 2006: 33-34) points out that the JSCI is tasked with oversight of the intelligence and counter-intelligence activities of the intelligence services which includes administration and financial management and to report on these matters to Parliament. While the JSCI also conducts oversight on compliance with legislation, in general terms it does not include operational oversight, which falls within the purview of the IGI. According to Swart the IGI assists the JSCI in fulfilling its mandate and is accountable to the JSCI. A prime example of this relationship was when the IGI submitted its report on the Project Avani investigation to the JSCI in 2006 (Hutton, 2007: 15).

Dlomo (2004: 108-109) found that the parliamentary oversight dispensation was initially successful and effective as it started out on a firm footing with a willingness and consensus mind-set amongst its members at the time. The JSCI was regarded as effective and well-focussed, respecting national security and making decisions by consensus. He ascribes much of the progress and effectiveness of the JSCI to a sense of continuity with the retention of a core membership. Although the members understood their mandate and their brief he found that more balance was needed in their work as much of their focus was on the civilian intelligence services and that CI and DI were neglected. Furthermore, the JSCI is capacitated and supported by committee staff, either employed by Parliament or seconded by the Ministry of State Security. The committee is well resourced, although it is a matter of some contention, and Dlomo believes that, given the scope of their work, their resourcing needs to improve (Dlomo, 2004: 62-63, 115).

In assessing legislative oversight of intelligence in South Africa, Dube (2013, 80-81, 83-84, 95) used the Triple A model, as formulated by Aning and Larey (1995), which looks at the authority, ability and attitude of parliamentary oversight mechanisms. Dube found that a sound constitutional and legal framework for the concept of oversight existed in Parliament. The JSCI is established by the Constitution while ISOA provides a further basis for its functions and mandate, providing the 'authority' for this level of oversight. It is furthermore in line with international best practices in most democratic states where the concept of oversight is based on a sound constitutional and legal basis. Despite its undoubted authority, Dube points to the diminishing and unfortunate status of parliament as a 'failing institution' when it comes to asserting its authority on matters of oversight. He furthermore found that since the inception of democracy, Parliament has become less assertive over time, while the executive has become more assertive. The "ability" of the JSCI is centred on the knowledge and skills of JSCI members, and Dube found that it lacks a dedicated programme of skilling of members to enable them to keep up with technological advances. As a consequence, it becomes reliant on agencies it must exercise oversight over, and thus risk the undermining of its oversight work. As far as "attitude" is concerned Dube found that the clear political will to exercise oversight over the executive and the intelligence services, in a manner that provides assurance to the public, has diminished. Smaller parties, prioritising their participation in oversight, have tended to focus on areas which are of significance to the electorate (and would garner votes). Intelligence is a less attractive prospect and has consequently detracted from extensive participation in the JSCI by all parties represented in the Legislature. The cause for ineffective oversight can also be found in party discipline and loyalty, as, due to the nature of the proportional representation system, members of parliament are not seen to exercise sufficient power over their fellow party members in the executive. Despite the ruling party's encouragement of a more "robust and fearless oversight function" the ANC has proven unconvincing in demonstrating strong political will in promoting effective oversight.

In 2021, in the wake of apparent intelligence failures, during the unrest in KwaZulu-Natal and parts of Gauteng, the President indicated that a comprehensive review will be conducted of the readiness and response of the security sector to the unrest. To this end an Expert Panel was appointed to conduct a thorough and critical review of

preparedness and the shortcomings in the state's response and make recommendations on strengthening capabilities (Presidency, 2021). According to the Chair of Parliamentary Committee Chairs, Mr Cedric Frolick, Parliament will conduct an investigation into events and that the relevant ministers and role players will be required to testify (Boonzaaier, 2021). The JSCI will conduct a separate inquiry focused specifically on SSA, CI and DI (Thamm, 2021d). Parliament is set to debate the unrest (TimesLive, 2021b).

Masiopato (2018: 213-214) asserts that the JSCI, as representative of the people, could do more to engage the public on matters relating to its work and matters of national security which would both educate the public and demystify intelligence.

Hutton (2007: 12) points out that as much as parliamentary oversight is a fine feature of a democratic South Africa, its effective implementation is very much dependent on the vigour and vigilance of the parliamentarians tasked with this function. In her estimation the attitude of ministers towards their parliamentary mandate along with their response to being called to account also impacts significantly on the effectiveness of legislative oversight. Nathan (in Bentley et al, 2013: 191) found that while the JSCI may have strong powers it is not transparent and has displayed very little sense of accountability to the citizens of South Africa.

Initially, as found by Hutton (2007: 13) and O'Brien (in Born et al, 2005: 219), the JSCI played an effective oversight role, with Africa (2012: 109) pointing out that the intelligence services were subjected to rigorous oversight by the first JSCI. This has however waned significantly in the face of intra-party factionalism and political partisanship as pointed out by Mufamadi et al (2019), Stubbe (2014) and Dube (2013). Africa (2019: 9, 14) found that the JSCI has been ineffectual for years, especially at a time of purported poor governance in the SSA. She cites Merten (2015) who ascribes these perceptions of the JSCI to their "tardiness" in "producing the statutorily required annual reports". This notion is further supported by Stubbe (2014) who points out that the JSCI has habitually submitted its annual reports late and has never in its existence submitted oversight reports to either Houses of Parliament. Stubbe also expressed dismay that the budget of the intelligence services is subject to almost no parliamentary scrutiny (Hansard, Budget Vote 9, 2014: 27, 28).

3.3.2.3 Judicial Oversight

Judicial oversight is exercised through the courts and the judiciary and is a key component in crafting a security and intelligence system that is effective, yet limited in its powers, operates in the ambit of the law, is accountable, and is subject to democratic and civilian control. In a democracy government powers are subject to legislative oversight and review by the courts. Normally, in a democracy, judicial warrants must be obtained to authorise the use of intrusive techniques and procedures. The judiciary plays an important monitoring role to ensure compliance with the law, and through judicial review the judiciary prevents the arbitrary exercise of power by government. Judicial deference, where the judiciary shows undue respect to the executive; the absence of an independent judiciary and judges susceptible to political influence and pressure can however impede judicial oversight (Caparini in Born and Caparini, eds, 2016: 14-15).

The Constitution provides for the judiciary as one of the pillars of the state. As custodian of law, the judiciary plays an important role in controlling and overseeing the intelligence services (Dube, 2013: 30). Sereti (in IRAC, 2006: 79-80) furthermore points out that judicial oversight is an inherent component of the oversight of intelligence. South African High Courts have inherent jurisdiction to review administrative actions of organs of state, including the actions of the intelligence services. In review proceedings a court may either confirm or set aside the actions of the intelligence services. Judicial oversight may also take place through review of legislation. To this end Kasrils (in IRAC, 2006: 16) points out that “our oversight legislation is being tested by the courts for the very first time.”

The intelligence services have special powers to collect information and given the potential to misuse such, the judiciary is called on to authorise, in certain instances, the employment of such powers (Dube, 2013: 30). According to Africa (2011: 24-25) judicial oversight is required in the employment of intrusive operations. Intrusive actions, such as interception of communications, surveillance and surreptitious entry,

may only take place on the express authorisation of a specially designated judge[32]. Masiopato (2018: 152) points out that while RICA requires judge's authorisation (Figure 3.1, p62) to conduct interception of communications, it does not provide guidelines for the judge to interact with other oversight mechanisms.

The intelligence services are compelled to obtain judicial approval, as reflected in Figure 3.1 (p62), for telephonic and other communication intercepts. This is done in terms of RICA. The investigation by the IGI in 2005, following the irregularities in the NIA Project Avani, was based largely on non-compliance with this act (Dube, 2013: 30). The IGI investigation found that that this requirement was not complied with and that it consequently highlights the value of the designated judge in protecting the rights and freedoms of people (OIGI, 2006: 14, 18).

The courts have been called on to adjudicate cases dealing with disclosure of information relating to intelligence services or claims concerning information, review of their actions as well as the review of legislation. In 2005 in the wake of Project Avani and the investigation by the IGI, in the case of Masetlha v Minister for Intelligence Services, the courts were required to decide on the veracity of the so called "hoax emails" that were ostensibly developed under the then DG of NIA, Mr Masetlha (Dube, 2013: 30-31). In 2021, following a protracted legal challenge launched by Sam Sole and amaBhungane (amaBhungane and Another v the Minister of Justice and Correctional Services, Minister of State Security, Minister of Communication and Others, and Minister of Police v amaBhungane and Others, 2021) the Constitutional Court confirmed a 2019 High Court ruling that RICA is unconstitutional and that bulk interception was unlawful as it was not authorised by law. The findings were suspended for three years to provide Parliament the opportunity "to cure the defect causing invalidity" (Dolley, 2021).

Significantly, the IGI, Dr Dintwe approached the Pretoria High Court in April 2018 for relief when the DG of SSA, Mr Fraser (whom the IGI was investigating), revoked his security clearance. The IGI requested the Court's protection from interference in his

[32] **Designated Judge** – any judge of a High Court discharged from active service under section 3(2) of the Judges' Remuneration and Condition of Employment Act 47 of 2001, or any retired judge who is designated by the Minister (of Justice) to perform the functions of a designated judge for the purposes of this Act (RICA, 2002: 7, 11).

constitutional mandate. The matter was resolved when the Minister of State Security revoked the DG's instruction, transferred Mr Fraser and undertook to the Court, that they (the Minister and DG SSA) would not interfere with and will cooperate with the IGI's investigations (Maromo, 2018; Times Live: 2018). The IGI also launched court action to have sections of ISOA declared unconstitutional (Maromo, 2018).

Dube (2013: 31) argues that the judiciary is the 'bedrock' on which the intelligence services are anchored in terms of the legislative framework underpinning their existence, operation and conduct.

Hutton (2007, 15) raises an instance when there was some contention about the appointment of a judge to fulfil RICA responsibilities. In 2007 the JSCI had raised the concern that the Department of Justice and Constitutional Development was failing in its responsibility to designate a judge to fulfil this responsibility. Contention had arisen around finding a suitable candidate, but the Minister for Intelligence Services, in responding to a question on the matter in Parliament, provided assurance that the it had been resolved and a judge appointed by the Minister of Justice[33].

3.3.2.4 Civilian Oversight

Independent oversight of the intelligence services is carried out by institutions whose independence is safeguarded by law as well as special appointment and reporting mechanisms. A national audit office, an ombudsman, tribunals or independent inspector-generals are examples of independent oversight institutions. (Born & Leigh, 2005: 139).

Swart (in IRAC, 2006: 34-35) states that with judicial oversight, public access to a multiparty oversight committee and an independent IGI as well as a vibrant media willing to report on oversight matters, the concept of civilian oversight is firmly entrenched in South Africa (Figure 3.1, p62, depicts civilian oversight).

[33] As reflected in RICA, Section 1 (RICA, 2002: 7, 11)

3.3.2.4.1 The Inspector-General of Intelligence (IGI)

Within the sphere of intelligence, an Inspector-General (IG) is appointed and entrusted by the executive to perform a wide range of different tasks such as monitoring compliance by the intelligence services with the law and government policies and priorities as well as to review the activities of the intelligence services; and to submit regular reports to the executive or to Parliament (Born & Leigh, 2005: 139).

The IGI is established by the Constitution, and in law, as explained on page 69-72 of this chapter, to conduct civilian oversight of the intelligence services. According to Hutton (2007: 14) the IGI is the personification of civilian oversight while Fazel (in Hutton, 2009a: 34-35) and Masiopato (2018: 116) point out that the IGI is not a member of the intelligence services, is independent and reports to Parliament through the JSCI. The IGI is furthermore responsible and accountable for administration and budget to the executive, through the Minister of State Security.

According to Fazel (in Hutton, 2009a: 41) the role of the IGI is to promote accountability and operational effectiveness in the intelligence services through constructive oversight and to provide assurance to the Government and people of South Africa that the intelligence services operate within the framework of the rule of law and due process, and act with integrity and respect for human rights.

Hutton (2007: 14) points out that the IGI monitors compliance of the intelligence services with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence; reviews intelligence and counter-intelligence activities; performs functions designated by the President or Minister for Intelligence Services; receives and investigates complaints from the public or members of the intelligence services on alleged abuse of power, maladministration, transgression of the Constitution, laws or policies; fraud or corruption.

In order to execute its mandate Fazel (in Hutton, 2009a, 35) points out that the IGI has access to all the information needed for carrying out oversight work and has a capacity, the OIGI, to support the execution of the role and function of the IGI. South Africa, in

adopting this form of oversight, became part of a select group of countries that have introduced similar provisions for operational intelligence oversight.

The significance of the OIGI, according to Matthews (et al, 2008: 108) is highlighted by three unique features, not shared by other statutory oversight bodies, such as the PP as well as the SAHRC. First, the staff of the OIGI have experience and expertise in intelligence, which enhances their ability to identify illegality and misconduct that might otherwise escape the attention of external investigators. Second, the IGI may not be denied access to any information, intelligence, or premises under the control of the intelligence services, and any such denial amounts to a criminal offence. These are essential legal requirements when investigating the propriety of operations and activities that are classified as secret and top secret. Third, the ombuds role of the IGI is not limited to reactive investigation of complaints as they have an ongoing statutory responsibility to monitor compliance by the intelligence services with the Constitution and relevant laws and policies.

In terms of its mandate over the intelligence services the IGI performs a wide array of oversight activities designed to provide assurance on the efficacy and legality of intelligence activities. The emphasis is on monitoring and reviewing the intelligence and counter-intelligence activities of the intelligence services and compliance with the regulatory framework. Excluding incidental oversight functions, such as the evaluation of intelligence failures, core oversight is essentially focussed on the lawful conduct of the services; effective performance of intelligence work; providing assurance on the operational conduct of the services to the executive and people of South Africa through a certificate; and performing an ombuds role in investigating the complaints of members of the services and the public on the conduct of intelligence. Core oversight is embodied in pro- and re-active review and monitoring activities (Fazel in Hutton, 2009a: 35, 36).

According to Fazel (in Hutton, 2009a: 37) the legislative requirement for the heads of the intelligence services to report significant intelligence failures to the IGI provides a basis for the assessment of performance in critical areas of operation as well as for the development of corrective measures. He states that evaluating the performance of the activities of intelligence services is knowledge intensive, and is quite demanding

on intelligence oversight practitioners. It is greatly dependent on the appropriate expertise in intelligence practice in general, and in particular on an appreciation of foreign, domestic, military and crime intelligence disciplines.

An innovative component of the South African intelligence oversight system is the annual certificate of the IGI. The certification process is designed to provide assurance on the conduct of intelligence to both the government and the people of South Africa, represented by the Ministers responsible for intelligence and the JSCI (representing Parliament), respectively. The certificate conveys twofold assurance and serves a dual purpose. Firstly, it serves as a means for the IGI to express satisfaction with the fair presentation of the annual reports of the intelligence services on their activities. Secondly it is an avenue for the expression of an opinion as to whether anything done by an intelligence service is unlawful or involves an unreasonable or unnecessary exercise, by that service, of any of its powers during the course of its activities over that reporting period. The certificate furnishes the respective Ministers and the JSCI with a level of assurance on the reasonableness of reports presented to them and of the lawfulness of intelligence activities, as part of both executive control and parliamentary oversight of the intelligence community. Fazel points out that the IGI's certificate is not a guarantee, but offers reasonable, as opposed to absolute assurance, that the intelligence services give reasonable account of the performance of their activities (through their reports) and operate within the framework of the law and due process. Furthermore, the IGI's certificate, together with the reports of the AG and the RICA judge, provides assurance on the operational and financial activities of the South African intelligence services (Fazel in Hutton, 2009a: 38).

Mathews (et al, 2008: 108) and Fazel (in Hutton, 2009a: 38) found that the complaints responsibility of the IGI is an important feature of the oversight process which may highlight abuse in the intelligence environment, as the IGI is compelled to receive and investigate complaints from members of the public and of the intelligence community. Complaints range from abuse of power, corruption and alleged maladministration to transgressions of the Constitution, laws and policies by members of the intelligence services. The JSCI, on receipt of complaints from the public, may also refer such to the IGI for investigation. Fazel furthermore states that complaints on allegations of misconduct in the intelligence services are given precedence and are treated very

seriously. Appropriate findings are made and remedy recommended. Allegations are often in the public domain, without it being formally lodged and many are subsequently found to be specious, thereby undermining the credibility of the services. Fazel is adamant that all complaints, regardless of their origin or nature are investigated without fear or favour (Fazel in Hutton, 2009a: 39). Masiopato (2018: 256) however cautioned that in its complaints investigation mandate, the IGI has become operationally pre-occupied with handling human resource disputes by members of the intelligence services.

Fazel (in Hutton, 2009a: 41) states that investigations by the OGI have highlighted a number of abuses and malpractices in sections of the intelligence community and that the oversight capacity and ability to access information of the Office has been tested to the limit. He believes that the OIGI acquitted itself well under quite difficult circumstances and that valuable lessons were learnt.

Dube (2013: 32, 86) found that while the OIGI is essential in the oversight of the intelligence services, there is scope for improvement in bolstering the governance of the intelligence services, especially if it is considered that it only became operational a decade after it was first established.

Netshitenzhe (2005: 66) found that since the enabling legislation was enacted by Parliament in 2004, both Parliament and the executive have shown commitment to have the OIGI established and see it function to its full capacity. She does however concur with Hutton (2007) that the establishment of the OIGI has not been without difficulty, either in finding suitable candidates to fill the position or in developing the capacity of the Office to discharge its mandate.

Hutton (2007: 15) and Netshitenzhe (2005: 57-58) found that that not only has the OIGI faced various challenges since its inception, but the Office has not functioned to its optimum capacity. The first two incumbents, as pointed out by Netshitenzhe (2005: 58), Mufamadi (et al, 2018: 94) and SAGNA (2017) did not complete their terms of office as both resigned early in their terms while there was a two-year gap between the departure of the fourth IGI and appointment of the fifth IGI. Netshitenzhe (2005: 58) furthermore points out that this vacuum created by the absence of a long serving

incumbent creates ambiguity with regards to the compliance by the services with the laws governing their intelligence mandate, as there was no certificate or voucher to substantiate compliance by the services to their mandates as contemplated in ISOA. Mufamadi (et al, 2018: 94) similarly reflects on the abuse in the intelligence services that took place during the two-year absence of an IGI, following the departure of Adv Radebe.

However, as Netshitenzhe (2005: 65) points out, as a consequence of the premature departure of the first two incumbents, legislation was amended to rectify some issues concerning the remuneration of the IGI; the mandate of the IGI; and the lines of accountability of the incumbent. Mufamadi (et al, 2018: 94) found that because of concerns related to continuity proposals have been made about the creation of a post for a Deputy IGI.

Hutton (2007: 15) found that the IGI is assisted by a modest staff complement and an equally modest budget. She points out that during the Project Avani/ Browse Mole investigation into illegal surveillance, the IGI was aided by staff from the Ministry of Intelligence, notably by a legal advisor. The lack of capacity along with the lack standard operating procedures contributed to the IGI's report being questioned in some circles. Masiopato (2018: 232-233) also found that the capacitation of Oversight Officers of the OIGI is problematic as there are no formal intelligence oversight learning programmes, courses, training or qualifications offered at training institutions in South Africa. In order to address capacity in the OIGI, Masiopato (2018: 256-257) consequently recommends that a highly qualified person should be appointed as IGI and, in concurrence with Dube (2013: 97), that Oversight Officers in the Office should be properly capacitated through appropriate and continuous education, training and development.

In testimony at the State Capture Commission, the IGI, Dr Dintwe, commented on the resourcing challenges of the OIGI, referring to a staff complement of 34, with a high rate of vacancies while the budget and finances of the OIGI is allocated by SSA (Kretzman, 2021a).

According to Dube (2013: 86) while the IGI as an institution, is intended to afford a window to civilian oversight in the intelligence services through public complaints and related matters, it has not successfully accomplished its vision of being a voice that offers public assurance on the work of the civilian intelligence services. He points to two possible reasons: government struggled to find suitable and skilled incumbents to occupy the Office; and questions about the independence of the Office.

Mathews (et al, 2008: 124) raised the concern that the Office is not sufficiently independent of the executive and that, as a consequence, it fails to exercise its full constitutional mandate. The MRC contended that the OIGI "should be given independent organizational status", allowing it to receive and manage its budget independently and providing the IGI with complete control of the resources and activities of the Office. In their estimation the IGI would remain functionally accountable to the JSCI but would be financially and administratively accountable to the Minister for the purposes of the PFMA.

The political nature (appointed by the President on advice of the JSCI on approval by Parliament) of the appointment, according to Masiopato (2018: 255), compromises the independence and flexibility of the IGI in executing its legislated mandate. It should be done by the judiciary, civil society or another independent body and, if that be the case, the IGI should also account to them. Masiopato (2018: 256) furthermore opines that the OIGI is bureaucratically wrongly positioned, administratively subordinate to the SSA, an intelligence structure it oversees. This situation, while not unique, is not conducive to the independence of the IGI. Masiopato, similarly to Matthews (et al 2008) also recommends that the IGI should be granted complete independence with its own budget vote in Parliament.

In contrast Dube (2013: 87) argues for more autonomy as opposed to independence. While independence is required to compellingly assure the public that intelligence services are performing in accordance with the Constitution, the OIGI needs significantly more autonomy, which will enable it to make and effect its own decisions, without fear or favour. In his estimation autonomy would go a long way in making sure that while the Office would be receiving its budget from the executive and would be

accountable to Parliament, it will be able to fully assume its mandate and perform it in the supreme knowledge that it cannot be influenced in any way.

In expressing similar sentiments, Netshitenzhe (2005: 65-66) found that the issue of independence is not unique to the South African IGI as it is a matter affecting the offices of Inspectors-General internationally.

Dube (2013: 32) cites Duncan (2011) who contends that that the IGI "is not sufficiently independent from the executive, lacks the resources and does not release reports publicly" He points out that the fact that reports are not published but sent to the JSCI, who themselves meet behind closed doors, thwarts the entire process. This notion is supported by Masiopato (2018: 152) who cites Nathan (2010) in pointing out that the IGI does not release its annual reports for public consumption.

In his testimony at the State Capture Commission, Dr Dintwe brought the matter of independence into stark focus, lending credence to the concerns mentioned in the preceding paragraphs above. The IGI indicated how the OIGI budget allocation is controlled by SSA and how it has adversely impacted on staffing vacant positions while administrative accountability in terms of the Ministerial Powers Delegation (MPD) as well as SSA security vetting mandate was ostensibly manipulated to undermine the OIGI. Shared ICT infrastructure also leaves the OIGI vulnerable to intrusion by the SSA (Kretzman, 2021a). Of particular concern is how the SSA launched a counter-intelligence operation against the IGI (who was investing the SSA's PAN programme at the time), surveilling him in his interaction with complainants, withdrawing of his security clearance and barring him from access to his office (Thamm, 2021c). According to Dr Dintwe these actions completely debilitated the OIGI (Kretzman, 2021b).

The relationship between the OIGI and other oversight mechanisms, apart from the JSCI, is not formalised in legislation. The relationship between the OIGI and other statutory oversight mechanisms such as the AG, PP and SAHRC is very much governed by the constitutional injunction that government departments should cooperate and support each other. At various times the OIGI had, or attempted to conclude MOUs with the PP, AG, IPID, while a MOU with the SAHRC floundered on

a lack of agreement amongst its own commissioners (Masiopato, 2018: 220; IPID, 2017: 12; SA Government, 2010). Very little is however known about relations with the Military Ombudsman, Defence Inspectorate and IPID, the internal departmental oversight bodies of the Department of Defence and Department of Military Veterans and SAPS, respectively.

Fazel (in Hutton, 2009a: 41) found that through the work of the OIGI 'the rule of law and due process", the central requirement upon which the democratic functioning of intelligence is set, "was re-established". In his estimation the idea of "bending the rules" was banished from the philosophy of intelligence conduct, while the intelligence mandate was re-examined and bolstered in certain areas. He points out that operational procedures for the use of intrusive measures were refined, legislation and policies, as a whole, were fortified and a range of initiatives initiated in the civilian intelligence community to improve professionalism and awareness of the need for legality in the execution of intelligence operations. He believes that the OIGI made a significant impact in developing the intelligence industry as a regulated business conducting lawful and effective intelligence conduct, and that the Office's ability to uncover wrongdoing has been significantly improved.

Africa (2019: 14) laments the fact that the restructuring of the civilian intelligence services was not only not accompanied by an overall review of the intelligence dispensation, but the purported strengthening of the intelligence agencies was not accompanied by a commensurate strengthening of the oversight architecture.

Nathan (in Bentley et al, 2013: 191) found that while the OIGI may have strong powers it is not transparent and has displayed very little sense of accountability to the citizens of South Africa.

3.3.2.4.2 The Chapter 9 Institutions

The purpose of Chapter 9 institutions, so called as they are created through Chapter 9 of The Constitution, is to promote and strengthen constitutional democracy. Their function is to keep a check on the way the three branches of government exercise

their powers and also to promote the transformation of South African society (Freedman, 2013: 287).

The PP, the SAHRC and AG are Chapter 9 institutions, as depicted in Figure 3.1 (p62), which play a role in intelligence oversight (Dube, 2013: 53; Masiopato, 2018: 120). According to Netshitenzhe (2004: 12, 41) the PP and SAHRC supplement or even complement the oversight of the IGI and AG. According to Masiopato (2018: 120) the Chapter 9 institutions are better positioned than Members of Parliament, who are subject to the control and discipline of their political parties, to oversee politically sensitive matters.

3.3.2.4.2.1 Auditor General (AG)

The AG of South Africa conducts investigations on financial management by government as mandated by the AGA/PAA, as discussed on page 74-75 of this study. Freedman, 2013: 296, describes the AG as the “guardian of the public purse”. The AG audits and reports on accounts, financial statements and financial management of state organs, and reports to government. To this end the AG conducts financial investigations and inspections, and formulates opinions on the on-going financial affairs and status of the finances of state organs (Netshitenzhe, 2005: 27).

In keeping with this mandate, Africa (2019: 5) found that the AG audits the financial statements of the intelligence services annually and reports to Parliament. These reports specifically relate to accounts established by the Security Services Special Account Act 81 of 1969; the Defence Special Account Act 6 of 1974; and the Secret Services Act 56 of 1978, through which National Treasury allocates funds to the civilian intelligence services, DI and CI respectively. Internal, independent audit committees, are by legislation, to meet twice annually. Although the AG reports to the JSCI, the JSCI does not table the audit reports to Parliament, or make the reports public, but as a compromise between the JSCI and AG, they are attached as an addendum to the JSCI Annual Report.

According to Africa (2019: 6, 7) the AG, has since the start of the post-1994 dispensation, expressed concern about the financial oversight of the intelligence

services and that the situation had deteriorated since. She also points out that due to delays in publishing the JSCI Annual Reports, AG reporting has consequently been delayed (as a result of the earlier mentioned compromise).

Dube (2013: 18) in the same vein, points out that there has been some disquiet about the manner in which the AG reports are managed and the extent to which the public can draw assurance that public finances are managed accordingly. Similar to Africa (2019), he cites the MRC of 2008, which expressed concern about the non-publication of AG reports, as despite constitutional provision, the audit reports on the intelligence services are only presented to the JSCI and are classified. The MRC regards this state of affairs as unconstitutional. Masiopato (2018: 123-124) reflects similar sentiments and describes the audit work of the AG as "superfluous" given the fact that it has limited access to financial information for audit purposes. He does point out that while an MOU between the IGI and IGI could go some way in remedying the situation, more formalised cooperation is required. Matthews (et al, 2008: 229) reflects that the AG pointed out that after presentation to the JSCI, their audit reports should be presented to Parliament.

Masiopato (2018: 200) found that in terms of the Public Audit Act 25 of 2004 the AG is the "supreme audit institution" in South Africa and that as such the AG not only has full access to financial information, but that it cannot be denied access to information based on sensitivity or confidentiality. Its work is however bedevilled by outdated pre-1994 legislation, as mentioned (earlier) by Africa (2019) and the fact that the Secret Services Account Evaluation Committee, required to monitor the use of the Secret Service Account and avoid abuse, is not operational. The attitude of the services, in trying to limit the role of the AG in auditing intelligence funds, as indicated by Dr Dintwe in his testimony at the State Capture Commission, raises concerns about their commitment to transparency and accountability (Nicholson, 2021).

Netshitenzhe (2005: 40) states that the AG complements the IGI by conducting financial audits and, despite the limitations placed on it, Africa (2019: 14-16) found that the AG has to an extent been effective in exposing financial mismanagement. She cites the MRC Report (2008) in pointing out that in order to be effective and to expose maladministration, internal controls must, in the first instance, be in place. As the AG

consistently points to a lack of executive supervision and control of covert structures, she advises that addressing it should be prioritised and she calls for a critical review of controls and oversight in this regard. Dutton points out that the governance of the Secret Services Account needs urgent attention. In her opinion, if governance arrangements are tightened, a number of problems in SSA and CI will be eliminated as the incentive to abuse and corrupt will be obviated (De Villiers, 2021b).

3.3.2.4.2.2 Public Protector (PP)

The PP is, for all intents and purposes, an Ombudsman. It investigates, reports and takes remedial action on any conduct of state affairs and the public service which is alleged or suspected of being improper or may result in prejudice (Freedman, 2013: 294, 295). Its mandate, in terms of the PPA, is enumerated on page 76 of this study.

As the PP investigates complaints from the public against all government departments the extent of its functions therefore includes the intelligence services (Netshitenzhe, 2005: 26). Masiopato (2018: 122) concurs, stating that the powers of the PP extend to all government institutions, which includes the intelligence services.

Masiopato (2018: 122-123) found that even though legislation regulates their interaction, it is further facilitated by MOU. As a consequence, the PP refrains from investigating intelligence related matters, which in the opinion of Masiopato, is in contradiction of its own legislated mandate. He states that “Compared with other countries, the South African ‘Ombudsman’ (PP) in practice does not look into intelligence related matters, but leaves it to the IG.”

Netshitenzhe (2005: 40) holds that the PP complements the office of the IGI by dealing with issues of general malpractice and corruption. Similarly, to Netshitenzhe (2005) and Fazel (2009), Dube (2013: 53) found that the PP plays an investigative role akin to that of the IGI and that it can refer intelligence related matters to the IGI for investigation.

3.3.2.4.2.3 SA Human Rights Commission (SAHRC)

The SAHRC is to promote and protect human rights and monitor and evaluate the observance of human rights in South Africa (Freedman, 2013: 298). In this regard the JSCI, in terms of its mandate, is required to refer the violation of human rights in the intelligence services to the SAHRC (see page 68). (Masiopato, 2018: 125). Dube (2013: 53) consequently states that the SAHRC can be called to investigate human rights abuses related to the use of intrusive means and methods of collection or when allegations of violations of basic human rights are raised.

Dlomo (2004: 104) found that the JSCI, has had very little interaction with the SAHRC, as human rights violations have not been reported or detected in the intelligence services.

The SAHRC has, according to Masiopato (2018: 126), on occasion expressed concerns about compliance with the Public Access to Information Act 2 of 2000, while Lefebvre (2017: 512) points out that during the drafting of the proposed Protection of State Information Act the SAHRC had expressed concern that the proposed legislation would not pass constitutional muster given the limitations it imposes on the right to freedom of expression and access to information.

3.3.2.4.3 Independent Police Investigative Directorate (IPID)

The mandate of IPID is to conduct independent oversight of the SAPS and Municipal Police Services (MPS). To this end it independently and impartially investigates crimes allegedly committed by members of the police services and makes recommendations for further action (IPID Act, 2011: 8; IPID, 2020: 7,17).

IPID concluded an MOU with the IGI in 2016/7 to improve cooperation in investigating CI. While IPID and the IGI cooperate in investigating CI, IPID investigations have been hampered by the use of classification and claims of “threats to national security” to prevent access to information held by CI (IPID 2017: 8, 9; IPID 2018: 11, 12). IPID subsequently launched legal action to have documents, which relate to fraud and the use of covert funds to influence the outcome of the ANC 2017 Elective Conference,

declassified. In January 2021 the Pretoria High Court ruled that there is no reason for the documents to not be declassified (Wick, 2021; Thamm, 2021b).

3.3.2.4.4 Military Ombud

The South African Military Ombudsman is mandated to investigate complaints regarding conditions of service by members and complaints from members or the public regarding the conduct of serving members of the SANDF (South African Military Ombud, 2020: 14).

3.3.2.4.5 Defence Inspectorate Division

The Defence Inspector-General conducts performance and regulatory internal audits and provides management information to the Secretary for Defence (Burger, 2008: 442). O'Brien (2003, 34) and Netshitenzhe (2004: 94) found that DI, as division of the SANDF, is subject to inspection by the Defence Inspector-General. The Defence IG has in the past, in the absence of an IGI, reviewed the activities of DI (Netshitenzhe, 94).

3.3.2.4.6 Civil Society

Civil society[34] and the media, according to Caparini (in Born & Caparini [eds], 2016: 24) perform an informal oversight role. Their role may be legitimate and even influence policy, but it is often delayed as it lacks the institutionalised means to exert an immediate effect. According to Dube (2013: 85) it means that in adhering to the concept of civilian oversight, the public plays a vital role in holding those in power to account. Lefebvre (2017: 501) and Kissoon (in Hutton, 2009a: 71), elaborates on this notion stating that it is universally accepted in democratic societies that governments should be subject to public scrutiny, even in regard to national security, and that transparency is necessary to ensure that it is held to account by amongst others, the public or elected representatives. Sole (in Hutton, 2009a: 56) sites Hutton (2007) in

[34] **Civil Society** – "the set of institutions, organisations and behaviour situated between the state, the business world, and the family. Specifically, this includes voluntary and non-profit organisations, philanthropic institutions, social and political movements, other forms of social participation and engagement, and the values and cultural patterns associated with them" (Born and Leigh, 2005: 137).

pointing out that “the intelligence sector is possibly the most difficult for civil society to engage” notwithstanding the fact that the intelligence services have the greatest potential to infringe on the freedoms and rights of citizens.

In contrast to the pre-1994 dispensation and despite a continued fixation with secrecy and national interest, civil society has increasingly played a role in the intelligence debate and role of intelligence in a democratic society, through increased public consultation in Parliament and mechanisms such as the MRC. Hutton contends that the role of intelligence in South Africa should be continuously challenged, and regularly evaluated. This greater openness in intelligence matters is prescribed by the White Paper on Intelligence (Hutton, 2009a: 5).

Indicative of this engagement was the Institute for Security Studies’ Security Sector Governance Programme in 2008, initiated subsequent to the Project Avani/ Browse Mole and MRC and the debate around the Protection of Access to Information legislation (Hutton, 2009a: vii). Kasrils (in Hutton, 2009a: 19) welcomed this ISS initiative, stating that Intelligence policy should be subject to “informed public debate and scrutiny”.

In contrast, Lefebvre (2017: 496) refers to the limited nature of public participation (by what he terms as mainly an “an educated élite”) to the Protection of State Information Bill (PSIB). Resistance to PSIB by amongst others, the media and advocacy groups, forced several changes to the bill, which was ultimately never signed into law by the President. In the wake of the PSIB debate, Lefebvre (2017: 510-511) pointed out that concerns lingered that a new state secrecy regime may stifle the media in reporting or academia in researching government activities obtained from the leaking of classified information.

NGOs, the media and research bodies play a critical role while public engagement, in the opinion of Nathan (2010: 102- 103) will strengthen accountability in an area which has been characterised by excessive secrecy, and consequently inefficient accountability. He however points out that it is only NGOs such as the Right2Know campaign, that have made any notably attempt to hold the intelligence services to account (Nathan, 2017). TimesLive (2018), Maromo (2018) as well as Mitchley &

Chabalala (2018) point out that Right2Know and the media were quite vocal on the long delay in appointing an IGI after the departure of Adv Radebe and also covered the court action by the IGI against the DG of SSA, Mr Fraser, in 2018, quite extensively.

Tsedu (in IRAC, 2006: 90) states that the media regards themselves as fulfilling a watchdog role in curbing abuse of power. He opines that the oversight bodies and media should develop an understanding that the media will not relinquish its watchdog role. He even points to cooperation between oversight bodies and the media as both serve the public.

Hadebe (2021) however holds that intelligence is not a matter for public display. He points out that intelligence accounts to Parliament and that it is the responsibility of Parliament to address lapses or maladministration in the intelligence community. He contends that it is not for public discourse and that in order to keep intelligence and security matters out of public scrutiny, parliamentary oversight must be strengthened.

In reaction to revelations around the intelligence services at the State Capture Commission Friedman (2021) points out that the dismay expressed over the revelations and allegations reflects how unprepared politicians, media and citizen's organisations are in dealing with threats emanating from the security establishment. He ascribes the media's reaction in particular to journalists' disinterest and to a media and civil society which does not regard the security services as a threat.

These sentiments are however contradicted by Du Preez (2021), who states that the perpetrators of "state capture" and abuse in the intelligence services miscalculated the extent to which South Africa has become an open society, its citizens inculcated with the Constitutional guarantees of freedom of speech and association and equality before the law. He furthermore points to an independent judiciary, investigative journalism and renewed civil society activism ensuring that those in power are held to account.

In South Africa, the culture of civil activism in matters of intelligence oversight is still in its infancy. While there was significant public clamour around the PSIB, especially

around 2011/12, much of it was driven by concerns about issues of corruption, more than concerns about national security per se. According to Dube this situation will only improve once a shared vision on national interest issues have been arrived at and a national security strategy is arrived at (Dube, 2013: 85-86, 89).

Dube (2013: 29, 96-97) found that civilian oversight has not been institutionalised in South Africa and, as a result, public participation and interest in intelligence or national security matters are impacted to the extent that it is mainly "scandal" driven or focussed. Much of it furthermore depends on the media playing a role in exposing issues for public consumption. Duncan (2011) reinforces this point in stating that the absence of an institutionalised oversight framework contributes to a perception that "intelligence matters are inherently secret and therefore lie outside the public domain". Dube (2013:98-99) consequently finds that such an assumption is not consistent with international best practice where the public seemingly insists on more accountability on matters that affect their security. He recommends that legislation should be amended to provide for institutionalised civilian oversight.

3.4 Performance of Intelligence Oversight

Dube (2013: 94) found that the design of the South African oversight model has no discernible limitations and, is in fact, in line with international best practice. Where limitations do exist in the model, they are a function of implementation, within a context of power and ideological contestations. At its core, the extent to which the model can improve on its efficiency and effectiveness depends significantly on the incumbents of the institutions established by legislative provisions. Duncan (2011) similarly points out that South Africa "is meant to have a state-of-the-art oversight system for the intelligence community". She however found that in reality there are too few safeguards to inhibit factions in the ruling party, that seek to secure or retain power, from employing the intelligence services to advance their political aims.

South Africa's accountability and oversight mechanisms for intelligence, according to O'Brien (in Born et al, 2005: 218-219) barely make the grade and are described as fragile and bare. Landers (in IRAC, 2006: 21) however reflects that the oversight bodies, executive, legislature, judiciary, Chapter 9 institutions and civil society, have

acquitted themselves well and have succeeded in providing the essential checks and balances necessary for a constitutional democracy.

Netshitenzhe (2005: 94) found that the IGI needs to work in partnership with other review and monitoring institutions to ensure that cases are referred to a competent institution. The OIGl requires the support of the PP, the AG, the IG of the SANDF and the ICCS. To this end the OIGI investigation into Project Avani revealed that there is no systematic cooperation model between the various structures tasked with intelligence oversight (OIGI, 2006: 8, 19). In this regard Marais (2021) points out that external oversight can never be adequate. In his estimation, an intelligence environment free from inefficiency and scandal, requires senior management with integrity and consummate management skills, not only setting an example, but acting ruthlessly against transgressions at any level.

Masiopato (2018: 145-146, 152, 166, 205) citing the MRC (2008) found that despite a comprehensive oversight model comprising executive, legislative, judicial, civilian, Chapter 9 institutions, media and civil society, abuse in the intelligence services went undetected. Masiopato ascribes this to the lack of proper cooperation between the intelligence oversight structures. Despite recommendations by the MRC (2008) to remedy the situation Masiopato found that not only is there very little cooperation when conducting intelligence oversight, but it is also fragmented, uncoordinated and in his estimation contributing very little to holding the intelligence services accountable. While commendable oversight mechanisms have been developed, a legislative framework for oversight cooperation was not, and MOU have been employed to facilitate cooperation.

In order to ensure a coherent oversight regime Masiopato (2018: 239) suggests that reshaped intelligence oversight structures are required. To this end the JSCI, Ministry of State Security and the IGI needs to be refocussed and the role of civil society and the media strengthened.

Sole (in Hutton, 2009a: 62-63) acknowledges that there are democratic oversight structures such as the IGI and the multi-party JSCI at the parliamentary level. He however points out that such bodies are predisposed to institutional capture by “the

big, sexy departments they are supposed to oversee". Not only is most of the work of both the IGI and JSCI never open to broader public scrutiny, they often displayed undue deference and rather release a sanitised selection of information. He points out that the oversight bodies did not pick up on the alleged abuses that took place in NIA under Mr Masetlha and the subsequent report of the IGI on the matter was never released in full. In fact, the report provoked some criticism from the JSCI. In contrast, Africa (2012: 124) found that the aftermath of Project Avani revealed that South Africa had a fairly robust oversight framework as, on receipt of a complaint from a politician, the minister referred the complaint to the IGI, who investigated and found against the intelligence service implicated, the minister answered in parliamentary debate on the matter. In the process court action was launched and the matter was reported widely in the media.

Since the Masetlha/ Project Avani matter intelligence oversight has detected, investigated and reported on the NIA/SSA PAN programme, SO, and the SARS investigative unit in the civilian intelligence services and abuse of the Secret Service Account in CI, amongst others. Complaints lodged by NGOs, the media, journalists, politicians and political parties related to irregular expenses, abuse of power, corruption, illegal surveillance, executive overreach and politicisation of the intelligence services were furthermore investigated and reported. While especially the IGI reported on some of these abuses, they were not acted on by the executive or Legislature and remain unattended (Mufamadi et al, 2018: 2, 32, 54, 55, 63, 64-69, 95).

The MRC 2008 found that while the accountability of the intelligence services to Parliament and the executive is strong, the accountability of the intelligence services and the oversight and control mechanisms to the public is less strong. This is ascribed to excessive secrecy, which is not consistent with the constitution (Matthews et al, 2008: 11). The MRC furthermore did not believe that the intelligence services are over-regulated or subject to excessive oversight. It advocated for greater rationalisation and coordination of oversight and review activities as long as it does not compromise the quality and control of oversight (Mathews et al, 2008: 19).

The HLRP on SSA found that while the fundamentals of the intelligence oversight mechanisms are sound their effectiveness had declined in recent times (Mufamadi et al, 2018: 96).

Africa (2011: 28) calls for oversight to be re-invigorated. To this end transparency in senior appointments should be enhanced and major policy shifts be encouraged, while mechanisms should be put in place to promote engagement with the media, advocacy groups and other independent institutions which have an important role to play in oversight of the security sector.

In 2018 Pres Ramaphosa, in establishing the HLRP on SSA furthermore stated that it is vital for important oversight bodies such as the JSCI and OIGI to be empowered to undertake their respective mandates more effectively (Hansard, 2018b: 20). Marais (2021), similar to Africa (2011), points out that oversight has not only been ineffective, but also contributed to the politicisation of intelligence across the board. He consequently also calls for the expansion and improvement of specifically parliamentary and civilian oversight. According to Marais (2021) oversight is not merely about external structures as the intelligence services should be led by people with demonstrated integrity and management skills while the emphasis should move from secrecy to transparency.

The State Capture Commission has heard evidence and received submissions on how intelligence oversight had been subverted or undermined (as reflected in this Chapter and Chapter 2), but has still to conclude its work and make findings and recommendations (Hansard, 2021: 33). The MRC (2008) and the HLRP on SSA (2018) on the other hand, have made findings and recommendations regarding intelligence oversight, which will be enumerated in Chapter 4 of this study.

3.5 Conclusion

Control over intelligence is an important feature of democratic states, and intelligence oversight is part of the system of checks and balances holding the intelligence community to account. International practice reflects that intelligence oversight is exercised by the executive, the legislature, judiciary, expert civilian oversight

structures, civil society and internal control mechanisms in the services. The purpose is to provide assurance to the public that the intelligence services act in accordance with their mandate, account for their actions and use of resources and comply with the rule of law.

Oversight and control, was a feature of governance in pre-1994 South Africa, but especially intelligence oversight, was flawed and inadequate due to the nature of the political architecture, nature of the state, threat perception and organisational culture at the time. Intelligence oversight evolved as a result of global and domestic political changes and constitutional reform which culminated in a democratic state with an intelligence oversight system based on those in Western liberal-democracies although displaying both the characteristics of a democratic system and a state in transition. Intelligence Oversight is thus conducted in a hybrid state with intelligence police (see Figure 2.1, p18).

The legislative framework for intelligence oversight is well crafted and extensive. The White Paper on Intelligence (although dated) and the Constitution provide for intelligence oversight which is given effect through governing legislation in mainly ISOA. The Act provides for executive, legislative, judicial and civilian oversight. Provision is also made for oversight by the AG, PP and SAHRC. The legislative framework compares well with international practice.

The intelligence oversight architecture is extensive and gives effect to legislative intention. It consists of executive oversight by Ministers, the multi-party JSCI of Parliament at legislative level, the judiciary, a civilian inspector-general, financial oversight by the AG, administrative oversight by the PP as well as monitoring by the SAHRC and civil society. In addition, the SAPS Crime Intelligence Division is subject to oversight by IPID and the SANDF Defence Intelligence Division is subject to the scrutiny of both the Defence Inspector-General and the Military Ombudsman.

Despite the comprehensive nature of the South African intelligence oversight model, and the regard in which it is held, its effectiveness has declined over time. Abuse has in some instances gone undetected, or even when it was detected, little or no action was taken. Some of these failings can be attributed to the failure, not of external

oversight, but to the failure of management and executive and internal control, as oversight is not only about external mechanisms or structures. It is evident that in some instances the attitude of the services is not conducive to oversight, transparency and accountability. It is furthermore reflective of some of the hindrances to parliamentary oversight – lack of resources, insufficient cooperation from the executive and intelligence agencies, and insufficient motivation to engage in pro-active oversight, identified by Born and Wetzling (in Johnson, 2007).

Reviews by the MRC and the HLRP on SSA have made findings and recommendations for improvement, but has met with mixed reception and implementation. It is evident that many of the ills plaguing the intelligence services; politicisation, executive and legislative inertia, interference, limited resources, poor coordination and cooperation, flawed regulatory framework, lack of independence and undue deference have also come to characterise intelligence oversight.

This chapter focused on explaining the concept of intelligence oversight and control and establishing the role and form of intelligence oversight in South Africa. It explained the development, regulatory framework, philosophy, mandate, role and functions as well as the architecture of South African intelligence oversight. The challenges that have emerged in exercising oversight of the intelligence services was furthermore highlighted. Along with Chapter 2 it establishes the context for the next chapters which examines the findings and recommendations of the HLRP on SSA specifically related to intelligence oversight as well as international best practice in intelligence oversight and a preferred model for intelligence oversight, developed by Born & Wills, against which intelligence oversight in South Africa can be assessed.

CHAPTER 4

THE FINDINGS AND RECOMMENDATIONS OF THE HIGH LEVEL REVIEW PANEL ON SSA

4.1 Introduction

The purpose of this chapter is to present the findings and recommendations on intelligence oversight as enumerated by the HLRP on SSA.

In the 2018 State of the Nation Address, President Ramaphosa not only expressed himself strongly against corruption in the public sector, but indicated that initiatives would be undertaken to deal with public sector corruption (Hansard, 2018a: 7, 32). In this regard the President referred to the critical role of the Commission of Inquiry into State Capture in ensuring that, not only is the nature and extent of state capture determined, but that confidence in public institutions is re-established and that those responsible for malfeasance are identified (Hansard, 2018a: 32-33). The President furthermore indicated that government had prioritised restoring the integrity of public institutions that are tasked with "the very critical mandates in our constitutional democracy". To this end government aimed to stabilise key institutions in the security cluster, bolstering law enforcement institutions and shielding them from external interference or manipulation (Hansard, 2018b: 19).

The establishment of the HLRP on SSA was motivated by growing concern on allegations of corruption and other acts of malfeasance in some of the intelligence services, particularly the SSA. To this end the President established a review panel and directed the Minister of State Security to take the steps needed to attend to all governance and operational challenges confronting the Agency and to work to restoring public trust in the institution (Hansard, 2018b: 19-20).

In establishing the HLRP on SSA the President also indicated that it is vital for critical oversight bodies such as the JSCI and OIGI to be empowered to undertake their respective mandates more effectively (Hansard, 2018b: 20).

4.2 The HLRP on SSA

The key objective of the HLRP on SSA was "to enable the reconstruction of a professional national intelligence capability for South Africa that will respect and uphold the Constitution, and the relevant legislative prescripts" (Mufamadi, 2019: 1).

The Terms of Reference (TOR) provided 12 focus areas for the work of the HLRP: "the high-level policies and strategies, legislation, regulations and directives governing, or impacting on the mandate, structure, operations and efficacy of the SSA; the impact on the work of the civilian intelligence agencies of the amalgamation of the previous services into one agency and the appropriateness of this change; the appropriateness of the current structure of the agency to its core mandates and to effective command, control and accountability; the mandate and capacity of the SSA and to examine the compatibility of its structure in relation to this mandate; the effectiveness of controls to ensure accountability; the institutional culture, morale, systems and capacity to deliver on the mandate; the involvement of members of the national executive in intelligence operations and measures to prevent this; the policy framework (including legislation) that governs operational activities conducted by members of the national executive; the development of guidelines that will enable members to report a manifestly illegal order as envisaged in section 199 (6) of The Constitution and; the effectiveness of Training and Development Programmes in capacitating members" (Mufamadi et al, 2018: 1).

4.3 Findings and Recommendations on the SSA and the Civilian Intelligence Community

The report addresses the civilian intelligence community in the main, and findings and recommendations address the focus areas as reflected in the TOR, Chapters 3 to 12 and a Conclusion in Chapter 14. These address control measures that relate to the role of the Minister of State Security, the mandate and capacity of the SSA, internal controls of SSA, illegal orders as well as financial controls and oversight by the AG and other entities (Mufamadi et al; 2018: 90, 6, 7, 8). The recommendations of the HLRP are summarised in Appendix A, p A-i to A-ix.

It is worth noting that in the course of its investigations into state capture, the State Capture Commission, also attended to the state of capture in the intelligence community (as reflected in Chapter 2 and 3 of this study). To this end testimony was heard from Dr Mufamadi, in his capacity as chairman of the HLRP on SSA; who reiterated much of what was found by the HLRP (Zondo, 2021), past and serving members of the SSA, as well as the IGI, Dr Dintwe (Hansard, 2021: 39-40). Their testimony highlighted and even emphasised what was found by the HLRP on SSA. The State Capture Commission is however still to conclude its proceedings and its findings on the intelligence services and intelligence oversight could be instructive (Hansard, 2021: 31-32). The Chairman of the JSCI, Mr J.J. Maake, was quite clear that in the wake of these revelations at the State Capture Commission, that the best remedy is the implementation of the recommendations of the HLRP on SSA. Mr Maake and other members of the JSCI were furthermore critical of the slow rate of implementation of the recommendations of the HLRP, despite Minister Ayanda Dlodlo's assurances in the 2021 State Security Budget Vote that steady progress is being made in giving effect to the recommendations (Hansard, 2021: 10, 33, 35, 38-39). The Minister specifically referred to the establishment governance structures, audit and risk issues, skills audit and issues involving capacity building and organisational culture change. Amongst others, a Ministerial Advisory Council on Training; Ministerial Implementation Task Team; and Ministerial Appeals and Adjudication Board had been established while the work of Audit and Risk Committee had been resuscitated; and a Task Team on Sexual Harassment and Bullying in the workplace had been established (Hansard, 2021: 10).

The findings of the HLRP on SSA, and the slow rate of its implementation, was brought into focus with the apparent failure of the intelligence services to predict the outbreak of unrest and instability in the wake of the sentencing and incarceration of Mr Zuma. According to Duncan many of the ills identified in the HLRP informed the apparent failure of the intelligence services to predict the turn of events and provide intelligence for intelligence driven operations by the SAPS and the SANDF (deployed in support) (De Villiers, 2021b). Kasrils (Tsotetsi, 2021), Duncan (de Villiers, 2021b) and Cilliers (2021) agree that action needs to be taken on the HLRP report as soon as possible. According to Kasrils (Tsotetsi, 2021) it is evident that the HLRP raised the alarm and

it should therefore not be a surprise that the intelligence services failed to identify and provide warning on the violence which erupted in KZN.

According to Thamm (2021e) the initiatives announced by the President in August 2021 reflects a tightening of control over the intelligence services and gives effect to the findings and recommendations of the HLRP on SSA. The appointment of Dr Syndney Mufamadi, who chaired the HLRP on SSA, is regarded as significant in changing the security architecture and addressing the abuse and mismanagement in the intelligence services.

4.4 Findings and Recommendations on Intelligence Oversight

Chapter 13 of the report of the HLRP on SSA focusses on the efficacy and pertinence of the existing oversight mechanisms in ensuring transparency and accountability (Mufamadi et al, 2018: 89). In so doing the chapter primarily addressed the dedicated intelligence oversight mechanisms conceived by the Constitution, the White Paper and the ISOA, namely; the JSCI and the IGI.

In addressing legislative provisions Mufamadi (et al, 2018: 90) points out that the Constitution and the White Paper provides for control of the intelligence services as well as intelligence oversight through the JSCI and inspectors-general:

- Section 210 of The Constitution states that national legislation must provide for civilian monitoring of the intelligence services by an inspector-general.
- The section on ‘Control and Coordination of Intelligence’, in the White Paper on Intelligence states that control mechanisms include: allegiance to the Constitution; subordination to the Rule of Law; a clearly defined legal mandate; a mechanism for parliamentary oversight; budgetary control and external auditing; independent IGI - one each for the two civilian intelligence services; ministerial accountability; and the absence of law enforcement powers.

ISOA, Mufamadi (et al, 2018: 91-92) points out, gives effect to the high-level policy

positions on oversight of the intelligence community, broadening the role of the JSCI and the IGI to cover DI and CI as well. ISOA furthermore provides for unfettered access by the IGI to information, intelligence and premises of the services and defines the functions of both the JSCI and IGI:

- The IGI is to monitor compliance by any Service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence; to review the intelligence and counter-intelligence activities of any Service; to perform all functions designated to them by the President or any Minister responsible for a Service; to receive and investigate complaints from members of the public and members of the Services on alleged, abuse of power, maladministration and transgressions of the Constitution, laws and policies.

- The JSCI is to consider the audited financial statements of the Services; to consider the reports of the Evaluation Committee established by the Secret Services Act; to consider reports from the judge appointed in terms of RICA; to consider any legislation and regulations relating to the intelligence services; to review and make recommendations regarding inter-departmental cooperation; to order investigations by the head of a service or the IGI on complaints received by the committee; to refer relevant matters to the SAHRC; to deliberate on, hold hearings, subpoena witnesses and make recommendations on aspects relating to intelligence and the national security, including financial expenditure and administration; and to consider and report on the appropriation of revenue or moneys for the functions of the Services.

Mufamadi (et al, 2018: 92) found that the access of the JSCI, as mandated by ISOA, is not as extensive as that of the IGI as the name of intelligence functionaries and certain confidentially obtained information may be withheld from the JSCI.

The Panel made general findings as well as specific findings on the JSCI and IGI.

4.4.1 General Findings regarding Intelligence Oversight

The fundamentals of South Africa's intelligence oversight mechanisms are sound, although, over the medium-term, they can be refined with reference to (recent) international developments in this area (Mufamadi, et al 2018: 96). In this regard Mufamadi (et al, 2018: 89) points out that "The framers of our Constitution and democratic intelligence policy and legislation created an oversight system for our intelligence service comparable to the best in the world, comprising a bi-cameral, multi-party parliamentary committee – the JSCI – and the IGI". Oversight can accordingly be conducted by the executive (mainly, but not exclusively, by the relevant Minister), the judiciary, the legislature and administrative bodies which are independent of the executive. In the case of South Africa, oversight responsibilities are dispersed between the Minister of State Security (sic), the JSCI, the IGI, Chapter 9 institutions (SAHRC, the PP and the AGSA) and the judiciary, including the judge responsible for lawful interception of communication in terms of the RICA.

Mufamadi (et al, 2018: 96) however found that the oversight mechanisms have failed to act effectively of late, largely due to politicisation, factionalism and neglect. The HLRP furthermore points out that whatever the architecture and specifics for the intelligence oversight mechanisms, it is important that they should have the confidence and trust of the intelligence services to ensure the services are forthright with them (Mufamadi et al 2018: 96).

4.4.2 Findings on the IGI

The findings and recommendations of the 2006 and 2008 reviews, insofar as they deal with the IGI, are fundamentally correct (Mufamadi et al, 2018: 97).

It was a serious dereliction of duty on the part of successive Ministers of State Security that the recommendations of the two reviews were not taken further and that the long-awaited regulations governing the functioning of the OIGI have still not been promulgated (Mufamadi et al, 2018: 97).

The OIGI should be established as a separate entity, independent of the SSA or any successor service, with its own administration and budget (Mufamadi et al, 2018: 97).

The legislative requirement for the IGI to have knowledge of intelligence is a valid and important requirement in order to allow them to be able to detect any attempts to deceive or mislead them, but also to allow the services to have confidence and trust in the incumbent (Mufamadi et al, 2018: 97).

Given the powers given to the IGI by legislation, it is a serious failure that the IGI post had been left vacant for so long, and that the creation of a Deputy IGI post is desirable (Mufamadi et al, 2018: 97).

The OIGI should be given some legislated status (Mufamadi et al 2018: 97).

4.4.3 Findings on the JSCI

The JSCI over the past few years has been largely ineffective and impacted by the factionalism of the ANC (Mufamadi et al 2018: 97).

The Committee is divided and unable to articulate a coherent collective response on the state of intelligence in the country (Mufamadi et al 2018: 97).

The absence of/changes to the Chair of the Committee coupled with a lack of institutional memory has contributed to the dysfunctionality of the JSCI (Mufamadi et al 2018: 97).

4.4.4 Recommendations on Intelligence Oversight

The HLRP made five recommendations on intelligence oversight (Mufamadi et al 2018: 97):

- Urgently process and promulgate the regulations governing the functioning of the IGI.

Mufamadi (et al, 2018: 94) points out that while there had been attempts to draft and promulgate regulations since 2009, promulgation has been delayed due to changes in administration, inaction by the JSCI and proposed changes to intelligence and oversight legislation.

- Urgently institute a formal investigation into the issues surrounding the withdrawal of the IGI's security clearance.

  This state of affairs, according to Mufamadi (et al, 2018: 92) speaks directly to the independence of the IGI from an entity it overseas, as the IGI's security clearance was withdrawn by the DG SSA.

- Establish a task team to review and oversee the implementation of the recommendations of the 2006 and 2008 reviews insofar as they related to the IGI.

  The 2006 Task Team recommended that the OIGI should be given independent status, allowing the IGI to have full control over the resources and activities of the OIGI and that the legislative mandate of the IGI should be amended to exclude investigations into human resource complaints or grievances (Mufamadi et al, 2018: 93).

  On the issue of powers, the 2006 Task Team recommended that the IGI should not have powers to subpoena witnesses; persons appearing before the IGI for purposes of an investigation or inspection, should not have automatic right to legal representation; and that the findings of the IGI in any investigation or inspection should not be enforceable, but should serve as recommendations (Mufamadi et al, 2018: 93).

  The Task Team furthermore supported the need for the urgent issuing of regulations governing the conduct of investigations and inspections by the IGI while it regarded the obligatory consultation with the IGI in the drafting or amending of legislation or regulations as an unnecessary additional step in the

legislation-making process. It favoured consultation as a matter of good practice wherever possible (Mufamadi et al, 2018: 94).

While the 2008 MRC Report agreed with most of the findings of the 2006 Task Team Report, it did not agree that those appearing before the IGI should not have automatic right to legal representation; and it did not agree that it should not be mandatory for legislation to be consulted with the IGI (Mufamadi et al, 2018: 94).

- Propose a review of the functioning of the JSCI.

- Given the demands of intelligence oversight, the idea of a dedicated capacity for the JSCI needs to be explored further.

4.5 Conclusion

The establishment of the HLRP on SSA as well as the State Capture Commission can be regarded as part of a wider initiative by the South African Government to address public sector corruption in the state. Closely related to addressing public sector corruption is restoring the integrity of public institutions and the public's trust in these institutions. The intelligence services are highlighted as institutions critical to the constitutional democracy that is South Africa and the HLRP on SSA was established to specifically deal with wrongdoing and corruption in the civilian intelligence services. It is consequently significant that in launching the HLRP on SSA that the President confirmed the critical role of the JSCI and OIGI and that they be empowered to undertake their respective mandates more effectively.

The HLRP on SSA is not the first investigation into the civilian intelligence community as at least two ministerial commissions or task teams in 2006 and 2008 preceded this Panel. Its findings and recommendations were only haphazardly implemented with the result that the HLRP repeated and/or confirmed many of the findings and recommendations on intelligence oversight. Submissions regarding the intelligence services at the State Capture Commission reflect to what extent delays and the failure

to act and implement previous recommendations, amongst others, have had on intelligence oversight and the intelligence function of the state. It is reflective of these failures and omissions that the HLRP, yet again, had to confirm the validity of previous investigations and recommend that the recommendations of 2006 and 2008 be implemented! It is indicative of the lack of political will to exercise executive control and implement remedial action to ensure that the intelligence services and oversight fulfil their constitutional and legislated mandates.

The TOR of the HLRP on SSA restricted its scope to the civilian intelligence environment, and it consequently made findings and recommendations on the SSA, the executive (minister and ministry) and NICOC. In this regard, from an oversight perspective, it mainly addressed control measures related to the superintendence of the executive as well as the internal administrative, operational and financial controls of the Agency (and its sub-ordinate structures). This is relevant, as reflected in Chapter 1, as oversight and control perform a complementary function in a democracy, in ensuring accountability and good governance. It is however difficult to extrapolate its findings beyond the Agency to DI and CI.

The findings of the HLRP on SSA indicate that the fundamentals of the South African oversight framework are sound. Intelligence oversight is based in law and provision is made for a combination of oversight institutions which covers all aspects of intelligence. It does have the powers, in legislation, to conduct investigations, it has unimpeded access to information, officials and institutions to perform its functions, legislation provides for security of information and penalties for non-compliance and breach of security. Recourse is provided for access to intelligence oversight institutions who independently investigate matters.

The South African oversight framework however falls short as far as internal oversight regulations, executive control, resources, expertise, cooperation from the services and independence are concerned. The HLRP recommendations on intelligence oversight consequently address the promulgation of regulations to address shortcomings in the oversight regulatory framework, resourcing and independence of the OIGI and its legislated status, a review of the functions of the JSCI as well as its capacitation.

This chapter places the HLRP on SSA in context against wider government initiatives, such as the State Capture Commission, and furthermore enumerated the findings and recommendations of the HLRP On SSA with regard to intelligence oversight. Along with Chapter 3 it establishes the context for the next chapter which examines international best practice in intelligence oversight and a preferred model for intelligence oversight, developed by Born & Wills, against which intelligence oversight in South Africa can be assessed.

CHAPTER 5

INTERNATIONAL BEST PRACTICE ON INTELLIGENCE OVERSIGHT

5.1 Introduction

As stated in Chapter 1, South Africa benchmarked and relied on international best practice[35] in democratic states, in developing its intelligence and oversight architecture post-1994. Chapter 2 elaborated on the development of the intelligence system based on intelligence best practice, while Chapter 3 examined the intelligence oversight framework developed in South Africa based on international best practice in intelligence oversight systems in selected democratic states. It is consequently only appropriate to assess the South African intelligence oversight framework in its current form, as well as proposals for improvement, as made by the HLRP on SSA and other investigations and commissions (Chapter 4) against a more formalised set of international best practices. To this end the UN Compilation of Good Practices for Intelligence Agencies and their Oversight will be enumerated and a benchmark standard for assessment of the HLRP on SSA and South African Oversight regime established.

The purpose of this chapter is to present a case study of international best practice in intelligence oversight based on good practice as identified by Born and Wills for the UN Human Rights Council (UNHRC).

5.2 Background and International Practice

Since intelligence oversight gained initial traction in Europe and the Americas and spread to other parts of the globe the question of how to exercise democratic control over the security and intelligence services have come to pervade political discourse. Whereas the discourse in established democracies in mainly North America, Western Europe, New Zealand and Australia were initially driven by scandal and abuse of

[35] For the purposes of this study “Best Practice” and “Good Practice” are not mutually exclusive terms, but refer to standards or norms of practice which are regarded as an accepted or recommended technique or method, which has proven itself as superior and thus is used as a benchmark (Conte, 2017). Mohammed (2017) describes good practice as best practice followed over a period of time, a way of life.

powers and rights by intelligence services, elsewhere it has been driven by democratisation (Gill, 2003: 1). Since the “first wave” of oversight, international consensus on intelligence oversight has grown with international organisations, notably the Organisation of Economic Co-operation and Development (OECD), the UN, the Organisation for Security and Cooperation in Europe (OSCE), the European Union (EU) and Summit of the Americas, explicitly recognising that intelligence services should be subject to democratic accountability (Born & Leigh, 2005: 13, 14). The AU, in its 2013 Security Sector Reform (SSR) Policy Framework, likewise, not only advises member states to strengthen oversight instruments, but also commits regional structures to support national oversight of the security sector in member states (AU, 2014: 17, 19). In this regard Goldman & Rascoff (2016, xvii, xxi) point out that oversight of intelligence services is set for transformation as, since the 1970’s, while intelligence oversight had largely been defined by national boundaries, it is becoming increasingly transnational in nature.

Despite the growing international consensus on democratic control and oversight of the intelligence and security services, Gill (2003: 4) reflects that there has not been a singular standard design for democratic control and intelligence oversight. Gill found that while the design and practice of intelligence oversight is the product of the unique culture, history and politics of the various countries, there are basic overarching principles that states can consequently learn from each other (Gill, 2003: 4-5). Mevik and Winkler (in Born & Leigh, 2005:3) made similar findings while the AU likewise recognises that oversight mechanisms may be country-specific in endeavouring to subscribe to good governance principles, the rule of law and respect for the statutory framework (AU, 2014: 17).

Born and Leigh (2005: 23) consequently proposed that legal standards and best practice should be developed at four levels for the oversight of the intelligence and security services. Each is envisaged as a tier of democratic oversight that is encapsulated by the next layer; namely internal control at the level of the intelligence service; executive control; parliamentary oversight; and oversight by independent oversight bodies. They argue that judicial oversight and the role of civil society as layers of oversight is addressed indirectly.

Based on international best practice Born and Johnson (in Born et al, 2005: 236-238) identified independence, investigative powers, access to classified information, ability to maintain secrets and adequate support staff, as five vital elements of effective intelligence oversight. Wills (2007: 32), in proposing a guidebook for understanding intelligence oversight, identified five main types of institutions that control and/or oversee the intelligence services, namely; the internal management of intelligence services, the executive, the judiciary, parliament and expert oversight bodies. Wills (2007: 34, 38-39) furthermore identified a set of standards or focus areas for expert intelligence oversight bodies. The oversight of the legality of operations and policy, oversight of the effectiveness of operations, oversight of administrative practice and oversight of financial management is regarded as the minimum focus or standard for intelligence oversight. Baldino (2010, 211) consequently argues that a realistic and reliable democratic system of oversight must deal with special executive powers, requirements of secrecy, as well as the relationship between structures and processes.

It is worth noting that Born and Johnson (in Born et al, 2005: 238) point out that good practice is only one part of effective oversight as much depends on authority (legal and other powers) and ability (resources and expertise) along with attitude and willingness of those tasked with oversight. Similarly, Baldino (2010: 211-212) opines that as much as organisations and structures of intelligence and oversight may exist, much still depends on the integrity and character of the staff manning such structures.

Born & Mesevage (in Born & Wills, 2012: 19) argue that there is no “one-size-fits-all” model for intelligence oversight and no particular standard or practice is unarguably the best. They do however point out that a range of equally good models and approaches can be found in countries around the globe. Translating good practices from one country to another can nevertheless be difficult given the differences in legal, political, and cultural systems; and even where it is possible, would usually require some adaption before it can be usefully applied. They nonetheless point out that it is possible to identify common standards and practices that contribute to effective intelligence oversight.

To this end, in 2010, DCAF prepared a directory of good practices for intelligence oversight based on a comparative analysis of the constitutions, laws, decrees, parliamentary resolutions, independent inquiries, and court rulings of more than fifty countries, for the UN Special Rapporteur[36] on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Born & Mesevage in Born & Wills, 2012: 19).

5.3 UN Compilation of Good Practice of Intelligence Oversight

Born (et al, 2011: 14) points out that the compilation of good practice[37] on legal and institutional frameworks for intelligence services and their oversight is the outcome of a consultation process mandated by the UNHRC, which, in Resolution 10/15, requested the Special Rapporteur to prepare, working in consultation with states and other relevant stakeholders, a compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight. The outcome of the process was the identification of 35 elements of good practice (Born et al, 2011: 9, 14).

According to Born (et al, 2011: 14), it is not the purpose of the compilation to prescribe a set of normative standards that should apply at all times and in all parts of the world. While the elements of good practice are consequently presented as descriptive and not normative, it is nonetheless possible to identify common practices. They furthermore point out that while the UNHRC had mandated the compilation of good practices in the context of the role of intelligence services in counter-terrorism, its application, extends to general intelligence and oversight activities.

DCAF is endeavouring to promote the use of the Compilation in two main areas: firstly, in the context of security sector reform processes involving the reform of legal and institutional frameworks for intelligence governance and, secondly, as a statement of

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[37] **Good Practice** - legal and institutional frameworks which serve to promote human rights and the respect for the rule of law in the work of intelligence services. “Good practice” not only refers to what is required by international law, including human rights law, but goes beyond these legally binding obligations (Born et al, 2011: 9, 14).

international standards and benchmarks which governments, legislatures and civil society can use to evaluate legislation and practice regarding intelligence services and intelligence oversight structures (Born et al, 2011: 8).

The 35 areas of good practice are grouped into four different “baskets”. Legal basis (1–5), Oversight and Accountability (6–10 and 14–18), Substantive Human Rights Compliance (11–13 and 19–20) and Issues Relating to Specific Functions of Intelligence Agencies (21– 35) (Born et al, 2011: 9, 14; Scheinin, 2010: 5). While Table 5.1 reflects the Oversight and Accountability Basket of Good Practice, the 35 areas of good practice are summarised in Appendix B, p B-i to B-vii.

Grouping	Practice	Description
Oversight Institutions	Practice 6	Intelligence services are overseen by a combination of internal, executive, parliamentary, judicial and specialized oversight institutions whose mandates and powers are based on publicly available law. An effective system of intelligence oversight includes at least one civilian institution which is independent from both the intelligence services and the executive. The combined remit of oversight institutions covers all aspects of the work of intelligence services including their compliance with the law; effectiveness and efficiency of their activities; their finances; and their administrative practices.
	Practice 7	Oversight institutions have the power, resources and expertise to initiate and conduct their own investigations, as well as full and unhindered access to the information, officials and installations necessary to fulfil their mandates. Oversight institutions receive the full cooperation of intelligence services and law enforcement authorities in hearing witnesses, as well as obtaining documentation and other evidence
	Practice 8	Oversight institutions take all necessary measures to protect classified information and personal data to which they have access during the course of their work. Penalties are provided for the breach of these requirements by members of oversight institutions.
Complaints and Effective Remedy	Practice 9	Any individual who believes that her/his rights have been infringed by an intelligence service is able to bring a complaint to a court or oversight institution, such as an ombudsman, human rights commissioner, or national human rights institution. Individuals affected by illegal actions of an intelligence service have recourse to an institution which can provide an effective remedy, including full reparation for the harm suffered.
	Practice 10	The institutions responsible for addressing complaints and claims for effective remedy arising from the activities of intelligence services are independent from the intelligence services and the political executive. Such institutions have full and unhindered access to all relevant information; the necessary resources and expertise to conduct investigations; and the capacity to issue binding orders.

Grouping	Practice	Description
State Responsibility for Intelligence Services	Practice 14	States are internationally responsible for the activities of their intelligence services, their agents, and any private contractors they engage, regardless of where these activities take place and who the victim of internationally wrongful conduct is. Therefore, the executive power takes measures to ensure and exercise overall control of and responsibility for their intelligence services.
Individual Responsibility and Accountability	Practice 15	Constitutional, statutory and international criminal law applies to members of intelligence services as it does to any other public official. Any exceptions which permit intelligence officials to take actions that would normally violate national law are strictly limited and clearly prescribed by law. These exceptions never allow the violation of peremptory norms of international law or of the human rights obligations of the State.
	Practice 16	National laws provide for criminal, civil or other sanctions against any member, or individual acting on behalf of an intelligence service, who violates or orders an action which would violate national law or international human rights law. These laws also establish procedures to hold individuals to account for such violations.
	Practice 17	Members of intelligence services are legally obliged to refuse superior orders which would violate national law or international human rights law. Appropriate protection is provided to members of intelligence services who do refuse orders in such situations.
	Practice 18	There are internal procedures in place for members of intelligence services to report wrongdoing. These are complemented by an independent body that has the mandate and access to the necessary information to fully investigate, and take action to address wrongdoing when internal procedures have proved inadequate. Members of intelligence services who, acting in good faith, report wrongdoing are legally protected from any form of reprisals. These protections extend to disclosures made to the media or the public at large if they are made as a last resort and pertain to matters of significant public concern.

Table 5.1: Oversight and Accountability Basket of Good Practice (Born et al, 2011: 17-20; Scheinin, 2010: 31-32)

Born and Wills (2012: 19) only include Practice 6, 7 and 8 (see Table 5.1) as these deal directly with intelligence oversight. Born (et al, 2011: 14) and Scheinin (2010: 5) however include Practice 6, 7, 8, under oversight institutions, Practice 9 and 10 under complaints and effective remedy along with Practice 14 under state responsibility for intelligence services and Practice, 15, 16, 17 and 18 under individual responsibility and accountability (see Table 5.1). Apart from the principles of each practice, as reflected in Appendix B (p B-i to B-vii), Born (et al) and Scheinin offers additional insight by elaborating further on some of the practices.

Intelligence oversight institutions are based on law, and in some instances founded on a constitution. As reflected in Practice 6 the range of oversight institutions ensures that there is a separation of powers in the oversight of intelligence services as the institutions that commission, undertake and receive the outputs of intelligence

activities are not the only institutions that oversee these activities. An effective system of oversight is particularly important in the field of intelligence because these services conduct much of their work in secret and, hence, cannot be easily overseen by the public. Intelligence oversight institutions serve to engender public trust and confidence in the work of intelligence services by ensuring that they perform their statutory functions in accordance with respect for the rule of law and human rights (Born et al, 2011: 17; Scheinin, 2010: 8-9).

The powers of oversight institutions, as reflected in Practice 7, help to ensure that overseers can effectively scrutinise the activities of intelligence services and fully investigate possible contraventions of the law. In some instances, the investigative competences of oversight institutions have been strengthened by criminalizing failure to cooperate with them and oversight institutions consequently have recourse to law enforcement authorities to secure cooperation. Strong legal powers are crucial for effective oversight, but it is regarded as good practice for these to be accompanied by the human and financial resources needed to make use of these powers and consequently, to fulfil their mandates. As a result, many oversight institutions not only have their own independent budgets provided directly by parliament, but also the capacity to employ specialized staff, and to engage the services of external experts (Born et al, 2011: 17; Scheinin, 2010: 9-10).

In complying with Practice 8 a range of mechanisms are put in place to prevent unauthorised disclosure of information. Prohibitions may be placed on unauthorised disclosures of information (with appropriate sanction); and members and staff may be subject to security clearance procedures before access to classified information is allowed. Alternatively, members are required to sign non-disclosure agreements. Ultimately, reliance is placed on the professionalism of members in handling classified information appropriately (Born et al, 2011: 18; Scheinin, 2010: 10).

In providing for complaints and effective remedy in compliance with Practice 9 and 10, institutions may be judicial bodies established exclusively for this purpose, or part of the general judicial system. Regardless, they are usually empowered to order remedial action (Born et al, 2011: 18; Scheinin, 2010: 11, 12).

Executive control of intelligence services (Practice 14) is vital and is consequently enshrined in several national laws (Born et al, 2011: 20; Scheinin, 2010: 14). Individual members of intelligence services are also responsible and held to account for their actions (Practice 15). As a broad rule, constitutional, statutory and international criminal law applies to intelligence officers as it does to any other individual (Practice 16) (Born et al, 2011: 10, 20; Scheinin, 2010: 14-15). States ensure that employees of intelligence services are held to account for violations of the law by providing and enforcing sanctions for particular offences. It is good practice for national law to oblige the management of intelligence services to refer cases of possible criminal wrongdoing to prosecutorial authorities (Born et al, 2011: 21; Scheinin, 2010: 15).

It is an entrenched principle of international law that individuals are not cleared of criminal responsibility for serious human rights violations by virtue of having been requested to undertake an action by a superior. The obligation to refuse illegal orders (Practice 17) is closely connected to the availability of internal and external mechanisms through which intelligence service employees can raise their concerns about illegal orders (Born et al, 2011: 21; Scheinin, 2010: 15-16).

Practice 18 requires that regardless of the exact nature of the channels for disclosure, it is good practice for national law to afford individuals, who make disclosures authorized by law, with protection against reprisals especially as members of the intelligence services are often the first to know or best placed to identify or experience abuse or wrong-doing by the intelligence services (Born et al, 2011: 21; Scheinin, 2010: 16-17).

5.4 Proposed Framework for Assessing South African Oversight

The good practices identified by Born (et al, 2011) and Scheinin (2010) are quite comprehensive and address good practice in intelligence services and oversight institutions. As the focus of this study is on intelligence oversight best practice, the lead of Born and Wills (2012) will be followed in applying Practice 6, 7, 8, 9 and 10 as Practice 14, 15, 16, 17 and 18 apply primarily to internal intelligence services control measures which is reflective of control and not oversight.

For the sake of simplicity and ease of reference these five good practices, grouped in "Oversight Institutions" and "Complaints and Effective Remedy" can be tailored further (see Table 5.2). To this end the following is proposed:

Grouping	Practice	Description
Oversight Institutions	Practice 6: **Combined Comprehensive Coverage**	Intelligence services are overseen by a combination of internal, executive, parliamentary, judicial and specialized oversight institutions whose mandates and powers are based on publicly available law. An effective system of intelligence oversight includes at least one civilian institution which is independent from both the intelligence services and the executive. The combined remit of oversight institutions covers all aspects of the work of intelligence services including their compliance with the law; effectiveness and efficiency of their activities; their finances; and their administrative practices.
	Practice 7: **Empowered**	Oversight institutions have the power, resources and expertise to initiate and conduct their own investigations, as well as full and unhindered access to the information, officials and installations necessary to fulfil their mandates. Oversight institutions receive the full cooperation of intelligence services and law enforcement authorities in hearing witnesses, as well as obtaining documentation and other evidence. [38]Members of the legislature and specialised civilian oversight institutions, responsible for intelligence oversight, have the education, training and skills to conduct intelligence oversight. Learning programmes are developed and in place to develop intelligence oversight expertise.
	Practice 8: **Secure**	Oversight institutions take all necessary measures to protect classified information and personal data to which they have access during the course of their work. Penalties are provided for the breach of these requirements by members of oversight institutions.
Complaints and Effective Remedy	Practice 9: **Recourse and Remedy**	Any individual who believes that her/his rights have been infringed by an intelligence service is able to bring a complaint to a court or oversight institution, such as an ombudsman, human rights commissioner, or national human rights institution. Individuals affected by illegal actions of an intelligence service have recourse to an institution which can provide an effective remedy, including full reparation for the harm suffered.
	Practice 10: **Independence and Unrestricted Access**	The institutions responsible for addressing complaints and claims for effective remedy arising from the activities of intelligence services are independent from the intelligence services and the political executive. Such institutions have full and unhindered access to all relevant information; the necessary resources and expertise to conduct investigations; and the capacity to issue binding orders.

Table 5.2: Modified Born, Wills and Scheinin Toolkit for Assessing South African Intelligence Oversight (Own Construct; Born et al, 2011: 17-20; Scheinin, 2010: 31-32)

[38] Inserted by the author as part of modifications to the DCAF/ UN Compilation, for the purposes of this study.

5.5 Conclusion

Intelligence oversight has, since inception, not only spread across the globe, but has come to pervade political discourse. While intelligence oversight reflects unique country specific characteristics in its evolution, basic overarching principles, common standards and practices, which contribute to effective oversight, can be discerned. South Africa, like many other countries, benchmarked and relied on international best practice, as available at the time, to develop its intelligence oversight architecture.

The UN Compilation of Good Practices for Intelligence Agencies and their Oversight (2010) and the DCAF Toolkit – Legislating for the Security Sector International Standards Compilation of Good Practices for Intelligence Agencies and their Oversight (2011) represents a statement of international standards and benchmarks which can be used to evaluate legislation and practice in intelligence oversight.

Good practice is however only one side of effective oversight as it should be complemented by authority (legal and other powers), ability (resources and expertise) as well as willingness, attitude and integrity of the staff and structures tasked with intelligence oversight.

The good practices identified by Born (et al, 2011) and Scheinin (2010) have been modified for simplicity and ease of reference for the purpose of this study. As the focus of this study is on intelligence oversight best practice, the lead of Born and Wills was followed in applying Practice 6, 7, 8, 9 and 10, modified to describe “combined comprehensive coverage”, “empowered”, “secure”, “recourse and remedy”; and “independence and unrestricted access”, respectively. Practice 7 (Empowered) is elaborated on with insertion of intelligence oversight education, training and skills development learning programmes, specifically aimed at increasing the competency of members of the legislature as well as civilian oversight personnel, tasked with intelligence oversight.

This chapter interrogated the development of international good practice in intelligence oversight and enumerated the Compilation of Good Practices for Intelligence Agencies and their Oversight. This enabled the identification of international standards and

benchmarks against which the findings and recommendations of the HLRP on SSA regarding oversight, as well as the South African Oversight regime can be assessed.

CHAPTER 6

CONCLUSIONS AND RECOMMENTATIONS

6.1 Introduction

This final chapter of this study summarises and provides an overview of the research, tests the propositions of the study and evaluates the central assumption of this study, in order to provide findings and conclusions. The contribution of this dissertation will be discussed, final recommendations enumerated and possible future study opportunities identified, followed by overall conclusions.

6.2 Summary and Overview of the Study

Chapter 1 contextualised the study. The research topic, research problem, research questions as well as a general description of the research design and methodology was provided. Literature used was demarcated and reviewed while a common understanding of the concept of intelligence oversight was established. Chapter 1 concludes with a general outline of the dissertation.

Chapter 2 examined intelligence in South Africa. In providing an overview of the intelligence services an understanding of the South African intelligence services was provided by explaining the development, legislative framework, mandate, role and functions of the intelligence services. The performance of the South African intelligence services was also addressed. This was achieved by explaining the relationship between intelligence and state and the type of intelligence services, serving different regime types, the role of intelligence in the state and defining pertinent security and intelligence concepts. It highlighted the challenges that have emerged in controlling and holding the intelligence services to account in an evolving (hybrid) democratic state such as South Africa.

Chapter 3 examined the Intelligence Oversight Regime established in 1994. The chapter focused on explaining the concept of intelligence oversight and control and the role and form of intelligence oversight in South Africa. It interrogated the

development, regulatory framework, philosophy, mandate, role and functions as well as the architecture of South African intelligence oversight. The challenges that have emerged in exercising oversight of the intelligence services was highlighted.

Chapter 4 examined the findings and recommendations of the High Level Review Panel (HLRP) on SSA. The findings of the HLRP specifically related to intelligence oversight is enumerated.

Chapter 2, 3 and 4 established the context for examining international best practice in intelligence oversight and a preferred model for intelligence oversight, developed by Born & Wills, against which intelligence oversight in South Africa can be assessed.

Chapter 5 identified international best practice in Intelligence Oversight. The chapter interrogated the development of international good practice in intelligence oversight and enumerated the Compilation of Good Practice of Intelligence Oversight. This enabled the identification of international standards and benchmarks against which the findings and recommendations of the HLRP on SSA regarding oversight, as well as the South African Oversight regime can be assessed.

This chapter summarises salient points, interprets results, tests the propositions, makes findings and recommendations and identifies gaps and further opportunities for further examination and study.

6.3 Testing the Proposition

The aim of the research was to determine whether the recommendations of the HLRP related to intelligence oversight can serve as a framework for intelligence oversight in South Africa.

This is achieved by addressing the following two questions:

- Is the existing intelligence oversight framework in South Africa adequate when measured against international standards of best practice?

- To what extent do the HLRP recommendations meet the standards of international best practice as a basis for intelligence oversight development?

A literary review based on a qualitative approach was conducted as it is believed that qualitative research would best address the research question. Research focussed on the existing intelligence oversight regime in South Africa, the recommendations of the HLRP, measuring it against principles of international best practice in intelligence oversight as identified by Dr Hans Born and Aiden Wills.

6.3.1 Adequacy of the South African Oversight Framework when measured against International Best Practice

6.3.1.1 Oversight Institutions

The South African Oversight Framework provides for **oversight institutions**. **Practice 6 (Combined, Comprehensive Coverage)** is complied with as the intelligence services are overseen by a combination of internal, executive (Ministers and President), parliamentary (JSCI), judicial (Designated Judge, subject to the rule of law) and specialized oversight institutions (IGI, AG, PP, SAHRC, IPID, Military Ombudsman, Defence Inspectorate) “whose mandate and powers are based on publicly available law”. Not only is provision made for oversight in the White Paper on Intelligence, but the constitutional imperative of intelligence oversight is given effect through ISOA while the AGA, PPA and SAHRCA also provide for oversight of the intelligence services. The failure or reluctance by the legislature and the executive to give effect to recommendations, on specifically internal regulations of the IGI, by successive inquiries and ministerial review commissions on intelligence, not only impedes the functioning of intelligence oversight, but prevents the oversight institutions to adjust to changing dynamics in the broader intelligence and security environment. It is indicative of hindrances to legislative oversight such as insufficient cooperation from the executive and insufficient motivation of parliamentarians to engage in pro-active oversight. The initiatives (relocation of State Security under the Presidency, appointing an Expert Panel to investigate the security response to the unrest and the appointment of Dr Mufamadi as National Security Advisor) announced

by Pres Ramaphosa is reflective of the intent to ensure greater political oversight of the intelligence services.

While **Practice 6 (Combined, Comprehensive Coverage)** states that "An effective system of intelligence oversight includes at least one civilian institution which is independent from both the intelligence services and the executive" and although the IGI is indeed such a civilian oversight institution, it fails to meet the requirement of independence given its administrative, budgetary and regulatory dependence on the SSA as prescribed by ISOA. The combined remit of oversight institutions such as the JSCI, IGI, AG, PP "covers all aspects of the work of intelligence services including their compliance with the law; effectiveness and efficiency of their activities; their finances; and their administrative practices". In the wake of purported intelligence failures and the role of intelligence coordinating structures such as NICOC in the sharing and distribution of Intelligence, it is not evident to what extent they are subject to intelligence oversight, as ISOA only refers to SSA, DI and CI. It would be pertinent to consider including intelligence coordinating structures such as NICOC within the ambit of the Act.

Good practice in a "multi-level system of oversight" includes "at least one institution which is" completely "independent from both the intelligence services and the political executive". In South Africa it is evident "that there is separation of powers in the oversight of intelligence services" as "the institutions that commission, undertake and receive the outputs of intelligence activities are not the only institutions that oversee these activities". In this regard the IGI, Judiciary, AG, PP, SAHRC, IPID, Military Ombud and the Defence Inspectorate, as well as civil society all have some form of oversight. In this regard the oversight work of the IGI, constituted by the review of intelligence and counter-intelligence activities of the intelligence services, monitoring of compliance with the regulatory framework, complaints investigation and annual certificate on the intelligence services, provides extensive coverage of all the dimensions of the work of the services. While "all dimensions of the work of intelligence services are subject to the oversight of one or a combination of external institutions" it is not as comprehensive as one is lead to believe given concerns expressed by the AG about lack of access to financial records, the politicisation of the intelligence services, partisanship of the JSCI, misuse of security classifications to prevent IPID

investigations into CI as well as widespread abuse that manifested in the PAN and SO of SSA, Secret Service Account of CI and abuse in DI. While “one of the primary functions of a system of oversight is to scrutinise intelligence services’ compliance with applicable law, including human rights”, and while this may have taken place, it is not evident that corrective or remedial action is consistently enforced by either the executive or the JSCI, in its role as legislative oversight.

Oversight institutions such as the executive, JSCI, IGI, AG, PP and IPID “are mandated to hold intelligence services and their employees to account for any violations of the law”. The extent to which “oversight institutions assess the performance of intelligence services (by) examining whether (they) make efficient and effective use of the public funds allocated to them is however subject to some debate” given the poor reporting record of the JSCI, often submitting their annual reports late, and restrictions on their reporting, with both audit reports and JSCI reports being classified. Institutions may be mandated to conduct intelligence oversight, but the ability to report and inform the public (to whom these institutions are ultimately accountable), and hold individuals and the services to account is impeded. There is a disjuncture between legislative intent as evidenced in the Constitution, White Paper and legislation, and the actions of internal management as well as political leadership and legislative oversight in scrutinising and calling to account (or failing to call to account) abuse and non-compliance. National Security and security classification is often used as excuse not to report or allow scrutiny. As a consequence of partisanship and strict party discipline political deference by the JSCI, and by extension Parliament, have led to the failure of effective intelligence oversight at its apex. A measure of insulation or shielding from scrutiny can be detected. In this regard South Africa still needs to mature as a functioning constitutional and multi-party democracy. Conversely, ministerial over-involvement, either micro-managing or involving themselves at the operational level, also prevents effective oversight as pointed out by Caparini (in Born and Caparini, 2016). It explains the politicisation of intelligence in South Africa. To date the Judiciary, have, when called to rule on matters involving intelligence, acted in enforcing the rule of law and have not been found to show undue deference to the executive or legislature (judicial deference).

"An effective system of oversight is particularly important in the field of intelligence" as the intelligence services "conduct much of their work in secret and, consequently cannot be easily overseen by the public". In this regard South Africa's transition to an unconsolidated democracy and consequent classification as a hybrid state instead of a consolidated democracy has direct consequences for the role and function of intelligence, and consequently intelligence oversight, as the South African intelligence regime evolved from being classified as a state security and political police service to an intelligence bureau in a democracy, bound by the Constitution, rule of law and under democratic control, to intelligence police agency in a hybrid state reflecting both democratic and authoritarian characteristics. South Africa made a successful transition to an intelligence service in a democracy by fashioning a legal framework, establishing intelligence control, oversight, accountability and transparency. These democratic practices have however been eroded and have come to reflect more non-democratic tendencies such as securitization by the political regime, insulation and reduced political impartiality of intelligence services. The broad domestic mandate of the SSA, duplication in mandate, role and functions, undue secrecy, abuse of power, corruption and politicization have come to permeate the intelligence system.

While it may be the intent, it is however not evident that the South African intelligence "oversight institutions serve to foster or engender public trust and confidence in the work of intelligence services by ensuring that they perform their statutory functions in accordance with respect for the rule of law and human rights" given restrictions placed on reporting to, and by the JSCI, IGI and AG.

The South African Constitution and legislation, as reflected in Chapter 3 of this study, ensures that oversight institutions have, in accordance with **Practice 7 (Empowered)**, "the power, resources and expertise to initiate and conduct their own investigations, as well as full and unhindered access to the information, officials and installations necessary to fulfil their mandates". ISOA provides for "oversight institutions" receiving "the full cooperation of intelligence services and law enforcement authorities in hearing witnesses, as well as obtaining documentation and other evidence". A significant flaw in ISOA is, however, the vesting of all intelligence oversight powers in the person of the IGI, as without an IGI the OIGI (as the office which supports the IGI) cannot

function and cannot exercise these powers, which potentially brings intelligence oversight to a standstill, as has happened during periods when no IGI was appointed.

The JSCI, IGI, AG, PP, SAHRC, IPID, Military Ombud and Defence Inspectorate have "specific powers to enable them to perform their functions. In particular, they have the powers to initiate their own investigations into areas of the intelligence service's work that fall under their mandates", and the IGI, in terms of ISOA is "granted access to all information necessary to do so". The difficulty which IPID had in accessing classified information in SAPS, as well as attempts to restrict the AG in conducting and reporting on financial oversight of intelligence, however contradicts this element of **Practice 7 (Empowered).** The abuse of the OIGI's dependence and administrative subordination to the SSA, as well as abuse of security clearance requirements to withdraw the IGI's security clearance, is furthermore reflective of attempts to limit the exercise of the powers of the IGI, as without an IGI, the OIGI cannot function and employ these powers to hold the intelligence services to account.

The IGI specifically has the "legal authority to view all relevant documents and files, inspect premises of intelligence services", but unlike the JSCI it does not have the powers to summon members of the intelligence services "to give evidence under oath". ISOA, in making contravention and non-compliance an offense and by providing for punishment, is in compliance with **Practice 7 (Empowered)**. In South Africa "oversight institutions have recourse to law enforcement authorities to secure the cooperation of relevant individuals". While provision is made for the resourcing of intelligence oversight institutions it is evident that the JSCI and IGI do not "have their own independent budget provided directly by Parliament. The capacity to employ specialised staff, and to engage the services of external experts" is provided for in ISOA. The capacity of the JSCI is however not regarded as optimum while formal intelligence oversight training of the oversight officers of the IGI has also been identified as a requirement. It is furthermore disconcerting that despite all these powers, as well as unfettered access to intelligence, intelligence premises and personnel, by especially the IGI, corruption, abuse of power and resources as well as illegality, has continued to take place in the intelligence services. It is evident that powers in law is not enough, the will to employ these powers or act on them must also exist.

Intelligence oversight in South Africa subscribes to **Practice 8 (Secure)** as both the JSCI and IGI "take all necessary measures to protect classified information and personal data to which they have access during the course of their work. Penalties are provided for the breach of these requirements by members of oversight institutions". In terms of ISOA members and staff of the IGI and JSCI "are prohibited from making unauthorised disclosures of information" and "failure to comply with" these "prescripts is "sanctioned through civil and/or criminal penalties" as prescribed by ISOA. Furthermore, members and staff are subject to security clearance procedures as ISOA requires that members must be security vetted. It can be contended that in South Africa there is still an overemphasis on secrecy and security which undermines accountability, transparency and oversight as required in a constitutional democracy. This much is evident from submissions to the State Capture Commission.

6.3.1.2 Complaints and Effective Remedy

Complaints and effective remedy is provided for in the South African intelligence oversight architecture. **Practice 9 (Recourse and Remedy)** is subscribed to, as "any individual who believes that their rights may have been infringed by an intelligence service is able to bring a complaint to a court or oversight institution, such as an ombudsman, human rights commissioner, or national human rights institution. Individuals affected by illegal actions of an intelligence service have recourse to an institution which can provide an effective remedy, including full reparation for the harm suffered".

The JSCI, IGI, PP, IPID, Military Ombud and SAHRC are mandated to "handle complaints raised by individuals who believe their rights have been violated by intelligence services and, where necessary, to provide victims with an effective remedy". Effect has furthermore been given to addressing intelligence related complaints by MOU between the IGI, PP and IPID from time to time, while the JSCI habitually refer complaints to the IGI for investigation. Without formalisation (through legislation, regulation or MOU) and coordination, some duplication may occur as the intelligence services are subject to complaints investigation by more than one oversight institution. DI, for instance, is potentially subject to complaints investigation by the JSCI, IGI, PP, SAHRC and the Military Ombudsman and CI by the JSCI, IGI,

PP, SAHRC and IPID while SSA could face scrutiny on complaints submitted to the JSCI, IGI, PP and the SAHRC. While “these institutions are empowered to receive and investigate complaints; they cannot generally issue binding orders or provide remedies and thus, victims” may need to seek remedies through the courts. As South Africa is a constitutional democracy, the intelligence services are subject to the rule of law and the actions of the intelligence services have been challenged in court as evidenced by the Constitutional Court ruling RICA unconstitutional in 2021 and the IGI approaching the Pretoria High Court for relief in 2018 when the DG SSA withdrew his security clearance.

It is however not evident that **Practice 10 (Independence and Unrestricted Access)**, which provides for “The institutions responsible for addressing complaints and claims for effective remedy arising from the activities of intelligence services are independent from the intelligence services and the political executive” is fully complied with given the IGI’s dependence on the SSA (a service it oversees) for financial and other resourcing and administrative accountability to the Minister of State Security. The IGI’s functional subordination to the JSCI, which is susceptible to political partisanship and intra-party factionalism, undermines its independence. Furthermore, while the IGI has “full and unhindered access to all relevant information” the JSCI is subject to some limitation in terms of ISOA. While intelligence “oversight institutions have resources and expertise to conduct investigations” it is regarded as inadequate. It is not evident that the IGI, in contrast to the PP, can issue binding orders. Effective remedy for human rights violations is provided for in the Constitution, SAHRCA and provisions in ISOA requiring the JSCI to report human rights violations to SAHRC. SAHRC has the “requisite legal powers to investigate complaints and provide remedies to victims of human rights violations perpetrated by intelligence services”.

6.3.1.3 Findings

The South African intelligence oversight framework is adequate when compared to good practice as espoused by the DCAF and UN Compilation of Good Practice of Intelligence Oversight. Its significant shortcoming is the lack of independence of the oversight institutions, notably the IGI and JSCI. Other factors, such as the culture of secrecy prevalent in the services, politicisation, partisanship, insulation and shielding

as well as maturity of the political system influence the application and execution of intelligence oversight.

It is evident, as found in Chapter 5, that good practice is only one side of effective oversight as it should be complemented by authority (legal and other powers), ability (resources and expertise) as well as willingness, attitude and integrity of the staff and structures tasked with intelligence oversight. While the South African intelligence oversight regime has the legal authority and powers through legislation, the ability to conduct oversight is either eroded, absent or limited given resource constraints in the OIGI and JSCI, level of intelligence and oversight expertise in the JSCI, IGI and Chapter 9 institutions, lack of independence of the IGI (given its administrative subordination and dependence on the SSA) and the integrity and the willingness of the JSCI, as a result of undue political deference, to perform their duties. It is furthermore evident that external oversight has to be complemented by internal control and accountability.

6.3.2 The extent to which the HLRP recommendations meet standards of International best practices as basis for oversight development

It is noteworthy that the HLRP found that "the fundamentals of South Africa's intelligence oversight mechanisms are sound" and that it recommends that "…they can be finessed with reference to recent international developments in this area". This provides the opportunity to employ the DCAF Toolkit as well as the UN Compilation on Intelligence Oversight Best Practice to improve the existing oversight system in South Africa.

6.3.2.1 Oversight Institutions

The HLRP findings on the legislative basis of oversight, with intelligence oversight based on provisions of the White Paper on Intelligence and the Constitution, which is given effect through the ISOA complies with **Practice 6 (Combined, Comprehensive Coverage)**, **"**mandates and powers are based on publicly available law" and that **"**the institutions which oversee their activities are based on law, and in some cases founded upon the constitution". It is also aligned with **"**Intelligence services are overseen by a

combination of internal, executive, parliamentary, judicial and specialized oversight institutions whose mandates and powers are based on publicly available law", as the HLRP states that in the case of South Africa, oversight responsibilities are distributed between the Minister of State Security (sic), the JSCI, the IGI, Chapter 9 institutions and the judiciary, including the judge responsible for lawful communication intercepts in terms of the RICA. Effectiveness and efficiency is addressed through the review function of the IGI, while the JSCI is empowered to deliberate on, hold hearings, call witnesses and make recommendations on any aspect relating to intelligence, including administration and finances.

However, while, according to the DCAF Toolkit and UN Compilation, "An effective system of intelligence oversight includes at least one civilian institution which is independent from both the intelligence services and the executive", it is evident from the findings of the HLRP that, while the IGI is a civilian oversight mechanism, it does not enjoy the requisite level of independence, as it recommends that the OIGI should be given independent status, allowing the IGI to have full control over its own resources and activities. It is evident from the findings of the HLRP that while the "combined remit of oversight institutions covers all aspects of the work of intelligence services including their compliance with the law; effectiveness and efficiency of their activities; their finances; and their administrative practices", especially the JSCI has been ineffective, beset by factionalism and politicisation while the AG has been hamstrung by limited access and the IGI by the lack of independence and long periods during which no IGI was appointed.

The recommendations of the HLRP on the implementation of the 2006 and 2008 Ministerial Task Team findings and recommendations to ensure the independence of the IGI and the issuing of regulations governing the conduct of OIGI investigations and inspections as well as an investigation into the withdrawal of the IGI's security classification by a former DG of SSA brings it into alignment with **Practice 6 (Combined, Comprehensive Coverage)**. The recommendation that the legislative mandate of the IGI should be amended to exclude human resource complaints and grievances contradicts **Practice 6 (Combined, Comprehensive Coverage)**, the "combined remit of oversight institutions covers all aspects of the work of intelligence services including…their administrative practices". The recommendation against

obligatory consultation with the IGI on the drafting and amendment to legislation does not detract from the powers or functions of the IGI as it still encourages consultation as a matter of good practice. In a sense it prevents the IGI from being both player and referee, as it is mandated to monitor compliance with the regulatory framework.

The recommendations on some form of legislated status for the OIGI; the independent status of the IGI and control over its own administration, resources and activities; the requirement of knowledge of intelligence by the IGI; the appointment of a deputy IGI; review of the functions of the JSCI and a dedicated capacity for the JSCI is aligned with **Practice 7 (Empowered) "**Oversight institutions have the power, resources and expertise to initiate and conduct their own investigations, as well as full and unhindered access to the information, officials and installations necessary to fulfil their mandates". It is trusted that this recommendation, in legislating the status of the OIGI and appointing a deputy IGI, would provide for the Office functioning in the absence of an IGI, as to date, with the mandate and powers vested in the person of the IGI in terms of ISOA, the Office (OIGI) cannot conduct oversight when there is no IGI (as discussed earlier).

The HLRP found that ISOA provides for "Oversight institutions to receive the full cooperation of intelligence services and law enforcement authorities in hearing witnesses, as well as obtaining documentation and other evidence", but that oversight mechanisms have failed to act largely due to neglect, politicisation and factionalism.

The HLRP makes reference to the requirement that the IGI must "have knowledge of intelligence" no reference is made to "Members of the legislature and specialised civilian oversight institutions, responsible for intelligence oversight, have the education, training and skills to conduct intelligence oversight. There is also no indication of "learning programmes are developed and in place to develop intelligence oversight expertise" for either members of the JSCI or staff of the OIGI.

The HLRP findings and recommendations on intelligence oversight does not directly address **Practice 8 (Secure)**, **"**Oversight institutions take all necessary measures to protect classified information and personal data to which they have access during the course of their work. Penalties are provided for the breach of these requirements by

members of oversight institutions" save to point out that enabling legislation adequately provides for the powers and functions of the JSCI and IGI

6.3.2.2 Complaints and Effective Remedy

The HLRP found that ISOA provides for lodging of complaints and investigation of such complaints, by both the JSCI and IGI or referral to the SAHRC, which is in line with "Any individual who believes that her/his rights have been infringed by an intelligence service is able to bring a complaint to a court or oversight institution, such as an ombudsman, human rights commissioner, or national human rights institution. Individuals affected by illegal actions of an intelligence service have recourse to an institution which can provide an effective remedy, including full reparation for the harm suffered" as espoused by **Practice 9 (Recourse and Remedy)**. However, limiting the mandate of the IGI, by excluding human resource complaints and grievances from their ambit, will detract from alignment with **Practice 9 (Recourse and Remedy)**, as it would limit the type of complaints that can be brought to the IGI for investigation and limiting the extent of oversight of all the functions of intelligence services. It may furthermore require a greater role for the PP in overseeing administrative matters in the intelligence services or for internal grievance procedures and structures in the services, including the role of ministers and the JSCI, to be formalised.

The HLRP finds that the IGI is not independent from an institution, the SSA, which it oversees and the organisation is therefore not in complete alignment with **Practice 10 (Independence and Unrestricted Access)**, "The institutions responsible for addressing complaints and claims for effective remedy arising from the activities of intelligence services are independent from the intelligence services and the political executive". The HLRP recommendations on the independence of the OIGI, providing for its independent status and full control over its own resources and activities, will bring oversight into alignment with **Practice 10 (Independence and Unrestricted Access)**. The HLRP findings on oversight legislation indicates that there is alignment with "Such institutions have full and unhindered access to all relevant information; the necessary resources and expertise to conduct investigations; and the capacity to issue binding orders".

6.3.2.3 Findings

The findings of the HLRP on SSA indicate that the fundamentals of the South African oversight framework are sound. An assessment of the findings and recommendations reflect that it is aligned with best practice when assessed against the UN Compilation of Good Practice. Intelligence oversight is based in law and provision is made for a combination of oversight institutions which covers all aspects of intelligence. It does have the powers, in legislation, to conduct investigations, it has unhindered access to information, officials and institutions to perform its functions, legislation provides for security of information and penalties for non-compliance and breach of security. Recourse is provided for access to intelligence oversight institutions who independently investigate matters.

The South African oversight framework however falls short as far as internal oversight regulations (the 2006 and 2008 inquiries also reflected on their absence and recommended promulgation); resources (limited staff complement, dependence on SSA for funding and IT support); expertise (JSCI continuity, institutional memory and knowledge, level of training and formal intelligence oversight training programmes for OIGI oversight officers); cooperation from the services (excessive secrecy, over classification, resource allocation and manipulation of regulations, abuse of security vetting and clearance requirements of the IGI; and independence (OIGI dependence on SSA for resources and administrative support) are concerned.

The HLRP recommendations address the promulgation of regulations to address shortcomings in the oversight regulatory framework, resourcing and independence of the OIGI and its legislated status, a review of the functions of the JSCI as well as its capacitation. By addressing these shortcomings alignment with the UN Compilation is promoted.

The findings and recommendations of the HLRP on SSA, on their own, would not constitute the basis for a framework for oversight, but the implementation of its recommendations would, along with the existing framework, constitute such a framework. The framework should however be complimented by authority, ability as well as willingness, attitude and integrity for it to be effective.

6.4 The Contribution of the Study

This study makes a contribution to the literature on intelligence oversight in South Africa through an assessment of the South African intelligence oversight framework as well as the recommendations on intelligence oversight of the HLRP on SSA against international good practice as derived from the DCAF/ UN Compilation of Good Practices for Intelligence Services and their Oversight. In doing so it confirmed good practice against which to benchmark the South African Intelligence Oversight Framework, bearing in mind Born and Mesevage's (in Born & Wills, 2012: 19) argument, that there is no one-size-fits-all model and that no single standard or practice is unarguably the best. Some adaption to local conditions is required.

The type of state, intelligence service in that state and its oversight mechanisms are linked. In the case of South Africa, a hybrid state, which is still adjusting to being a multi-party constitutional democracy, the legacy of the past continues to inform the present as control, accountability, transparency and oversight remains elusive.

Oversight and control are mutually supporting, as much as intelligence oversight plays a role, internal control mechanisms and organisational culture serves as a first line of oversight, if they are weak or fail, external independent civilian and legislative as well as judicial oversight will be ineffective. In the words of Marais (2021) "external oversight will never be sufficient". Intelligence oversight cannot function and fulfil its role in isolation, it must be part of a larger control, accountability and oversight system underpinned by a democratic ethos in the state. In this regard South Africa, with a dominant ruling party, still has some way to go from a preoccupation with secrecy and an ideological mind-set, left over from the Cold War divide, to that directed by a constitutional democracy subject to the rule of law where allegiance is to the Constitution and not party and state. The initiatives (relocation of State Security under the Presidency, appointing an Expert Panel and the appointment of Dr Mufamadi as National Security Advisor) announced by Pres Ramaphosa is reflective of the intent to return to security governance reflective of a constitutional democracy.

The Compilation does not consider the impact that the type of state and intelligence service (see Chapter 2, Figure 2.1, p18) has on intelligence oversight, mainly because

it assumes or takes for granted that oversight is functioning in a multi-party democratic state and in that sense it does not adequately account for intelligence oversight in a hybrid state such as South Africa, where the ruling party holds political dominance, and which is still coming to terms with the control, accountability, transparency and oversight as opposed to secrecy and blind allegiance to the party, government or state from a defunct era. This gap can go some way in explaining why South Africa, although having an intelligence oversight framework which meets good practice, still falls short in ensuring compliance by the intelligence services. It confirms Born & Johnson's (in Born et al, 2005: 238) assertion that effective oversight depends on more than good practice, it requires authority or legal and other powers, the ability, seated in resources and expertise, along with attitude and willingness, to undertake oversight. Effective intelligence oversight is the sum total of good practice and authority, powers, ability, resources and the will to act.

6.5 Recommendations

The recommendations of the HLRP on SSA should be implemented as a matter of priority and to its fullest extent. Doing so would elevate the intelligence services to a level of what is expected of a democratic state (in the context of the typology of state and intelligence services) while intelligence oversight will be aligned to good practice.

Assessing the complete South African intelligence system against the 35 Practices of the Compilation of Good Practices for Intelligence Services and their Oversight should be undertaken as a useful aid in intelligence reform and to assess the standing of the South African intelligence system.

This study focussed on intelligence oversight mechanisms, which is only addressed as a single chapter in the report of the HLRP on SSA. The recommendations on SSA as well as executive and legislative role players should be subject to further interrogation.

The independence, resourcing and capacitation of both the JSCI as well as the OIGI have grown in significance and models which would address these could be investigated and proposals made. The feasibility of aligning the OIGI with the Chapter

9 Institutions, as mechanisms which supports democracy, can be investigated in this regard.

Training in intelligence oversight is an area which has not been interrogated exhaustively. The Compilation does not include it as a practice (hence the inclusion as a modification). Consideration should be given to investigate its possible inclusion as a further field of study. Given the importance of adequately resourcing and empowering intelligence oversight, the capacitation of Members of Parliament, who serve on the JSCI, along with the IGI and their oversight personnel, should be prioritised. In this regard consideration should be given to the development of tailor-made specific education, training and development programmes for oversight functionaries.

The link between internal control and external oversight in South Africa should be interrogated further.

Hindrances to legislative oversight as identified by Born and Wetzling (in Johnson, 2007), and their manifestation in South Africa, could be further explored.

Investigate the identification of intelligence failures from an oversight perspective.

Testing Born and Johnson's (in Born et al, 2005: 238) assertion that effective oversight depends on more than good practice, it requires authority or legal and other powers, the ability, seated in resources and expertise along with attitude and willingness to undertake oversight would be a useful field of further study.

The development of intelligence and security sector oversight, as part of the AU SSR should be monitored. In this regard the UN/DECAF Compilation and the modified toolkit (as developed in this study) may be useful tools in contributing to security sector reform in the AU and its member states.

6.6 Conclusion

The findings and recommendations of the HLRP on SSA, on their own, would not

constitute the basis for a framework of intelligence oversight, but the implementation of its recommendations would, along with the existing intelligence oversight framework, constitute such a framework. The framework should however be complimented by authority, ability as well as willingness, attitude and integrity for it to be effective.

Effective oversight is the sum total of good practice and authority, ability as well as willingness, attitude and integrity. While the focus is on good practice it needs to be expanded to ensure that ability, willingness, attitude and integrity is also cultivated. Only then will South Africa have an effective intelligence oversight framework.

It is the contention of this study that the recommendations on intelligence oversight made by the HLRP on SSA could constitute a framework for intelligence oversight in South Africa. The findings of this study as well as recommendations will go some way in developing a framework for intelligence oversight that is best suited to South Africa.

BIBILIOGRAPHY

Africa, S. 2006. *Policy for Managing Access to Information in Post-Apartheid South Africa.* Thesis: PHD in Management. Johannesburg. University of the Witwatersrand.

Africa, S. 2009. *Well-Kept Secrets The right of access to information and the South African Intelligence Services.* Johannesburg & Maputo. Institute for Global Dialogue and Friedrich Ebert Stiftung.

Africa, S. and Kwadjo, J. (editors) 2009. *Changing Intelligence Dynamics in Africa*. Birmingham. African Security Sector Network (ASSN) and Global Facilitation Network for Security Sector Reform (GFNSS).

Africa, S. 2011. *The Transformation of the South African Security Sector: Lessons and Challenges.* Geneva. Centre for the Democratic Control of the Armed Forces (DCAF).

Africa, S. 2012. *The Policy Evolution of the South African Civilian Intelligence Services 1994 to 2009 and Beyond*. Pretoria. Institute for Strategic and Political Affairs.

Africa, S. 2019. *Financial Oversight of the Civilian Intelligence Services in South Africa. Strategic Review for Southern Africa* in Strategic Review for Southern Africa, December, Vol 41 no 2. Pretoria. University of Pretoria.

African Union (AU). 2014. *African Union Policy Framework on Security Sector Reform (SSR) Adopted at the 20th Ordinary Session of the Assembly of the Union, Addis Ababa, Ethiopia, 27-28 January 2013.* Addis Ababa. Defense and Security Division (DSD) of the African Union Commission (AUC).

Ahmed, S. 1999. *Being Intelligent about Intelligence: SA Parliamentary Oversight* in South African Journal of International Affairs (SAJIA). Vol 6. Issue 2. http://www.tandfonline.com. Published online 11 November 2009. Downloaded on 18 June 2015.

Amabhungane and Another v Minister of Justice and Correctional Services, Minister of State Security and Minister of Communications and others. 4 February 2021. Republic of South Africa Constitutional Court. Johannesburg. https://saflii.org.za. Downloaded on 19 May 2021.

Baldino, D. (editor). 2010. *Democratic Oversight of Intelligence Services*. New South Wales. The Federation Press.

Bentley, K. (et al). 2013. *Falls the Shadow Between the promise and the reality of the South African Constitution.* Cape Town. UCT Press.

Boonzaaier, D. 2021. *Binnegevegte het die polisie verlam.* https://netwerk24.com. 25 July 2021. Downloaded on 27 July 2021.

Born, H. and Leigh, I. 2005. *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies.* Oslo. Publishing House of the Parliament of Norway.

Born, H. (et al). 2005. *Who's Watching the Spies? Establishing Service Intelligence Accountability*. Washington D.C. Potomac Books Inc.

Born, H. (et al). 2011. *International Standards Compilation of Good Practices for Intelligence Agencies and their Oversight Report to the UN Human Rights Council by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.* Geneva. DCAF.

Born, H. and Wills, A. (editors). 2012. *Overseeing Intelligence Services A Toolkit.* Geneva. DCAF.

Burger, D. (ed). 2008. *South Africa Yearbook 2007/08.* Pretoria. GCIS.

Caparini, M. and Born, H. (editors). 2016. *Democratic Control of Intelligence Services Containing Rogue Elephants.* New York. Routledge.

Cawthra, G. (ed). 2009. *African Security Governance Emerging Issues.* Johannesburg. Wits University Press, P&DM and Friedrich Ebert Stiftung.

Cawthra, G. 2013. *National Security and the Right to Information The Case of South Africa*. South African Consultative Conference on National Security and Right to Information Principles. Graduate School of Public and Development Management. 26 February 2021. Johannesburg. University of Witwatersrand.

Commission of Inquiry into State Capture. 2021. *Media Advisory: Commission of Inquiry resumes on 25 January 2021.* https://www.sastatecapture.org.za. 24 January 2021. Downloaded on 17 June 2021.

Cilliers. J. 2021. *ISS Today South Africa's security sector is in crisis – reform must start now.* https://issafrica.org.za. 21 July 2021. Downloaded on 28 July 2021.

Conte, S. L. 2017. *What is the difference between "best practice" and "good practice"?* https://www.projectmanagement.com. 2 May 2017. Downloaded on 25 June 2021.

Corruption Watch. 2018. *Toxic Mdluli Era Finally Comes to an End.* https://www.corruptionwatch.org. 18 January 2018. Downloaded on 23 November 2020.

Corruption Watch. 2019. *Zondo Commission – intelligence services restructured to protect the state, says Shaik.* https://www.corruptionwatch.org.za . Downloaded on 27 November 2020.

Daugherty, W.J. 2004. *Executive Secrets Covert Action & the Presidency.* Lexington, Kentucky. The University Press of Kentucky.

Davis, R. 2019. *Days of Zondo: Bheki Cele was paid to approve restructuring of Crime Intelligence, claims Hawks Investigator.* https://www.dailymaverick.co.za. 19 September 2019. Downloaded on 27 November 2020.

Defence Web, 2010. *White Paper on Intelligence under review*. https://www.defenceweb. 7 May 2010. Downloaded on 12 October 2020.

Defence Web. 2020. SANDF could be next in Zondo Commission's sights. https://www.defenceweb.co.za. 26 October 2020. Downloaded on 23 November 2020.

Department of Defence (DOD). 2021. *Media statement: The Minister of Defence and Military Veterans Task Team on Defence Intelligence Matters.* 4 March 2021. SANDF Facebook. Accessed on 4 March 2021.

De Villiers, J. 2021a. Was this a coup attempt? We speak to SSA spokesperson Mava Scott. https://news24.co.za. 16 July 2021. Downloaded on 21 July 2021.

De Villiers, J. 2021b. *Could the unrest have been avoided if a 2018 SSA report had been implemented? We speak to Jane Duncan.* https://news24.co.za. 23 July 2021. Downloaded on 26 July 2021.

Dlomo, D.T. 2004. *An Analysis of Parliamentary Oversight in South Africa with Specific Reference of the Joint Standing Committee on Intelligence*. MA Mini-dissertation. Pretoria. University of Pretoria.

Dolley, C. 2021. Spooks get another lashing – Concourt rules aspects of eavesdropping and spying indeed unlawful. https://www.dailymaverick.co.za. 4 February 2021. Downloaded on 6 February 2021

Dube, F. B. 2013. *Accountability and Oversight of Intelligence Services in South Africa post 1994*. MA Dissertation. Johannesburg. University of Witwatersrand.

Duncan, J. 2011. *How Deep is the Rot in South Africa's Intelligence Services?* The South African Civil Society Information Service. https://www.sacsis.org.za. 23 October 2011. Downloaded on 16 February 2021.

Du Preez, M. 2021. *The fatal flaw in Project State Capture.* https://www.news24.com. 12 February 2017. Downloaded on 17 February 2021.

Evans, S. 2019. *Mdluli letter shows Crime Intelligence was involved in party politics, ANC conferences – Hawks detective.* https://www.news24.com. 20 September 2019. Downloaded on 27 November 2020.

Farson, S. and Phythian, M. (editors). 2011. *Commissions of Inquiry and National Security: Comparative Approaches*. Santa Barbara, California. ABC-CLIO.

Felix, J. 2020. *Probe into the involvement of ministers in spy operations, Parliament told.* https://news24.com. 3 November 2020.

Freedman, W. (Prof). 2013. (Reprinted 2017). *Juta's Pocket Companions Understanding the Constitution of the Republic of South Africa.* Cape Town. Juta Law.

Friedman, S. 2021. *Spy Agency abuse shows oversight is needed.* https://www.iol.co.za/star. 5 February 2021. Downloaded on 17 February 2021.

Gill, P. 2003. *Democratic and Parliamentary Accountability of Intelligence Services after September 11th. Working Paper no 103.* Geneva. DECAF.

Gill, P. and Phythian, M. 2012. *Intelligence in an Insecure World.* Cambridge. Polity Press.

Goldman, Z.K. and Rascoff, S.J. (eds) 2016. *Global Intelligence Oversight Governing Security in the Twenty-First Century.* New York. Oxford University Press.

Hadebe, H. 2021. Why bare state secrets? https://iol.co.za/thestar. 2 February 2021. Downloaded on 4 February 2021

Haffajee, F. 2021. *Suspended ANC members Carl Niehaus and Andile Lungisa on WhatsApp group for planning riots and looting.* https://dailymaverick.co.za. 29 July 2021. Downloaded on 30 July 2021.

Hansard. 2010. *Appropriation Bill Debate on Vote No 09 – National Treasury (State Security)*. 5 May 2010. https://www.parliament.gov.za. Cape Town. Parliament of the Republic of South Africa. Downloaded 11 May 2021.

Hansard. 2014. *Appropriation Bill Debate on Vote No 10 – National Treasury (State Security)*. 23 July 2014. https://www.parliament.gov.za. Cape Town. Parliament of the Republic of South Africa. Downloaded on 11 May 2021.

Hansard. 2018a. *State of the Nation Address by the President of the Republic of South Africa.* 16 February 2018. https://www.parliament.gov.za. Cape Town. Parliament of the Republic of South Africa. Downloaded on 17 June 2021.

Hansard. 2018b. *Proceedings of the National Assembly: Questions to the President of the Republic.* 8 May 2018. https://www.parliament.gov.za. Cape Town. Parliament of the Republic of South Africa. Downloaded on 17 June 2021.

Hansard. 2018c. *Appropriation Bill Debate on Vote No 07 – National Treasury (State Security)*. 18 May 2018. https://www.parliament.gov.za. Cape Town. Parliament of the Republic of South Africa. Downloaded on 11 May 2021.

Hansard. 2021. *Appropriation Bill Debate on Vote No 08 – National Treasury (State Security)*. 1 June 2021. https://www.parliament.gov.za. Cape Town. Parliament of the Republic of South Africa. Downloaded on 17 June 2021.

Hastedt, G.P. and Knickrehm, K.M. 1991. *Dimensions of World Politics.* Harper New York. Collins.

Head, T. 2019. *Who, or where, is Thulani Dlomo? Zuma's "top spy" missing since January.* https://www.thesouthafrican.com. 26 September 2019. Downloaded on 24 November 2020.

Heinecken, L. 2021. *Military not a magic bullet: South Africa needs to do more for long term peace.* https://theconversation.com. 27 July 20201. Downloaded on 29 July 2021.

Hutton, L. 2007. *Looking Beneath the Cloak – An Analysis of Intelligence Governance in South Africa* in ISS Occasional Paper 154. Pretoria. Institute for Security Studies (ISS).

Hutton, L. (editor) 2009a. *To Spy or not to Spy Intelligence and Democracy in South Africa* in ISS Monograph no 157, February 2009. Pretoria. ISS.

Hutton, L. 2009b. *Intelligence Accountability in Africa* in ISS Policy Brief nr 2. June 2009. Pretoria. ISS.

Independent Police Investigative Directorate (IPID). 2017. *Independent Police Investigative Directorate Annual Report 2016/17.* Pretoria. Department: IPID.

Independent Police Investigative Directorate (IPID). 2018. *Independent Police Investigative Directorate Annual Report 2017/18.* Pretoria. Department: IPID.

Independent Police Investigative Directorate (IPID). 2020. *Independent Police Investigative Directorate Annual Report 2019/20.* Pretoria. Department: IPID.

International Review Agencies Conference (IRAC). 2006. *Balancing National Security and Constitutional Principles within a Democracy*. 2-4 October 2006. Cape Town.

Johnson, L.K. (editor). 2007. *Handbook of Intelligence Studies.* New York. Routledge.

Kennedy, W.V. et al, 1987. *Intelligence Warfare Penetrating the secret world of today's advanced technology conflict.* New York. Crescent Books.

Kretzman, S. 2021a. Meddling ministers and dodgy spooks: Inspector-General of Intelligence lays bare his woes to Zondo. https://dailymaverick.co.za. 21 April 2021. Downloaded on 4 May 2021.

Kretzman, S. 2021b. *Spy watchdog Dintwe spells out how Bongo and Fraser tried to derail his SSA investigations and weaken the IG Office.* https://dailymaverick.co.za. 21 April 2021. Downloaded on 4 May 2021.

Kruys, G.P.H. 2006. *Intelligence Failures: Causes and Contemporary Case Studies* in Strategic Review for Southern Africa. No 28 (1). Institute for Security Studies. Pretoria. University of Pretoria.

Lefebvre, S. 2017. *Reconciling Democracy and the Protection of State Secrets in South Africa.* International Journal of Intelligence and Counter Intelligence. Vol 3. No 3. London. Routledge.

Mabuza, E. 2020. *How Richard Mdluli bent the system*. https://www.timeslive/sunday-times. 4 October 2020. Downloaded on 23 November 2020.

Mahlati, Z. 2019. *Zondo Commission hears of abuse of crime intelligence secret service account*. www.iol.co.za . 17 September 2019. Downloaded on 23 November 2020.

Marais, N. 2021. *State Security Agency has become a source of embarrassment – it's time for our spies to come in from the cold.* https://dailymaverick.co.za. 3 May 2021. Downloaded on 4 May 2021.

Matthews J. (et al) 2008. *Intelligence in a Constitutional Democracy Final Report to the Minister for Intelligence Services, the Honourable Mr Ronnie Kasrils, MP.* Pretoria.

Maromo, J. 2018. *Inspector General for Intelligence says probe on Fraser still on.* https://www.iol.co.za. 19 April 2018. Downloaded on 11 December 2020.

Masiapato, N.M. 2018. *Cooperation of South African Democratic Intelligence Oversight Structures for Good Governance*. PHD Thesis. University of Johannesburg. Johannesburg.

Merten, M. 2019. *Former special ops Boss Thulani "Silence" Dlomo dismissed by State Security Agency.* www.dailymaverick.co.za. 15 October 2019. Downloaded on 11 December 2020.

Mitchley, A. & Chabalala, J. 2018. *Arthur Fraser vs Inspector General of Intelligence in court over security clearance.* https://www.mg.co.za. 17 April 2018. Downloaded on 11 December 2020.

Mohammed, N. 2017. *What is the difference between "best practice" and "good practice"?* https://www.projectmanagement.com. 2 May 2017. Downloaded on 25 June 2021.

Morningside News. 2017. *The Principal Agent Network (PAN) Dossier: Zuma and Mahlobo knew about Arthur Fraser's Rogue Intelligence Programme.* https://www.morningsidenews.co.za. 6 December 2017. Downloaded on 23 November 2020.

Mtabane, B. 2016. *Fill Inspector General of Intelligence post urgently – R2K.* https://www.r2k.org.za. 23 April 2016, updated 27 July 2016. Downloaded 11 December 2020.

Mufamadi, S. et al. 2018. *Report of the High Level Review Panel on SSA.* Pretoria.

Mvumvu, Z. 2020. *Zuma, Dlomo turned SSA special ops into "parallel" intelligence unit Mr "Y" lifts the lid on unit's 'diversion of mandate' at state security enquiry.* www.timeslive.co.za . 19 February 2020. Downloaded on 24 November 2020.

Nathan, L. 2007. *No Ownership, No Commitment: A Guide to Local Ownership of Security Sector Reform.* Birmingham. University of Birmingham: Global Facilitation Network on Security Sector Reform (2nd Edition).

Nathan, L. 2010. *Lighting up the intelligence community: An agenda for intelligence reform in South Africa* in Africa Security Review 18.1 Pretoria. ISS.

Nathan, L. 2017. *Nobody keeps an eye on the spies.* https://thecitizen.co.za. 4 October 2017. Downloaded 17 February 2021.

Netshitenzhe, T.E. 2005. *A Comparative Analysis of the Roles and Functions of the Inspector·General of Intelligence with Specific Reference to South Africa*. MA Mini Dissertation. Pretoria. University of Pretoria.

Newman, G. 2021. *SA police failures demand urgent reform before it's too late.* https://issafrica.org. 28 July 2021. Downloaded on 30 July 2021.

Njenje, L. 2019. *Judicial Commission of Inquiry into Allegations of State Capture, Corruption, and Fraud in the Public Sector including Organs of State. Exhibit PP2 Lizo Njenje: Affidavit.* 20 August 2019. https://www.statecapture.org.za. Downloaded on 23 November 2020.

Nicholson, G. 2021. Looting at intelligence agencies flourished while politicians failed their oversight role. https://www.dailymaverick.co.za. 13 May 2021. Downloaded on 17 May 2021.

Nkomo, P. 2012. *The Police Commissioner's dirty secrets.* https://showme.co.za. April 2012. Downloaded on 23 November 2020.

Ngatane, N. 2021. *Zuma usurped power of legislature with proclamation on intelligence, Zondo hears.* https://ewn.co.za. 25 January 2021. Downloaded on 17 February 2021.

O'Brien, K.A. 2003. *Controlling the Hydra: An Historical Analysis of South African Intelligence Oversight "Making Intelligence Accountable: Executive and Legislative Oversight of Intelligence Services".* (Geneva) DCAF; The Norwegian Parliamentary Intelligence Oversight Committee (Oslo); Human Rights Centre, Department of Law, University of Durham.

Office of the Inspector General of Intelligence (OIGI). 2006. *Executive Summary of the Final Report on the Findings of an Investigation into the Legality of the Surveillance Operations Carried Out by the NIA on Mr S Macozoma. Extended Terms of Reference Report on the Authenticity of the Allegedly Intercepted e-mails.* Media briefing 23 March 2006.

Potgieter, De Wet. 2012. *The spy wars continued: Crime Intelligence in Mdluli Turmoil.* https://www.dailymaverick.co.za. 12 December 2012. Downloaded on 27 November 2020.

Presidency of South Africa. 2021. *Statement by President Cyril Ramaphosa on changes to the National Executive, Union Buildings, Tshwane.* www.thepresidency.gov.za. 5 August 2021. Downloaded on 6 August 2021.

Puren, S. 2020. *"Fluitjieblasers" se Korrupsie, plundering volop in weermag.* https://maroelamedia.co.za/2020/10/20. 20 October 2020. Downloaded 27 November 2020.

Qukula, Q. 2019. Former intel boss Mo Shaik recounts how calls for Gupta probe led to his axing. https://www.702.co.za. 25 November 2019. Downloaded on 23 November 2020.

Republic of South Africa. 1969. *Secret Services Special Account Act 81 of 1969.* Pretoria. Government Printers.

Republic of South Africa. 1974. *Defence Special Account Act 6 of 1974.* Pretoria. Government Printers.

Republic of South Africa. 1978. *Secret Services Account Act 56 of 1978.* Pretoria. Government Printers.

Republic of South Africa. 1994. *Public Protector Act 23 of 1994.* Pretoria. Government Printers.

Republic of South Africa. 1994. *Intelligence Oversight Act, Act 40 of 1994*. Pretoria. Government Printers.

Republic of South Africa. 1994. *National Strategic Intelligence Act, Act 39 of 1994*. Pretoria. Government Printers.

Republic of South Africa. 1994. *White Paper on Intelligence*. Pretoria. Government Printers.

Republic of South Africa. 1995. *Auditor General Act 12 of 1995.* Pretoria. Government Printers.

Republic of South Africa. 1996. *Constitution of the Republic of South Africa, Act 108 of 1996*. Pretoria. Government Printers.

Republic of South Africa. 1999. *The Public Finance Management Act 1 of 1999.* Pretoria. Government Printers.

Republic of South Africa. 2002. *Defence Act 42 of 2002*. Pretoria. Government Printers.

Republic of South Africa. 2002. *Regulation of Interception of Communication Act 70 0f 2002.* Pretoria. Government Printers.

Republic of South Africa. 2004. *The Public Audit Act 25 of 2004.* Pretoria. Government Printers.

Republic of South Africa. 2011. *The Independent Police Investigative Directorate Act 1 of 2011.* Pretoria. Government Printers.

Republic of South Africa. 2013. *General Intelligence Laws Amendment Act 11 of 2013*. Pretoria. Government Printers.

Republic of South Africa. 2013. *South African Human Rights Commission Act 40 of 2013.* Pretoria. Government Printers.

Republic of South Africa. 2020. *Proclamation no 13 of 2020 by the President of the Republic of South Africa.* Government Gazette. No 43083. 10 March 2020. Pretoria. Government Printers.

Scheinin, M. 2010. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight.* 5 May 2010. UN Human Rights Council. New York.

Scheinin, M. *Curriculum Vitae: Martin Scheinin. European University Institute.* https://www.eui.eu . Downloaded on 7 March 2021.

Shaik, R. 2019. *Judicial Commission of Inquiry into Allegations of State Capture, Corruption, and Fraud in the Public Sector including Organs of State. Exhibit PP1 Rieaz Shaik: Affidavit.* 21 November 2019. https://www.statecapture.org.za. Downloaded on 23 November 2020.

Sidimba, L. 2021. *Ministers Cwele, Mahlobo and Bongo abused spy agency, 'Ms K' tells Zondo Commission.* https://www.iol.co.za. 27 January 2021. Downloaded on 29 January 2021.

South African Defence Force. 1981. *South African Defence Force Intelligence Dictionary.* Pretoria. Military Intelligence Division/ Directorate Language Services. Pretoria.

South African Defence Force. 1993. *Militêre Woordeboek (MW) SA Weermag/ Military Dictionary (MD) SA Defence Force.* Pretoria. Directorate Language Services.

South African Government. 2010. *Public Protector, Inspector-General of Intelligence sign Memorandum of Understanding (MOU).* https://www.gov.za. 15 November 2010. Downloaded on 11 December 2020.

South African Government News Agency (SAGNA). 2017. *New Appointment: Inspector-General of Intelligence.* https://www.sanews.gov.za. 13 March 2017. Downloaded 11 December 2020.

South African Military Ombud. 2020. *Annual Report 2019/20 South African Military Ombud.* Pretoria. Department of Defence.

Steenhuisen, J. 2018. *Does Fraser have a new President to keep?* https://www.da.org.za . 3 October 2018. Downloaded on 23 November 2020.

Stubbe, D. 2014. *DA: Dirk Stubbe: Address by Democratic Alliance Shadow Minister of State Security, during the delivery of the State Security Budget Vote, Parliament, Cape Town (23/07/2014).* https://www.polity.org.za. Downloaded on 20 February 2021.

Thamm, M. 2021a. *DM 168 Analysis Zuma's Spy State: A decade of unfettered surveillance, secrets, lies and lootings propped up by a private army of spies.* https://www.dailymaverick.co.za. 30 January 2021. Downloaded on 16 February 2021.

Thamm, M. 2021b. *Ramaphosa asks for documents implicating senior leadership in alleged R45m bid to defraud Crime intelligence.* https://www.dailymaverick.co.za. 16 February 2021. Downloaded on 16 February 2021.

Thamm, M. 2021c. *Dintwe dishes the State Capture dirt despite concerted attempts to stop him.* https://www.dailymaverick.co.za. 1 May 2021. Downloaded on 4 May 2021.

Thamm, M. 2021d. Nine lost days: SA government was uniquely placed TO STOP THE July insurrection – but it didn't. https://www.dailymaverick.co.za. 29 July 2021. Downloaded on 4 30 July 2021.

Thamm, M. 2021e. *Ramaphosa takes direct control of security agencies after years of profligate rogue political operations.* https://www.dailymaverick.co.za. 5 August 2021. Downloaded on 6 August 2021.

Tshabalala, M. 2020. *Intra-ANC factionalism within SANDF a real concern.* Sowetan. 9 October 2020.

TimesLive. 2018. *Hands off the Inspector General of Intelligence! Fire Arthur Fraser: R2K.* https://www.timeslive.co.za. 11 April 2018. Downloaded 11 December 2020.

TimesLive. 2021a. Ayanda Dlodlo and Bheki Cele have some questions to answer. https://ww.timeslive.co.za. 12 July 2021. Downloaded 21 July 2021.

TimesLive. 2021b. *Thandi Moidise calls for an extraordinary parliament debate on violent unrest.* https://timeslive.co.za. 22 July 2021. Downloaded 23 July 2021.

Tsotetsi, D. 2021. *Ramaphosa Administration must act on Mufamadi Report to reform State Intelligence.* https://www.sabc.co.za. 22 July 2021. Downloaded on 23 July 2021.

Van den Berg, M.A. 2014. *The Intelligence Regime in South Africa (1994-2014): An Analytical Perspective*. MA Dissertation. Potchefstroom. North-West University.

Venter, A. (ed) 1989. *South African Government and Politics An Introduction to its Institutions, Processes and Policies*. Johannesburg. Southern Book Publishers.

Wa Afrika, M. & Ngoepe, K. 2020. *SANDF is "rotten to the core", says retired major-general.* https://www.iol.co.za/sundayindependent. 20 October 2020. Downloaded on 27 November 2020.

Wa Afrika et al. 2019. *How crime slush fund was looted.* https://www.iol.co.za/sundaytribune. 22 September 2019. Downloaded on 27 November 2020.

Wasemiller, A.C. 1994. *The Anatomy of Counterintelligence The essentials of organising a counterintelligence service.* https://www.cia.gov/library. Downloaded 14 March 2008.

Wick, J. 2021. *Top Secret: Dodgy ANC Nasrec 'cash for votes' investigation stalled once more.* https:// www.news24.co.za. 17 February 2021. Downloaded on 17 February 2021.

Wills, A. 2007. *Understanding Intelligence Oversight.* Geneva. Centre for the Democratic Control of the Armed Forces (DCAF).

APPENDIX A

SUMMARY OF THE FINDINGS AND RECOMMENDATIONS OF THE HLRP ON SSA (Mufamadi et al, 2018: 3-10)

2.1National Security Strategy

The Panel recommends the urgent development of a NSS as an overriding basis for redefining and refining the concepts, values, policies, practices and architecture involved in South Africa's approach to security. Such a strategy should be widely consulted with the public and Parliament before formal approval.

2.2 Architectural Review

The Panel recommends that, on the basis of the above National Security Strategy and other considerations, there is a comprehensive review of the architecture of the South African security community which considers, inter alia:

a) The separation of the SSA into two services - a domestic and a foreign service – with maximum or, preferably, total separation.

b) Locating the Coordinator for Intelligence and the NICOC analysis arm in the Office of the Presidency.

c) Formally re-establishing the National Security Council.

d) Refining the mandates of the intelligence departments, including defence intelligence and crime intelligence, to ensure minimum duplication and maximum coordination.

2.3 Implementation Task Team

The Panel recommends that the President appoints a Task Team, preferably on a fulltime contractual basis, to unpack the above and other recommendations of the Panel into a concrete plan of action; initiate, undertake and coordinate the above recommended reviews and oversee the implementation of their outcomes.

2.4 Investigations and Consequences

The Panel recommends that the President instructs the appropriate law enforcement bodies, oversight institutions and internal disciplinary bodies to investigate all manifest breaches of the law, regulations and other prescripts in the SSA as highlighted by this report with a view to instituting, where appropriate, criminal and/or disciplinary prosecutions.

In particular, the Panel recommends the establishment of a multidisciplinary investigation team to deal with the criminal investigations, and that a private advocate is appointed to conduct internal disciplinary hearings.

2.5 Panel records

The Panel recommends that the records of the work of this Panel be sealed and stored – including this report, documents submitted, panellists' and secretariat's notes, recordings of interviews etc – and made available as necessary for the work of the above-recommended task teams and investigation capacities.

2.6 Publication of Report

The Panel has temporarily classified this report as Secret in order to protect its contents from unauthorised disclosure until the President has had a chance to consider it and decide on further action.

The Panel recommends that the President considers declassifying this report and releasing it to the public or a redacted version thereof where some of its contents might be considered sensitive.

2.7 Detailed Recommendations

2.7.1 On Policy and Prescripts

a) Urgently draft a NSS, guided by the recommendations of this Panel, for consultation in Parliament and with the public as a basis for the further development of policy and prescript for the intelligence community.
b) On the basis of the revised NSS, bring the current White Paper up to date, retaining the basic vision, values and principles of the current Paper.
c) On the basis of the approved recommendations of this Review Report and a revised NSS and White Paper, establish a high-level task team to review all relevant legislation, regulation and directives. The team should include legal experts from outside the intelligence community, the State Law Advisors, functional and legal experts from within the intelligence community as well as experienced practitioners.
d) On POSIB, the President should consider whether the option of sending it back to Parliament for further consideration of the concerns about its constitutionality has been exhausted and, if so, to submit it to the Constitutional Court.
e) Urgently initiate a process to look into the implications of rescinding the Secret Services Act and, in the interim, ensure that the Council established by the Act is established and functioning.
f) Establish a process to investigate breaches of the Regulations and institute the necessary disciplinary processes.

2.7.2 On the Amalgamation of SASS and NIA into SSA

a) Serious consideration be given to once more separating the SSA into a foreign service and a domestic service but this time with maximum independence of each, with the minimum of shared services between them if at all.
b) The NCC, as a capacity that is supposed to focus exclusively on foreign signals intelligence, should be located inside the foreign service at least as an interim measure.
c) The President should establish a task team, comprised of expertise within and outside the SSA, to explore in detail the practical and other implications of the re-separation of the services and other possible architectural changes.

d) Any process of major changes to the SSA be thoroughly consulted and change-managed with Agency staff at all levels.
e) The titles ‘State Security Agency’ and ‘Minister/Ministry of State Security’ be changed to reflect the determination to return the role and philosophy of our democratic intelligence capacity back to their Constitutional origins.

2.7.3 On Structure

a) The pre-SDP structure should be immediately formally re-instituted and that necessary appointments be made to inject stability and purpose into the Agency and that, as far as possible, such appointments should not be in acting capacities.
b) No further restructuring of the Agency should take place until the restructuring task team recommended above has completed its work.
c) Management and staff displaced by the SDP process should be urgently reinstated or otherwise gainfully deployed and, where necessary, provided with re-training.
d) The one or more intelligence services arising from the possible outcomes of this review should go back to the ‘leanness’ and ‘meanness’ of the earlier days of civilian intelligence.

2.7.4 On Mandate and Capacity

a) As part of the community-wide architectural and legislative review recommended above, serious attention be given to clearer and more focused definitions of the mandate/s of any resulting service/s as well as other sections of the broader intelligence community.
b) As a matter of urgency, the leadership of the SSA take measures to address the capacity gaps in terms of people, financial and other resources in its provincial and foreign offices.
c) The SSA institute clear processes of interaction between its analysis and collecting arms and ensure these are effectively implemented.
d) Conduct an intensive evaluation of the quality of the SSA’s intelligence products through assessment of the products themselves and the surveying of a sample of the Agency’s clients.

e) An urgent policy review of the Agency's security vetting mandate be undertaken to consider the scope and reach of that mandate and to clearly identify the division between the normal probity checks of existing and prospective state employees to be undertaken by the employing departments and the more focused security competency vetting to be undertaken by the SSA.
f) The SSA should, as a matter of extreme urgency, resource and give priority to the further development and upgrading of the electronic vetting system to its full intended functionality.

2.7.5 On Controls

a) Urgently institute forensic and other investigations by the competent authorities into the breaches of financial and other controls identified by some of the information available to the Panel and other investigations, especially with regard to the PAN project and SO, leading to disciplinary and/or criminal prosecutions.
b) The task team recommended earlier to review legislation and prescripts relating to intelligence should include in their work a review of existing legislative and other controls governing the conduct of intrusive operations, including benchmarking with other appropriate jurisdictions.
c) In the meantime, the ministries of State Security and Justice should urgently attend to the strengthening of the capacity of the judicial authority established in terms of RICA and the expediting of the review of the RICA legislation.
d) The Ministry and the SSA should urgently conduct research to look into alternative payment methods to cash that provide the necessary protection of sensitive information, including benchmarking against the practice of foreign intelligence services to determine how to minimise the use of cash and to identify secure methods of non-cash methods for the movement of cash and making of payments.
e) The Agency should immediately ensure that the rules governing the temporary advance system are tightened up and consistently implemented, including introducing auditable methods for accounting for the expenditure of such advances, and should ensure there are routine and visible consequences for breaches of such rules and processes.

f) The Agency should institute disciplinary proceedings against all those found to have abused the temporary advances system and, where applicable, to recover monies resulting from such abuses.

g) As a matter of urgency, the Ministry and the Agency should review the SSA's annual planning process and its relation to the budgeting process that ensures clear accountability and manageability of budgeting, expenditure and performance against planning priorities and targets that are shareable with the AG, the JSCI and other relevant oversight bodies.

h) The Ministry and Agency should urgently find with the AG an acceptable method for the unfettered auditing of the Agency's finances including covert finances that leads to the absence of the standard qualification in the Agency's annual audits.

i) The Agency should institute measures to ensure a seamless interaction between the administrative (Finance, Procurement, Human Resources) and the operational arms of the Agency as concerns the accountability and compliance of the operational arms, ensuring, in particular, that the Agency's CFO has the same access to information as the director-general and Inspector-General.

j) The Ministry should establish a task team comprised of representatives of the Agency, retired practitioners, the legal profession and civil society to develop a policy document on achieving an appropriate balance between secrecy and transparency for the intelligence services, drawing on international comparisons, that leads practically to the development of appropriate prescripts and practices. Such a process should draw on previous reviews and commissions.

k) The Ministry should initiate a process together with the ministries of Finance, Defence and Police to explore the options and consequences for repealing the Security Services Special Account Act No. 81 of 1969 and the Secret Services Act, No. 56 of 1978 and design a process towards that end. In the interim, as recommended in Chapter 2, the Council established by this legislation is activated and functioning.

2.7.6 On the Executive

a) The current legislative provisions should be reviewed with regard to the Minister's powers as they relate to the administration of the service/s.

b) While the prerogative to appoint a head of service/s should remain with the President, such appointment should follow a similar process as currently being

undertaken for the appointment of the National Director of Public Prosecutions or as recommended in Chapter 13 of the National Development Plan.
c) The findings of the Panel and of the current investigation of the IG into the SO and related matters should form the basis for serious consequences for those involved in illegal activity, including, where appropriate, disciplinary and/or criminal prosecution.
d) The former head of SO should be withdrawn from his current position as a senior representative within government.

2.7.7 On Illegal Orders

a) Arising out of investigations following from this review and current or future investigations by the IGI, there should be firm consequences for those who issued manifestly illegal orders and those who wittingly carried them out.
b) An urgent process should be initiated, drawing on legal, intelligence and academic expertise, to develop a clear definition of manifestly illegal orders as applicable to the intelligence environment and to recommend procedures and processes for handling these. Such processes and procedures to include the consideration that *all* orders should be issued in writing and protection for those refusing to obey or reporting a manifestly illegal order.
c) On the basis of the outcome of recommendation b) above, as well as the broader review of relevant legislation and prescript arising from this report, there should be relevant amendments made to legislation, regulations and directives dealing explicitly with manifestly illegal orders and the processes for dealing with them, including providing for the criminalisation of the issuing of, or carrying out of, a manifestly illegal order.
d) In line with the recommendations contained in the chapter of this report dealing with Training and Development, the education, training and development of intelligence officers should ensure extensive knowledge and understanding of the constitutional, legislative and other prescripts relating to intelligence as well as the definition of, and procedures for dealing with, manifestly illegal orders.
e) In addition to d) above, there should be a compulsory induction programme for any member of the executive assigned with political responsibility for the intelligence services, including heads of Ministerial Services and advisors, as well as any newly-

appointed senior leaders of such services, that educates them on the relevant prescripts as mentioned above and on the nature of manifestly illegal orders and the consequences thereof.

f) Further, on the basis of the outcome of the process recommended in b) above, there should be an urgent, all-encompassing civic education campaign for all members of the service/s on the meaning of a manifestly illegal order and the processes for dealing with them.

2.7.8 On Training and Development

a) The establishment of an Advisory Panel, consisting of retired practitioners with training expertise, academics with expertise in security, a human resources specialist, an ICT expert, risk management expert and economist, to attend to, and ensure operationalisation of, the following:

• Review the vision and mission, scope and structure of a national intelligence training and education capacity for the intelligence community

• Confirm the intelligence doctrine, oriented towards the Constitution, and based on the revised White Paper, NSS and other relevant policies and prescripts.

• Develop appropriate curricula, including general, executive and specialised, continuous training and education, taking into account the differences of operating in the foreign and domestic terrains.

• Guide the establishment of a professional and appropriately trained and educated faculty (teaching and training staff) and management cadre.

• Develop an appropriate career advancement protocol to guide staff recruitment, development, deployment and promotion.

• Develop and confirm guiding values for intelligence training and education.

• Guide or develop exit options for existing staff and recognition and accommodation of former intelligence officers and officials if and where needed.

• Determine collaborations and partnerships with accredited academic institutions, select NGOs, specialist organisations and agencies, and relevant government training institutions.

• Review the appropriateness of the Mahikeng campus.

2.7.9 On Coordination

a) NICOC should be relocated to the Presidency to give it the necessary authority to ensure compliance by the intelligence departments with the prescripts on intelligence coordination.
b) The task team recommended above to look at the overall architecture and legislation of the intelligence and security community should factor in the recommendations of this Panel insofar as they relate to intelligence coordination and NICOC.
c) In the meantime, urgent measures should be put in place to ensure compliance by the intelligence services with the White Paper and legislative prescripts on intelligence coordination with consequences for non-compliance.

2.7.10 On Oversight

a) Urgently process and promulgate the regulations governing the functioning of the IGI.
b) Urgently institute a formal investigation into the issues surrounding the withdrawal of the IGI's security clearance.
c) Establish a task team to review and oversee the implementation of the recommendations of the 2006 and 2008 reviews insofar as they related to the IGI.
d) Propose a review of the functioning of the JSCI.
e) Given the demands of intelligence oversight, the idea of a dedicated capacity for the JSCI needs to be explored further.

APPENDIX B

COMPILATION OF GOOD PRACTICES ON LEGAL AND INSTITUTIONAL FRAMEWORKS FOR INTELLIGENCE SERVICES AND THEIR OVERSIGHT

(Born et al, 2011: 10-13; Scheinin, 2010:31-35)

Practice 1. Intelligence services serve an important role in protecting national security and upholding the rule of law. Their main purpose is to collect, analyse and disseminate information that assists policy-makers and other public entities in taking measures to protect national security. This includes the protection of the population and their human rights.

Practice 2. The mandates of intelligence services are narrowly and precisely defined in a publicly available law. Mandates are strictly limited to protecting legitimate national security interests as outlined in publicly available legislation or national security policies, and identify the threats to national security which intelligence services are tasked with addressing. If terrorism is included among these threats, it is defined in narrow and precise terms.

Practice 3. The powers and competences of intelligence services are clearly and exhaustively defined in national law. They are required to use these powers exclusively for the purposes for which they were given. In particular, any powers given to intelligence services for the purposes of counter-terrorism must be used exclusively for these purposes.

Practice 4. All intelligence services are constituted through, and operate under, publicly available laws which comply with the constitution and international human rights law. Intelligence services can only undertake or be instructed to undertake activities that are prescribed by and in accordance with national law. The use of subsidiary regulations that are not publicly available is strictly limited, and such regulations are both authorised by and remain within the parameters of publicly available laws. Regulations which are not made public do not serve as the basis for any activities which restrict human rights.

Practice 5. Intelligence services are explicitly prohibited from undertaking any actions which contravene the constitution or international human rights law. These prohibitions

extend not only to the conduct of intelligence services on their national territory but also to their activities abroad.

Practice 6. Intelligence services are overseen by a combination of internal, executive, parliamentary, judicial and specialized oversight institutions whose mandates and powers are based on publicly available law. An effective system of intelligence oversight includes at least one civilian institution which is independent from both the intelligence services and the executive. The combined remit of oversight institutions covers all aspects of the work of intelligence services including their compliance with the law; effectiveness and efficiency of their activities; their finances; and their administrative practices.

Practice 7. Oversight institutions have the power, resources and expertise to initiate and conduct their own investigations, as well as full and unhindered access to the information, officials and installations necessary to fulfill their mandates. Oversight institutions receive the full cooperation of intelligence services and law enforcement authorities in hearing witnesses, as well as obtaining documentation and other evidence.

Practice 8. Oversight institutions take all necessary measures to protect classified information and personal data to which they have access during the course of their work. Penalties are provided for the breach of these requirements by members of oversight institutions.

Practice 9. Any individual who believes that her/his rights have been infringed by an intelligence service is able to bring a complaint to a court or oversight institution, such as an ombudsman, human rights commissioner, or national human rights institution. Individuals affected by illegal actions of an intelligence service have recourse to an institution which can provide an effective remedy, including full reparation for the harm suffered.

Practice 10. The institutions responsible for addressing complaints and claims for effective remedy arising from the activities of intelligence services are independent from the intelligence services and the political executive. Such institutions have full and unhindered access to all relevant information; the necessary resources and expertise to conduct investigations; and the capacity to issue binding orders.

Practice 11. Intelligence services carry out their work in a manner which contributes to the promotion and protection of the human rights and fundamental freedoms of all individuals under the jurisdiction of the State. Intelligence services do not discriminate against individuals or groups on the grounds of their sex, race, colour, language, religion, political or other opinion, national or social origin, or other status.

Practice 12. National law prohibits intelligence services from engaging in any political activities, or from acting to promote or protect the interests of any particular political, religious, linguistic, ethnic, social or economic group.

Practice 13. Intelligence services are prohibited from using their powers to target lawful political activity or other lawful manifestations of the rights to freedom of association, peaceful assembly, and expression.

Practice 14. States are internationally responsible for the activities of their intelligence services, their agents, and any private contractors they engage, regardless of where these activities take place and who the victim of internationally wrongful conduct is. Therefore, the executive power takes measures to ensure and exercise overall control of and responsibility for their intelligence services.

Practice 15. Constitutional, statutory and international criminal law applies to members of intelligence services as it does to any other public official. Any exceptions which permit intelligence officials to take actions that would normally violate national law are strictly limited and clearly prescribed by law. These exceptions never allow the violation of peremptory norms of international law or of the human rights obligations of the State.

Practice 16. National laws provide for criminal, civil or other sanctions against any member, or individual acting on behalf of an intelligence service, who violates or orders an action which would violate national law or international human rights law. These laws also establish procedures to hold individuals to account for such violations.

Practice 17. Members of intelligence services are legally obliged to refuse superior orders which would violate national law or international human rights law. Appropriate protection is provided to members of intelligence services who do refuse orders in such situations.

Practice 18. There are internal procedures in place for members of intelligence services to report wrongdoing. These are complemented by an independent body that

has the mandate and access to the necessary information to fully investigate, and take action to address wrongdoing when internal procedures have proved inadequate. Members of intelligence services who, acting in good faith, report wrongdoing are legally protected from any form of reprisals. These protections extend to disclosures made to the media or the public at large if they are made as a last resort and pertain to matters of significant public concern.

Practice 19. Intelligence services and their oversight institutions take steps to foster an institutional culture of professionalism, based on respect for the rule of law and human rights. In particular, intelligence services are responsible for training their members on relevant provisions of national and international law, including international human rights law.

Practice 20. Any measures by intelligence services that restrict human rights and fundamental freedoms comply with the following criteria:

(a) They are prescribed by publicly available law that complies with international human rights standards;

(b) All such measures must be strictly necessary for an intelligence service to fulfill its legally prescribed mandate;

(c) Measures taken must be proportionate to the objective. This requires that intelligence services select the measure which least restricts human rights, and take special care to minimise the adverse impact of any measures on the rights of individuals, including in particular persons who are not suspected of any wrongdoing;

(d) No measure taken by intelligence services may violate peremptory norms of international law or the essence of any human right;

(e) There is a clear and comprehensive system for the authorisation, monitoring and oversight of the use of any measure which restricts human rights;

(f) Individuals whose rights may have been restricted by intelligence services are able to address complaints to an independent institution and seek an effective remedy**.**

Practice 21. National law outlines the types of collection measures available to intelligence services; the permissible objectives of intelligence collection; the categories of persons and activities which may be subject to intelligence collection; the threshold of suspicion required to justify the use of collection measures; the

limitations on the duration for which collection measures may be used; and the procedures for authorizing, overseeing and reviewing the use of intelligence collection measures.

Practice 22. Intelligence collection measures which impose significant limitations on human rights are authorized and overseen by at least one institution that is external to and independent from the intelligence services. This institution has the power to order the revision, suspension or termination of such collection measures. Intelligence collection measures that impose significant limitations on human rights are subject to a multi-level process of authorisation which includes approval within intelligence services, by the political executive, and by an institution which is independent from the intelligence services and the executive.

Practice 23. Publicly available law outlines the types of personal data which intelligence services may hold, and what criteria apply to the use, retention, deletion and disclosure of this data. Intelligence services are permitted to retain personal data that is strictly necessary for the purposes of fulfilling their mandate.

Practice 24. Intelligence services conduct regular assessments of the relevance and accuracy of the personal data which they hold. They are legally required to delete or update any information which is assessed to be inaccurate, or no longer relevant to their mandate, the work of oversight institutions or possible legal proceedings.

Practice 25. An independent institution exists to oversee the use of personal data by intelligence services. This institution has access to all files held by the intelligence services and has the power to order the disclosure of information to individuals concerned, as well as the destruction of files or personal information contained therein.

Practice 26. Individuals have the possibility to request access to their personal data held by intelligence services. Individuals may exercise this right by addressing a request to a relevant authority or through an independent data protection or oversight institution. Individuals have the right to rectify inaccuracies in their personal data. Any exceptions to these general rules are prescribed by law and strictly limited, proportionate and necessary for the fulfilment of the mandate of the intelligence service. It is incumbent upon the intelligence services to justify, to an independent oversight institution, any decision not to release personal information.

Practice 27. Intelligence services are not permitted to use powers of arrest and detention if they do not have a mandate to perform law enforcement functions. They are not given powers of arrest and detention if this duplicates powers held by law enforcement agencies that are mandated to address the same activities.

Practice 28. If intelligence services have powers of arrest and detention, they are based on publicly available law. The exercise of these powers is restricted to cases in which there is a reasonable suspicion that an individual has committed or is about to commit a specific criminal offence. Intelligence services are not permitted to deprive persons of their liberty simply for the purpose of intelligence collection. The use of any powers and arrest and detention by intelligence services is subject to the same level of oversight as applies to their use by law enforcement authorities, including judicial review of the lawfulness of any deprivation of liberty.

Practice 29. If intelligence services possess powers of arrest and detention they comply with international human rights standards on the rights to liberty and fair trial, as well as prohibition on torture, inhuman and degrading treatment. When exercising these powers, intelligence services comply with international standards set out in, inter alia, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the UN Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

Practice 30.–Intelligence services are not permitted to operate their own detention facilities or to make use of any unacknowledged detention facilities operated by third parties.

Practice 31. Intelligence-sharing between intelligence agencies of the same State or with any authorities of a foreign State is based on national law that outlines clear parameters for intelligence exchange, including the conditions which must be met for information to be shared; the entities with which intelligence may be shared; and the safeguards that apply to exchanges of intelligence.

Practice 32. National law outlines the process for authorizing both the agreements upon which intelligence-sharing is based and the ad hoc sharing of intelligence. Executive approval is needed for any intelligence-sharing agreements with foreign

entities, as well as for the sharing of intelligence which may have significant implications for human rights.

Practice 33. Before entering into an intelligence-sharing agreement or sharing intelligence on an ad hoc basis, intelligence services undertake an assessment of the counterpart's record on human rights and data protection, as well as the legal safeguards and institutional controls that govern the counterpart. Before handing over information, intelligence services make sure that any shared intelligence is relevant to the recipient's mandate, will be used in accordance with the conditions attached, and will not be used for purposes that violate human rights.

Practice 34. Independent oversight institutions are able to examine intelligence sharing arrangements and any information sent by intelligence services to foreign entities.

Practice 35. Intelligence services are explicitly prohibited from employing the assistance of foreign intelligence services in any way that results in the circumvention of national legal standards and institutional controls on their own activities. If States request foreign intelligence services to undertake activities on their behalf they require these services to comply with the same legal standards that would apply if the activities were undertaken by their own intelligence services.

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