



*Submission on*  
**INTELLIGENCE GOVERNANCE AND OVERSIGHT IN  
SOUTH AFRICA**

*To*  
**THE MINISTERIAL REVIEW COMMISSION ON  
INTELLIGENCE**

*By*  
**THE INSTITUTE FOR SECURITY STUDIES**

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**Note of Appreciation**

The Institute for Security Studies wishes to thank the Ministry for Intelligence Services and the Ministerial Review Commission on Intelligence for opening the debate on the governance and oversight of the intelligence sector in South Africa and for providing this opportunity for civil society to engage on these crucial matters.

*Among the increasingly intricate arsenals across the world, intelligence is an essential weapon, perhaps the most important. But it is, being secret, the most dangerous. Safeguards to prevent its abuse must be devised, revised and rigidly applied. But, as in all enterprises, the character and wisdom of those to whom it is entrusted will be decisive. In the integrity of that guardianship lies the hope of the free people to endure and prevail.*

Sir William Stephenson, *A Man Called Intrepid*, pXVI.  
The Globe Pequot Press (2000)

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## **LIST OF ABBREVIATIONS**

- ANC** – African National Congress
- ASIO** – Australian Security Intelligence Organisation
- AU** – African Union
- CI** – Crime Intelligence (South Africa)
- CIA** – Central Intelligence Agency (United States of America)
- DI** – Defence Intelligence (South Africa)
- FTA** – Free Trade Agreement
- IG** – Inspector General
- ISA** – Intelligence Services Act 65 of 2002
- ISOA** – Intelligence Services Oversight Act 40 of 1994
- ISS** – Institute for Security Studies
- JSCI** – Joint Standing Committee on Intelligence
- NCC** – National Communications Centre
- NEPAD** – New Partnership for Africa's Development
- NIA** – National Intelligence Agency
- NICOC** – National Intelligence Coordinating Committee
- NSIA** – National Strategic Intelligence Act 39 of 1994
- PSA** – Public Service Act 103 of 1994
- SACU** – Southern African Customs Union
- SASS** – South African Secret Service

## EXECUTIVE SUMMARY

The South African intelligence community was rocked by a high-level scandal relating to the misuse of position and power and allegations of the subversion of the national intelligence apparatus to personal and group political interest in 2005. A brief analysis of the outcomes of the Project Avani scandal reveals the following fundamental gaps in the oversight and governance of the intelligence sector:

- A lack of sufficient preventative and proactive controls on politically sensitive operations
- A lack of sufficient control on the use of intrusive methods of investigation
- Insufficient control of operational protocols
- The continued politicisation of domestic intelligence operations and the potential for misuse of authority in the conduct of political intelligence operations
- Flaws in the practice of having a senior intelligence official serving in two posts

This scandal also presented an opportunity to practically test the effectiveness of the oversight mechanisms. To this end, the Inspector General, the executive and the JSCI all contributed towards defining the complimentary and separate checks-and-balance roles that the different players undertake. The Minister took decisive action and the IG was deployed accordingly. The JSCI interrogated the IG's report and it seems that there is sufficient oversight and control at executive and parliamentary levels once malpractice is suspected or discovered.

This episode of misconduct has spurred the Minister for Intelligence Services to appoint the Ministerial Review Commission on Intelligence as an instrument to review the mechanisms for control of the civilian intelligence agencies. The special requirements and features of the intelligence sector present a unique set of challenges to democratic control and oversight and it is within this context that the ISS is making this submission. Our research has focused on the mechanisms for control of the intelligence services, namely: the Joint Standing Committee on Intelligence; the judiciary; the executive and the Inspector General for Intelligence.

In terms of the legislative oversight of the intelligence services, our research has revealed that in general the Joint Standing Committee on Intelligence is fulfilling its legal

mandate and is functioning in an adequate manner. In order to improve on the ability of the JSCI to conduct democratic oversight and to hold the intelligence community to account, the following recommendations can be made:

1. The Chairperson of the Joint Standing Committee on Intelligence should be a parliamentarian from an opposition party.
2. The members of the Joint Standing Committee on Intelligence should have limited participation in other parliamentary committees.

Judicial oversight of the intelligence services is essential to ensure that the intelligence community functions in compliance with the rule of law and legal standards. As such, the mechanisms for control at judicial level include the granting of warrants and authorising intrusive methods of investigation. The Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 provides regulations for the issuing of directions authorising the interception of communication and communication-related information. This detailed and comprehensive legislation adequately outlines the requirements for the granting of such authorisation. It can, therefore, be concluded that there are sufficient provisions for the effective conduct of judicial oversight and this mechanism for control needs only to be utilised by the intelligence services in order to contribute to the accountable and transparent governance and conduct of intelligence operations.

In terms of executive control of the intelligence services, the Minister should be empowered by national legislation, to take responsibility for formulating policy, to receive reports from the agencies and have the right to approve matters of political sensitivity or undertakings that affect fundamental rights. The Minister can only reliably be called to account by Parliament for the actions of the intelligence agencies, if the Minister has real powers of control and adequate information about actions taken in his/ her name. In the South African context, although the legislation provides the Minister with sufficient powers, there is a critical lack of specificity relating to the exercise of executive powers especially in terms of the conduct of domestic intelligence operations of a politically sensitive nature. Following research into comparative international practices in terms of executive control of politically sensitive intelligence operations, the subsequent recommendations can be made:

1. It should be legislated that Ministerial authorisation is required for activities related to the collection of intelligence pertaining to South African citizens.
2. The Minister should, periodically, review the powers and functions of the Director-General of NIA in relation to the conduct of politically sensitive intelligence operations
3. The Minister should provide guidelines as to the functions and powers of NIA relating to the collection of political intelligence within South Africa.

A further area of interest in the discussion of executive oversight of intelligence, as highlighted by the recent events relating to the dismissal of the Director-General of the National Intelligence Agency, is the criteria and process for the appointment and dismissal of such senior staff. A review of the current legislation and analysis of international alternatives, resulted in the generation of the following recommendations:

1. Review the current criteria for the appointment and dismissal of Directors-General in the intelligence services, including the possibility of establishing clearer legal stipulations for procedure and causes of dismissal.
2. There should be a legally mandated requirement that the President consult with either members of the JSCI or the opposition in the selection of candidates.
3. Through Ministerial Regulation, it should be mandated that a senior intelligence official cannot occupy two posts, such as Director General of NIA and Acting Executive Director of NCC

A central element in the transformation of the intelligence community in the post-1994 era has been the introduction in law of oversight mechanisms. One such mechanism, which deserves further attention, primarily due to the central role played in the aftermath of Project Avani, is the Office of the Inspector General for Intelligence. The establishment of the Office of the Inspector General has not been without challenge, firstly in terms of finding a suitable candidate to assume the position and now that the IG has withstood the first real trial, the challenge is to develop the capacity of the Office to be able to fulfil its mandate. After reviewing the conduct of the investigation by the IG into the surveillance conducted in the course of Project Avani, the following recommendations can be presented:

1. Review the size and staff compliment of the Office of the Inspector General and align recruitment to organisational needs, through for example, ensuring that the IG has a legal advisor.
2. Develop standard operating procedures for investigations carried out by the Inspector General.

The intelligence scandal of 2005 has presented the opportunity for South Africa to reconsider the role that the national intelligence structures should play in contributing to the security of the state and its citizens. One of the key areas for investigation, which has emerged, is the mandate to conduct operations relating to political and economic intelligence. This is in fact a process of defining the contribution that the state intelligence apparatus should be making and refining the manner in which the legislation mandates the functioning of the intelligence bodies. The subsequent recommendations summarise the research findings in this regard:

1. The definition of political intelligence needs to be interrogated and the legal definition of domestic intelligence reviewed.
2. Guidelines as to the activities pursued under 'political intelligence' need to be formulated, specifying the types of domestic political activities that present a real threat to the national security of South Africa.
3. Further prioritise the gathering, correlating and evaluation of economic intelligence and devise specific strategies of engagement and coordination for different actors including a division of roles and responsibilities between the intelligence services and other state and non-state role-players
4. Review the current recruitment and retention strategies with a view to align the functional structure of the intelligence agencies to the key priority areas.
5. Review mechanisms, such as the cluster system at Director-General and Ministerial level, for coordination and communication between the intelligence agencies and economic departments.
6. Exercise vigilance over the non-partisanship of economic intelligence in order to avoid the use of public resources to further private sector interests.

***Thanking you in advance for considering this submission.***



## **INTRODUCTION**

Like any other department of state, the activities of the intelligence community are largely determined by the political environment of the state. This key variable determines not only the nature and structure of the intelligence community but also the priorities and operations pursued in this regard. In South Africa the watershed of 1994, provided a clear delineation for the change of political context and with that provided the impetus that drove the transformation of the South African security architecture in response to altered national security threats and priorities and a new democratic culture.

The intelligence domain presents an area of particular challenge for democratic transformation, due to the political sensitivities of the nature of the work undertaken and the need for secrecy. In the South African political context, the challenges of the democratic transformation of the intelligence services were complicated by the role played by the intelligence agencies of the state and liberation movements during apartheid and in negotiating the end of the apartheid regime. The result was that although there was organisational re-structuring and the creation of oversight mechanisms, the intelligence services have yet to entirely assume the central role assigned them in terms of pursuing a non-partisan and holistically viewed notion of national security.

Part of the apartheid hangover, is that the South African intelligence community has been unable to extract itself from the domestic political environment, at times even becoming a servant of domestic political interest, as witnessed in the 1998 and 2005/2006 conspiracy scandals. Good governance, oversight and control of the intelligence services is the only way in which to ensure that this powerful tool of statecraft does not become an instrument of personal or group interest but serves to enhance the security and freedom of all South Africans.

It was in pursuit of the democratic consolidation of the intelligence dispensation, that following the debacle surrounding Project Avani, the Minister for Intelligence Services convened the Ministerial Review Commission on Intelligence in November 2006 to make recommendations on the strengthening of mechanisms of control of the civilian intelligence structures in order to ensure full compliance and alignment with the

Constitution, constitutional principles and the rule of law, and particularly to minimise the potential for illegal conduct and abuse of power.

The focus of the review includes the following topics:

- Executive control of the intelligence services
- Control mechanisms related to intelligence service operations
- Control over intrusive methods of investigation
- The spheres of activity currently referred to as political and economic intelligence
- Political non-partisanship of the intelligence services
- The balance between secrecy and transparency
- Controls over the funding of covert operations

## **BACKGROUND TO THE REVIEW COMMISSION**

The national intelligence apparatus was rocked with scandals relating to the abuse of position and misconduct of surveillance operations during 2005. The scandal largely revolved around the unlawful interception of telephone calls and the conduct of illegal surveillance of prominent business people, high-level ANC members and the parliamentary office of the opposition party. These activities were conducted under and during the life of the now infamous Project Avani. Project Avani was a Political Intelligence National Stability Assessment Project legally constituted under the provisions of the National Strategic Intelligence Act, 1994 (Act 39 of 1994) and the Intelligence Services Act, 2003 (Act 65 of 2003). The mandate of the project was 'to gather, correlate, evaluate and analyse intelligence in order to identify any threat or potential threat posed by the presidential succession debate, foreign services interests therein, the impending Jacob Zuma trial and poor service delivery impacts and dynamics to the security and stability of the Republic and its people' (IGI 2006:15). Initially the project did not identify any specific targets and was conceived as a 360-degree scan of the political horizon.

During the course of Project Avani physical surveillance operations were launched on at least three civilians and voice communications of at least thirteen people were intercepted. On the 5<sup>th</sup> of September 2005, Minister Kasrils received a complaint from Mr. Saki Macozoma, member of the ANC National Executive Committee and a leading

South African politician turned businessman, that he and his family had been harassed by NIA from the 29<sup>th</sup> of August 2005 until the 31<sup>st</sup> of the same month. Two days later the Minister received an interdict from Mr Macozoma's lawyers to stop the National Intelligence Agency (NIA) from further disturbing him and his family. On the 20<sup>th</sup> of September 2005, the Minister formally requested the IG to investigate the allegations made by Mr Macozoma.

Authorisation of Project Avani, although seemingly legally constituted, has emerged as a bone of contention. The Minister for Intelligence Services denies having given consent for this project and it was planned and implemented by the Director-General of NIA, Billy Masetlha. Masetlha has since claimed in an affidavit, filed with the Pretoria High Court at the end of 2006, that the project was carried out following a request from Cabinet for an investigation into the public unrest directed against local authorities and the causes of such unrest. Sources close to Masetlha revealed in 2005, however, that he was instructed by President Mbeki to use NIA to find evidence against Jacob Zuma and those supporting the then Deputy President (Sole et al 2006). There is at present no legal obligation to obtain authority from the political head (i.e. the Minister for Intelligence) for operations such as this. Consequently, although both the Minister and the Inspector-General of Intelligence (IG) agree that the operation was legitimate, the Minister 'terminated it after discovering its consequences' (Monare 2006).

According to the conclusions reached by the IG, the physical surveillance operation of Mr Macozoma was not authorised in terms of existing NIA operational policy, and resources were deployed without proper justification and the operations, therefore, lacked legitimacy (IGI 2006:14). However, according to Barry Gilder, Coordinator of the National Intelligence Coordinating Committee, physical surveillance requires only authorisation from either a Director-General or a deputy Director-General (Monare 2006). Based on this interpretation, Masetlha was operating within the purviews of his authority in ordering the physical surveillance. Furthermore, in the case of intercepting of telephone conversations, the interception of voice communication by means of the National Communications Centre (NCC) was found by the IG to be, not only a gross abuse of the facilities of the NCC, but also illegal as the requisite authority of a judge for the interception of such communications was not obtained. The NCC focuses primarily on the interception of foreign communications and should not have been used for the

domestic interception of bulk voice communication. At the time, however, Masetlha was the Acting Executive Director of the NCC.

The conduct or misconduct of surveillance associated with Project Avani is further complicated by what has since become known as the e-mail hoax. Masetlha is accused of having fabricated a conspiracy through the 'interception' of e-mails, which supported the notion of a grand conspiracy against former deputy President, Jacob Zuma and the Secretary General of the ANC, Kgalema Montlanthe as well as himself directly.

In the investigation by the IG, it was found that the interception e-mails, which outlined a political conspiracy, were in fact 'faked mock-ups' (IGI 2006:24). This conclusion was based both on an analysis of the technical feasibility of the e-mails having been intercepted as well as on an analysis of the style and language used. In other words, the e-mails were not intercepted but were actually fabricated.

In the interception of the now confirmed hoax e-mails, Masetlha outsourced the interception of e-mails of selected targets to a third party interest which is a statutory contravention of intelligence operating procedures and effectively placed the e-mail surveillance outside of the oversight regime (IGI 2006:18). Furthermore, the authenticity of the e-mails was not examined as part of Project Avani.

After the investigation by the IG, Masetlha was dismissed as Director General of NIA and a flurry of court cases have ensued. Furthermore, the ANC National Executive Committee rejected the report of the IG and ordered their own investigation into the e-mail hoax. As the Aldrich Ames scandal did for the CIA, so too has the Masetlha incident for South Africa, forced us to question key elements in the intelligence domain. Issues of procedural irregularities have come to light, as well as a lack of control of politically sensitive operations and the use of the national intelligence apparatus for party political purposes.

A brief analysis of the outcomes of the Masetlha scandal reveals the following key elements:

Positive outcomes	Negative outcomes
<p>This scandal presented an opportunity to practically test the effectiveness of the oversight mechanisms. To this end, the Inspector General, the executive and the JSCI all contributed towards defining the complimentary and separate checks-and-balance roles that the different players undertake. The Minister took decisive action and the IG was deployed accordingly. The JSCI interrogated the IG's report and it seems that there is sufficient oversight and control at executive and parliamentary levels once malpractice is suspected or discovered.</p>	<ul style="list-style-type: none"> <li>• Indicated the lack of sufficient preventative and proactive controls on politically sensitive operations</li> <li>• Indicated a lack of sufficient control on the use of intrusive methods of investigation</li> <li>• Indicated that there was insufficient control of operational protocols such as the need for judicial approval for the interception of communication, the out-sourcing of the interception of e-mails and the misuse of the NCC facilities</li> <li>• Highlighted the continued politicisation of domestic intelligence operations and the potential for misuse of authority in the conduct of political intelligence operations</li> <li>• Highlighted flaws in the practice of having a senior intelligence official serving in two posts – i.e. the Director General for NIA also being the Acting Executive Director of NCC</li> </ul>

It is within the context of providing clarity against existing ambiguities that the ISS is making this submission. Furthermore, given the diverse nature of interpretations associated with the conduct of the Director General of NIA during Project Avani, this contribution seeks to generate informed and articulate debate for the purpose of generating credible alternatives in order to overcome the abovementioned shortfalls.

While making this submission, we are acutely aware that the intelligence sector is arguably the most difficult sector in which civil society can aspire to influence decision-making, policy and practice. However, against this backdrop, the opportunity provided by the Ministerial Review Commission on Intelligence does offer a unique opportunity to open public debate and allows the voice of civil society to be heard in the secret corridors of the intelligence domain.

## **MECHANISMS OF CONTROL OF THE CIVILIAN INTELLIGENCE STRUCTURES**

The challenge of control of intelligence services is often framed in terms of the balance between the need for security and the relative weight of security in contrast to other public values. As Caparini (2002) explains, it must be recognised that security is one value among many, and must coexist and compete with other values towards which society via government allocates scarce resources. The balance needs to be struck between protecting the security of the state and society and the democratic value of individual freedom. The quest for intelligence control and oversight then revolves around the aim of achieving effective security intelligence within a democratic framework (Caparini 2002).

The special requirements and features of the intelligence sector present a unique set of challenges to democratic control and oversight, even for the most established of democracies. At a minimum, control of intelligence focuses on ensuring that these services operate within the rule of law. The rule of law is an indispensable and fundamental element of democracy and it is through effective legislative provisions that intelligence agencies derive their powers and legitimacy. Intelligence agencies are subjected to legislative frameworks, which provide the mandate, coordination and control, and oversight and accountability guidelines for intelligence communities. The legislation that governs intelligence needs to be sensitive to the competing dynamics of secrecy and accountability while at the same time engendering robust and effective intelligence processes which are able to effectively and positively contribute to policy formulation and decision-making. The legal framework grounds the work of intelligence agencies within a system of legal controls and outlines the principles that govern this sensitive area of security activity.

When speaking of control of the intelligence services, a particularly important consideration is in the conduct of counterintelligence functions. Counterintelligence activities relating to internal security are perhaps the most directly relevant to democracy and the fundamental freedoms of citizens (Caparini 2002). There are two vital concerns in this realm; firstly under what conditions can a government agency legitimately conduct surveillance of a citizen. This would entail interrogating the means and process for

authorising and conducting such surveillance. Secondly, what should the proper objectives of such surveillance in a democracy be, in other words, what are the threats that are driving domestic intelligence activities? While authoritarian regimes have been notorious for using intelligence agencies against opponents to the political leadership, democratic states are supposed to tolerate and protect freedom of speech, opinion, assembly, political opposition, political protest and dissent unless it threatens violence or the overthrow of government (Caparini 2002).

An important element in the post-apartheid reform of the intelligence services was the establishment of an oversight regime to govern the activities of the various intelligence bodies. The formal instruments of oversight, established by the Intelligence Services Oversight Act 40 of 1994, are:

- a) Legislative oversight – through the Joint Standing Committee on Intelligence
- b) Judicial oversight
- c) Executive control
- d) Civilian monitoring – primarily through the Office of the Inspector General, the Auditor-General and the South African Human Rights Commission

#### **a) Legislative Oversight of the Intelligence Services: The Joint Standing Committee on Intelligence**

The establishment of a multi-party parliamentary committee to execute legislative oversight of the intelligence domain is a definitive feature of the post-apartheid South African intelligence dispensation. The Joint Standing Committee on Intelligence (JSCI), established by the Intelligence Services Oversight Act 40 of 1994, is empowered by the Act to fulfil, *inter alia*, the following functions:

- To obtain an audit report on the financial statements of the intelligence services from the Auditor-General
- To obtain a report from the Evaluations Committee on the secret projects reviewed and evaluated by the Evaluations Committee
- To obtain a report regarding the functions performed by the judge designated to authorise intrusive methods of investigation
- To consider, initiate and make recommendations on all legislation pertaining to the intelligence services



- To review and make recommendations regarding interdepartmental cooperation and the rationalisation and demarcation of functions relating to intelligence and counterintelligence
- To order investigations into complaints from the public
- To hold hearings and subpoena witnesses on matters relating to intelligence and national security, including administration and financial expenditure

Evident in the above legislative mandate, is that the JSCI holds a highly influential position for the conduct of oversight of the intelligence services. Research into the limited publicly available information regarding the functioning of the JSCI, especially in connection with the recent events and investigation by the IG, reveals that the JSCI seems to be interrogating and holding to account the actions of the intelligence community, including the executive. One of the key aspects that enables the JSCI to effectively conduct oversight, is the multiparty nature of the Committee. A concern can, however, be raised in this regard in that the objectivity of the JSCI may be threatened by the fact that the President appoints members and the majority party can hold up to 8 of the 15 seats on the Committee. Although, current trends do not reveal that the JSCI has faltered in its role, caution can be advised as to maintaining the objectivity and ability of the Committee to continue to fulfil the essential role it plays in the democratic control of the intelligence domain. It can be recommended, therefore, due to the special nature of the work conducted by this Committee and the need for balancing secrecy and transparency, that a member from an opposition party chair the JSCI. This element, as practiced by SCOPA for example, adds a further dimension of accountability to the mechanism for legislative control.

An issue of concern in the functioning of the JSCI, which has been raised in a research paper prepared by Dennis Thokozani Dlomo (2004:75), is that there is a problem with the attendance of meetings and forming the necessary quorum. The JSCI is made up of senior members of political parties who often fulfil a variety of functions within their parties and in other parliamentary committees. As such limiting the members of the JSCI to participate in fewer other committees could enhance the ability of the JSCI to focus attention on and make greater contribution to the oversight of intelligence.

**Recommendations:**

1. The Chairperson of the Joint Standing Committee on Intelligence should be a parliamentarian from an opposition party. Such a regulation would have to be made through legal mandate as an amendment to the Intelligence Services Oversight Act 40 of 1994.
2. The members of the Joint Standing Committee on Intelligence should have limited participation in other parliamentary committees. This could be facilitated through the development of a regulation/ rule of parliament that could specify the number of committees in which membership would not deter from the ability to focus attention on the important issue of the oversight of the intelligence services.

**b) Judicial Oversight**

Judicial oversight of the intelligence services is essential to ensure that the intelligence community functions in compliance with the rule of law and legal standards. As such, the mechanisms for control at judicial level include the granting of warrants and authorising intrusive methods of investigation. The Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 provides regulations for the issuing of directions authorising the interception of communication and communication-related information. This detailed and comprehensive legislation adequately outlines the requirements for the granting of such authorisation. It can, therefore, be concluded that there are sufficient provisions for the effective conduct of judicial oversight and this mechanism for control needs only to be utilised by the intelligence services in order to contribute to the accountable and transparent governance and conduct of intelligence operations.

**c) Executive Control of the Intelligence Services**

The terms control and oversight are often used interchangeably. A distinction can, however, be made between the control exercised at executive and administrative level and the oversight exercised in Parliament. Parliamentary oversight is in actuality an ex-post-facto process, as it is more concerned with reviewing the activities of the intelligence bodies. Therefore, control of the intelligence services, in terms of the actual management and supervision, occurs largely at executive and administrative levels.

Executive level control tends to concentrate on efficacy issues such as how effectively the service is fulfilling its tasks and functions, such as accurately identifying threats, providing sound analysis and the adequacy of its capabilities (Caparini 2002). The main challenge confronting executive control of intelligence is the principle of 'plausible denial' useful for policy makers to deny knowledge and/ or authorisation of sensitive or covert activities. The doctrine of plausible denial rests on the ability of the executive to be able to assert, with some plausibility, that activities were carried out by their subordinates without their knowledge or approval. This works against the principle of accountability insulating the decision-makers from the consequences of controversial intelligence operations. Furthermore, it reinforces the view that there is no limit on the scope and realm of intelligence and counterintelligence activities, undermining any semblance of serving a national interest responsive to the needs of the people and sanctioning the heads of intelligence agencies to conduct sensitive and controversial operations without due regard.

In terms of executive control of the intelligence services, the Minister should be empowered by national legislation, to take responsibility for formulating policy, to receive reports from the agencies and have the right to approve matters of political sensitivity or undertakings that affect fundamental rights (Born & Leigh 2005:58). The Minister can only reliably be called to account by Parliament for the actions of the intelligence agencies, if the Minister has real powers of control and adequate information about actions taken in his/ her name. As Born & Leigh (2005:57) explain,

'Legislation should contain clear arrangements for political direction and, in the case of internal agencies, political independence, to ensure that matters of policy are determined by politicians accountable to the public. It is preferable that various mechanisms be explicit in legislation and be backed up by appropriate legal duties...a legal framework in which the respective powers and responsibilities are clear may of itself help to deter abuses and encourage a responsive and frank working relationship.'

Intelligence services should be accountable to the responsible Minister and in turn the Minister exercises control from the government, determining the budget and providing guidelines for the functioning and priorities of the services. When considering the South African context, according to the Chapter 11 (209.2) of the Constitution the President

must appoint a member of the Cabinet to assume political responsibility for the control and direction of the intelligence services. Furthermore, the National Strategic Intelligence Act 29 of 1994 (Section 5 A.1) empowers the Minister of Intelligence Services to 'do everything necessary for the efficient functioning, control and supervision of the co-ordination of intelligence supplied by the National Intelligence Structures'. Additionally, Section 6 of the aforementioned legislation empowers the Minister to make regulations, in consultation with the JSCI on matters such as intelligence co-ordination, the production and dissemination of intelligence and the co-ordination of counter-intelligence.

A consideration can be made regarding the clarity of the scope assigned to the Minister in order to assume responsibility for the functioning of the intelligence domain. Table 1 draws comparison between the role assigned to the Minister by South Africa legislation, with international examples and the legal standard and best practice as outlined in Born & Leigh's document.

**Table 1: Comparison of Legislation outlining Ministerial Responsibilities**

Legal standards and best practice	Canada	Australia	South Africa
<p>The Minister should:</p> <ul style="list-style-type: none"> <li>• Be responsible for the formulation of policy on security and intelligence matters</li> <li>• Be legally entitled to receive regular reports from the intelligence bodies</li> <li>• Be legally responsible for approval of matters of political sensitivity.</li> </ul>	<p>The Minister may issue to the Director of the Intelligence Service, written directions as to the control and management of the Services and a copy of any such direction shall be given to the Parliamentary Review Committee. (Section 6.1 &amp; 6.2)</p> <p>The Director shall consult with the Deputy Minister on the general operational policies of the Service and before applying for a warrant or the renewal of a warrant (Section 7.1 &amp; 7.2)</p> <p>The Director shall at least every twelve months or on request of the Minister, submit reports with respect to the operational activities of the Service during that period (Section 33.1)</p> <p>Canadian Security Intelligence Service Act 1984</p>	<p>The intelligence agency is legally required to obtain an authorisation from the relevant Minister before undertaking activities for the purpose of producing intelligence on an Australian person or which will have a direct effect on an Australian person (Intelligence Services Act 2001 Section 8)</p> <p>Agency heads are required to provide the responsible Minister with written reports in respect of activities carried out in terms of Section 8 authorisations (Section 10 A)</p> <p>The Australian Security Intelligence Organisation is under the control of a Director-General, subject to the direction of the Minister (Section 8). The Minister may provide the Director-General with guidelines, in writing, concerning the performance of functions and the exercise of powers by ASIO and the Director-General (Section 8 A.1). The Minister shall also provide in writing guidelines to be observed in relation to the performance of ASIO's functions that relate to politically motivated violence<sup>i</sup>. Such guidelines are to be submitted to Parliament, the Inspector General and the leader of the opposition (Section 8 A.2. &amp; 3).</p>	<p>The Minister shall do everything necessary for the efficient functioning, control and supervision of the co-ordination of intelligence supplied by the National Intelligence Structures (Section 5 A.1)</p> <p>The Minister shall advise the President and the national executive on national strategic intelligence and the co-ordination of intelligence (Section 5 A.5)</p> <p>The Minister may, after consultation with the JSCI, make regulations regarding:</p> <ul style="list-style-type: none"> <li>• The protection of information and intelligence</li> <li>• The carrying out of security screening investigations</li> <li>• Co-ordination of intelligence as an activity</li> <li>• Production and dissemination of intelligence</li> <li>• The co-ordination of counter-intelligence by NIA</li> <li>• The co-ordination of crime intelligence</li> <li>• Any other matter necessary for the effective administration of this Act</li> </ul>

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Table 1 provides an indication of the alternative means in which executive control of the intelligence services can be mandated. Each of the countries detailed have chosen a combination of tools through which executive authority is exercised and have selected a manner, cognisant of their own political environment, to empower the executive to exercise control in an accountable manner. Of interest, is the emphasis that the Canadian and Australian models place on executive approval and control of operational matters. In the South African context, although the legislation provides the Minister with sufficient powers, there is a critical lack of specificity relating to the exercise of executive powers in terms of domestic intelligence of a politically sensitive nature.

The items listed in regarding matters on which the Minister may make regulations, is a product of the context in which the legislation was developed and serves as an acknowledgement of the sensitivities of legislating control of intelligence in a transitional state. The National Strategic Intelligence Act 29 of 1994 is broad enough to sufficiently empower executive control, but is also not specific enough to avoid plausible denial.

**Recommendations:**

1. It should be legislated that Ministerial authorisation is required for activities related to the collection of intelligence pertaining to South African citizens. Once the Minister, in writing, has given authorisation it should be reported to the Inspector-General, within a reasonable time frame. Furthermore, reports on such activities should be made within a determined time frame and submitted to the Minister and the relevant oversight body (i.e. either the Inspector-General and/or the JSCI)
2. The Minister should, periodically, review the powers and functions of the Director-General of NIA in relation to the conduct of politically sensitive intelligence operations
3. The Minister should provide guidelines as to the functions and powers of NIA relating to the collection of political intelligence within South Africa. Furthermore, such guidelines should include the requirement that any project instructions should be given in writing and should include specific targets, a defined scope and period of investigation.

In terms of executive control of intelligence services, there is one area which demands closer attention as has been highlighted by recent events with the dismissal of Billy Masetlha from the position as Director General of NIA. Section 209 (2) of the Constitution establishes that the President, as head of the national executive, must appoint a man or woman as head of each intelligence service. The Intelligence Services Act 65 of 2002 regulates the establishment, administration and control of NIA and SASS and re-affirms the constitutional requirement that the President must appoint a Director-General, who is head and accounting officer, for each of the civilian intelligence services (Section 3.3.a & b).

The following table compares selected international practices in terms of the regulation of the appointment and dismissal of Directors-General, the legal standard and best practice as outlined in Born & Leigh's document and the South African example.

**Table 2: Regulating the appointment and dismissal of Directors-General**

<b>Legal standards and best practice</b>	<b>Australia</b>	<b>South Africa</b>
<ul style="list-style-type: none"> <li>• Legislation should establish the process for appointment</li> <li>• The appointment should be open to scrutiny outside the executive, preferably by parliament</li> <li>• The opposition in parliament should be involved in the appointment</li> <li>• The criteria for appointment and dismissal should be clearly specified by the law</li> </ul>	<p>The Prime Minister consults with the leader of the opposition in the House of Representatives before recommending the appointment of a DG (ASIOA 1979 7.2)</p> <p>The appointment may be terminated for reasons of physical or mental incapacity, misbehaviour, failure to comply with legislation, extended absenteeism or bankruptcy (ASIOA 1979 13.1 &amp; 13. 2)</p>	<p>The President must appoint a DG for each of the Intelligence Services (ISA 2002 3A)</p> <p>All persons who qualify for the post shall be considered and evaluated based on training, skills, competence, knowledge and need to redress past imbalances (PSA 1994 11.2)</p> <p>The contract between the executing authority (in this case the President) and the DG should detail the grounds and procedures for dismissal (PSA 1994 4C)</p> <p>The power to discharge rests with the executing authority (in this case the President) (PSA 1994 17)</p>



As part of the public service in South Africa, the employ of Directors-General for the intelligence agencies is bound by the conditions set out in the Public Service Act 103 of 1994 (PSA). Accordingly, the PSA (3B.1.a) echoes the Constitution in that the President is the executive authority tasked with the appointment of the heads of the intelligence agencies. Appointments are to be made with due regard to equality and other democratic values and principles enshrined in the Constitution (PSA 11.1).

The power to terminate employment also rests with the President (PSA 11.3) but unlike the rest of the public service, the intelligence agencies are not governed by the conditions of termination as outlined in the PSA, such as ill-health, incapacity, misconduct, misrepresentation or security risk. The failure to clearly establish the conditions for the termination of service of the head of intelligence agencies is a highly contentious case which will soon be played out at the Constitutional Court where former head of NIA, Billy Masetlha, is challenging the constitutionality of his dismissal by President Mbeki as there is no legal basis for dismissal, not in the Constitution nor in the PSA.

A further mechanism to avoid any misrepresentations in the appointment or dismissal of Directors-General for either of the Intelligence Services is to utilise parliamentary scrutiny, as in the Australian example above. Currently, there is no legal requirement, in terms of neither the Constitution nor the PSA that entails the involvement of Parliament in the appointment of the Directors-General for the intelligence services. The relevance of consulting with Parliament or the opposition in such an exercise is that through consensus building initiatives, national ownership of the appointment is encouraged; it takes on a national character and removes the perception of partisanship or party favour from the appointment.

**Recommendations:**

1. Review the current criteria for the appointment and dismissal of Directors-General in the intelligence services, including the possibility of establishing clearer legal stipulations for procedure and causes of dismissal.
2. There should be a legally mandated requirement that the President consult with either members of the JSCI or the opposition in the selection of candidates.

3. Through Ministerial Regulation, it should be mandated that a senior intelligence official cannot occupy two posts, such as Director General of NIA and Acting Executive Director of NCC

**d) Civilian oversight of the Intelligence Services**

A key element in the transformation of the intelligence community in the post-1994 era has been the introduction in law of oversight mechanisms. One such mechanism, which deserves further attention, primarily due to the central role played in the aftermath of Project Avani, is the Office of the Inspector General for Intelligence. Established in terms of the Intelligence Services Oversight Act 40 of 1994 (ISOA), the IG is appointed by the President after nomination by the JSCI and approved by Parliament (ISOA 1994 7.1). The IG is accountable to the JSCI and in relation to the civilian intelligence agencies, has the following functions (ISOA 1994: 7.7):

- To monitor compliance of NIA and SASS with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence
- To review intelligence and counterintelligence activities
- To perform all functions designated by the President or Minister for Intelligence 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; corruption or fraud

As mentioned in the background comments, the IG was called to investigate allegations of misconduct by the NIA in the surveillance of a prominent South African businessman. The Minister for Intelligence Services referred the complaint to the IG in terms of Section 7 (7) (cA) of the Intelligence Services Oversight Act 40 of 1994. This was the first occasion in which the IG has been called into action in such a manner and due to the politically sensitive nature of the Avani debacle; it was a case of trial by fire for the civilian oversight mechanism.

On the 23<sup>rd</sup> of August 2006, the IG presented a report to the JSCI on the findings of the suspected abuse of the security services during Project Avani. The IG is required by the Intelligence Services Oversight Act to report on its functions and activities to the JSCI.

After considering the procedures adopted by the IG in carrying out the investigation, the JSCI identified the following important concerns:

- Lack of standard operating procedures for investigations by the IG
- Limited capacity in terms of staff and resources

The establishment of the Office of the Inspector General has not been without challenge, firstly in terms of finding a suitable candidate to assume the position (and hold office for longer than six months) and now that the IG has withstood the first real trial, the challenge is to develop the capacity of the Office to be able to fulfil its mandate. The IG is assisted by a staff compliment of approximately 10 people running on a budget of R8 million per year (Monare 2004). During the investigation into the Macozoma surveillance, the IG was assisted by staff from the Ministry; most notably a legal advisor. The lack of capacity combined with the lack of standard operating procedures contributed to the report of the IG being rejected by certain political elements.

Being charged with the civilian oversight of intelligence is an arduous task, which does not invoke envy and requires independence and a high level of trust. These elements have been noticeably absent in the events of the past year. Firstly, questions have been raised as to the independence of the IG himself given his involvement with ANC intelligence structures since 1974. Secondly, the investigation into Project Avani was tainted as partial due to the inclusion of the Minister's legal advisor. And finally, the report of the IG was rejected by the ANC National Executive Council, pointing to a lack of trust in the oversight mechanisms established by the post apartheid government.

It should be noted that the appointment of the IG is done with the approval of two thirds of the National Assembly and this should contribute to the selection of impartial candidates. Vigilance is, however, necessary in order to avoid, what is on paper a bastion of democratic civil-security relations, becoming empty tokenism paying nothing more than lip service to democracy.

**Recommendations:**

1. Review the size and staff compliment of the Office of the Inspector General and align recruitment to organisational needs, through for example, ensuring that the IG has a legal advisor.

2. Develop standard operating procedures for investigations carried out by the Inspector General. This would add to the legitimacy of any investigations and add weight to any findings.

## **POLITICAL AND ECONOMIC INTELLIGENCE**

In any state, intelligence agencies are in place for the purposes of gathering foreign, domestic and military related information as part of their functions in support of national security. This includes covert intelligence operations and keeping files on individuals or organisations. Domestically, however, intelligence services run the risks of infringing on civil liberties and citizens rights, if such powers are put to use without sufficient reason and adequate controls. It is common practice, therefore, for intelligence services to have fairly circumscribed domestic powers.

However, any state institution is the product of a country's history and culture. These variables are prime determinants of security policy and the intelligence sector is not immune to this. For South Africa, after 1994, the primary challenge was the transformation of the intelligence apparatus from a tool of oppression into that of a democracy. However, the culture and idiosyncrasies that characterised the misuse of the intelligence services in support of the maintenance of the apartheid regime appears to have influenced the successor intelligence dispensation. As the Masetlha case has illustrated, the issue of political neutrality continues to haunt the intelligence service as does a lack of trust, not only in the products of the agencies, but also in the institutions, which have been tasked with oversight.

Nowhere is the lasting legacy of the apartheid security more apparent than in the domestic political operations of the intelligence services. As far back as 1949, when the British Security Service under Prime Minister Clement Atlee, were engaged in the establishment of South African security services, they noted that:

*Political considerations will almost certainly enter into the build-up of a Security Service organisation in the Union, and it may be too much to hope that such a Department will be able to remain immune from political influences in its subsequent activities.*

### **a) Political intelligence**

In the National Intelligence Agency's 2002/ 2003 Annual Report, the gathering of political intelligence is recognised as amongst the key domains of domestic intelligence work.

Political intelligence is defined by NIA as the monitoring of developments in the political sphere from the perspective of maintaining South Africa's domestic stability and security (NIA 2003:13). Furthermore, 'typical issues that might attract intelligence attention include political intolerance, inter and intra party conflict of a violent or disruptive nature or, opposition to democratisation. Any instability resulting from transformation in government structures and parastatals, or from social transformation in general, would also attract NIA's attention' (NIA 2003:13).

The 2003/ 2004 Annual Report defines political intelligence as focusing on political dynamics to ensure political stability in order that the Government goals and objectives can be realised both at economic and cultural levels (NIA 2004:21) without further specifying what such threats to political stability might entail.

In the context of foreign intelligence, the notion of political intelligence makes a lot of sense as it is in national interest to have information regarding the political stability and political affairs of neighbours and states of power or interest. Domestically, however, it becomes very difficult to separate political intelligence from partisanship and meddling in domestic political processes. Political intelligence is an ill-defined concept, which is probably at the heart of the contention in terms of the activities that a domestic intelligence agency may undertake in pursuit of political stability. Broadly, political intelligence can be understood as intelligence concerning foreign and domestic policies of governments and the activities of political movements<sup>1</sup>.

By allowing the prevalence of domestic political intelligence to remain in the national intelligence apparatus, it is difficult to prevent the misuse of intelligence agencies by government or political interest groups and to prevent intelligence agencies from interfering in the political life of citizens. As the debate on political intelligence is mostly in connection with domestic intelligence, it is necessary to review the legislation that has empowered NIA to conduct political intelligence operations in order to gain insight into the mandate, powers and functions of the domestic civilian intelligence agency. The National Strategic Intelligence Act 39 of 1994 (NSIA) defines the functions of the National Intelligence Structures (i.e. NICOC, NIA, SASS, DI and CI)

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<sup>1</sup> <http://www.dtic.mil/doctrine/jel/doddict/data/p/04151.html>, Defence Technical Information Centre, United States Department of Defence

## The National Intelligence Agency

Section 2 (1) of the NSIA outlines the functions of NIA as follows:

- To gather, correlate, evaluate and analyse *domestic intelligence* in order to identify any threat or potential threat to the security of the Republic or its people and to supply intelligence regarding any such threat to NICOC
- To fulfil the national counter-intelligence responsibilities and for this purpose to conduct and co-ordinate counter-intelligence and to gather, correlate, evaluate, analyse and interpret information regarding counter-intelligence in order to:
  - Identify any threat or potential threat to the security of the Republic or its people
  - Inform the President of any such threat
  - Supply where necessary intelligence relating to any such threat to the SAPS for the purposes of investigating any offence or alleged offence
  - Supply intelligence relating to national strategic intelligence to NICOC

Furthermore, the NSIA defines domestic intelligence as: 'Intelligence on any internal activity, factor or development which is detrimental to the national stability of the Republic, as well as, threats or potential threats to the constitutional order of the Republic and the safety and well-being of its people'. There is a notable inconsistency in the NSIA in terms of the inter-changeability of the terms security and stability. In the body of the Act, intelligence functions are defined in terms of threats to the security of the Republic. In the definitional section, however, domestic intelligence is defined in terms of national stability. This seemingly semantic difference is of relevance in that stability is a far more reflexive and subjective term than security. Threats to stability are also far broader than threats to security.

In the aftermath of Project Avani, the Ministry for Intelligence Services has begun to question the necessity of empowering the domestic intelligence agency to conduct such operations. Minister Kasrils has even claimed that 'he will expunge the term "political intelligence" from the lexicon' of NIA (Honey 2006).

Many other states have faced such issues and there are multiple international examples of ways in which to curtail the involvement of intelligence services in domestic political

activity. The first step in the creation of a truly non-partisan intelligence service, is legislating against the involvement in domestic political affairs.

In Argentina, for example, Article 4 of the National Intelligence Law No. 25520 states that: No intelligence agency shall:

- Perform repressive activities, have compulsive powers, fulfil police functions or conduct criminal investigations unless so required by justice on account of a judicial proceeding or when so authorised by law
- Obtain information, collect intelligence or keep data on individuals because of their race, religion, private actions, and political ideology, or due to their membership in partisan, social, union, community, cooperative, assistance, cultural or labour organisations, or because of legal activities performed within any field
- Exert influence over the institutional, political, military, police, social and economic situation of the country, its foreign policies, and the existence of legally formed political parties, or influence public opinion, individuals, the media, or any kinds of associations whatsoever

The Australian Security Intelligence Organisation is limited to information collection and evaluation on domestic activities, which seek to influence politics through violence. 'ASIO keeps track of individuals and groups judged liable to engage in politically motivated or communal violence' (<http://www.asio.gov.au/Work/Content/Violence.aspx>). ASIO produces assessments of the likelihood of politically motivated violence against people and property. The focus of the intelligence services should remain on ensuring that threats to safety and security are detected in time for them to be counteracted, to prevent harm, death and destruction (DCAF 2003:6). As such the concept of domestic intelligence as defined in the National Strategic Intelligence Act, can be replaced by something similar to the more reflective term 'security intelligence' which can be defined as: 'information that is relevant to internal security; for the protection of the state, territory and society from foreign-influenced activities, such as subversion or espionage, or politically motivated violence' (DCAF 2003:13). This can then include aspects such as safeguarding the economic well-being of the state and the maintenance of public safety,



which would include aspects of border control, combating drug trafficking and organised crime (to be conducted in conjunction with Crime Intelligence).

The issue of the non-partisanship of the intelligence services can only be addressed when the intelligence agencies are no longer legally allowed to gather and evaluate information relating to the non-violent processes and activities of political actors. The legacy of the South African intelligence services is that the security structures of not only the apartheid state but also the liberation movements themselves were entirely partisan and based solely on political motivations and aspirations. The functions and missions of intelligence agencies should change as the strategic threats and the global, regional and domestic political environment change. Each administration should set guidelines for intelligence activities and determine the priorities and requirements of those activities (Strategic Assessment 1996: Instruments of US Power).

**Recommendations:**

1. The definition of political intelligence needs to be interrogated and the legal definition of domestic intelligence reviewed. This needs to be based on the requirement for consistency in sanctioning the national intelligence structures to be concerned only with issues of national security and including the determinant that political intelligence should only be concerned with domestic political activities which seek to alter the political environment through violence or any unconstitutional means.
2. Guidelines as to the activities pursued under 'political intelligence' need to be formulated, specifying the types of domestic political activities that present a real threat to the national security of South Africa.

***b) Economic intelligence***

*In today's complex global world, economic security is a prerequisite for national security.*

*In fact the one cannot be achieved without the other.*

Minister for Intelligence Services, Ronnie Kasrils

A review of the Government's Programme of Action 2007, 'a national partnership to build a better life for all', reveals the following key priority areas in relation to the International Relations, Peace and Security Cluster and the Justice, Crime Prevention and Safety Cluster:

- A focus on consolidating the African agenda through the AU, NEPAD and SADC
- Contributing to peace and security in Africa through conflict prevention, management, resolution as well as post conflict reconstruction
- Strengthening economic relations and competitiveness through Free Trade Agreements and reform of the World Trade Organisation
- Contribute to debates on Terrorism and Weapons of Mass Destruction
- Reduce contact crimes with a major focus on social crime prevention, integrated law enforcement operations and the reduction of repeat offending
- Fight corruption in the public sector and society at large
- Target organised crime syndicates
- International cooperation on crime combating including international cross border and regional operations
- Continuous safety and security planning for 2010 Soccer World Cup

It is in pursuit of these identified national priorities that any discussion on the role and function of South African national intelligence bodies should be discussed. In the Programme of Action for the International Relations, Peace and Security Cluster, 10 of the 38 action items are purely economic in nature such as working towards the launch of SACU-China FTA negotiations. The importance of economic intelligence for South Africa lies not only in the goals for the development of the country but also in the ability of South Africa to achieve economic growth and development. Achieving economic growth and development is a cornerstone of South African policy as in the era of the globalisation of security threats; the ability to attain and maintain domestic economic well-being is paramount. In the post-Cold War period, national security is being interpreted more in terms of economic strength and sustainability than in purely military terms. This shift in the security paradigm is captured in the South African Constitution which highlights that 'national security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life' (Constitution Chapter 11 198).

The 1994 White Paper on Intelligence identifies that national intelligence structures need to fulfil the function of identifying 'opportunities in the international environment, through assessing real or potential competitors' intentions and capabilities. This competition may involve the political, military, technological, scientific and economic spheres, particularly the field of trade' (White Paper 1994 3.2.3).

In the 2003/ 2004, Annual Report of NIA (p22), economic intelligence activities are defined as follows:

'Economic intelligence focuses on factors impacting on economic and socio-economic stability within the country and is understood to consist of sub-categories such as macroeconomic matters, development and policy-related issues (socio-economic factors), as well as technological and environmental issues.

Economic security would require the maintenance of those conditions necessary to encourage sustained long-term economic growth and development and ensure a consistent improvement in the standard of living for all citizens. Economic intelligence is in essence aimed at contributing towards national endeavours to promote economic and socio-economic stability within the country'

The collection and evaluation of economic intelligence is not limited to the scope of activities undertaken by NIA. The South African Secret Service (SASS) highlight that:

'The economic realities of the new South Africa and the globalised world with increased competition for new technologies, markets, products and processes required a multi-levelled approach to conducting economic intelligence...SASS recognises that economic intelligence must deal with issues threatening South Africa's national economic security such as harmful trade practices, money laundering and industrial espionage'

In putting the above two aspects of economic intelligence together, it can be said that economic intelligence serves two basic goals, namely: (1) providing intelligence on factors which impact on the economic stability of South Africa (especially information that is not available through open sources and can only be gathered by covert means) and (2) directing counter intelligence relating to threats to the economic stability of South

Africa. Economic intelligence, therefore, can be seen as both proactive and protective action taken in pursuit of South African national economic interest.

On the proactive side, the government can use clandestinely obtained economic intelligence for a variety of purposes, most notably, given the priorities espoused in the Programme of Action, in trade negotiations. Furthermore, the analysis of open source information and clandestine information can help South Africa identify emerging markets and therefore contribute to national economic growth. This important function would have to be coordinated in conjunction with the economic actors already involved in the collection of overt economic intelligence such as the Department of Trade and Industry. The intelligence structures would need to focus their efforts on the collection of information that is not available through open channels in order to avoid overlap and duplication of efforts. There are sufficient actors from within the public sector, civil society and business that operate overt economic intelligence gathering and analysis apparatus and the efforts of the national intelligence structures should not be to become economic think-tanks but rather to fulfil the unique function assigned to intelligence agencies, i.e. the covert collection of intelligence. Similarly, in terms of protective action: intelligence agencies should focus their efforts on counterintelligence as this is a unique function that they are legally empowered to pursue.

The covert gathering of economic intelligence, as suggested above, should not be misconstrued as industrial espionage. Rather it is important to distinguish such activities as economic espionage, an established function of many international intelligence agencies, which can be defined as 'clandestine attempts by foreign interests to assist their economic interests by acquiring economic intelligence' (Gregory 1997). Furthermore, in this light economic intelligence can be clearly defined as policy or commercially relevant economic information, including technological data, financial, commercial and government information, that could, either directly or indirectly, improve the productivity or competitive position of the economy (cf Gregory 1997).

As with any aspects of the security sector, the conduct of economic intelligence would have to be cognisant of and in response to the strategic environment in which South Africa finds herself. Caution is, therefore, advised in the African context, so as to not further promote the image, misconstrued or otherwise, that South Africa is pursuing a

strategy of economic colonialism on the continent. In terms of the global arena, however, one could easily advocate for a more active approach in order to increase the competitiveness of South Africa, and often of the Southern African region and Africa in general, in international trade talks. Unfortunately, in this imperfect world, South Africa is competing with states that would not refrain, for any ethical considerations, to use covert intelligence to further their own interests. An example of this is the CIA bugging of private conversations of Japanese trade officials during trade negotiations in 1995 and passing these reports to the US trade representatives (Gregory 1997). It is imperative that the national intelligence apparatus is capable of countering such foreign covert actions.

Being able to effectively conduct economic intelligence operations of the scale and scope as reflected in the above paragraphs, would entail the concerted efforts of a group of highly trained and experienced analysts and operatives. Within the CIA, there are an estimated 250-270 professionals focusing only on economic issues (Gregory 1997). The South African capacity would not need to be of a comparable size, but the human resource dimension does present certain particular challenges to the national intelligence structures. The state intelligence apparatus is competing with the private sector to recruit and retain quality professionals. As an indication, the CIA experiences an annual turnover of economists on the region of twenty percent per annum (Gregory 1997). As with all aspects of the public sector in South Africa, the human resource capacity will be the key determinant in the efficiency and efficacy of the economic intelligence capabilities.

Furthermore, economic intelligence should always remain in the service of the state and private interests should never become clients of the intelligence agencies. Minister Kasrils has been quoted defining economic intelligence as 'the identification of economic opportunities for South African entrepreneurs' (Laurence 2005). Furthermore, in Parliament, the Minister commented that our intelligence services should seek to alert South African companies investing abroad on the possible threats, opportunities and challenges that they may confront (National Assembly Question No. 1002 For Written Reply 17/06/2005). The use of economic intelligence to directly contribute to the identification of opportunities for entrepreneurs is paramount to the partisanship of the intelligence services and the use of political intelligence for personal or group political

gain. The function of the intelligence community is to provide policy relevant information to the government and not to become involved in the furtherance of personal or group political or economic interests.

**Recommendations:**

1. Further prioritise the gathering, correlating and evaluation of economic intelligence and devise specific strategies of engagement and coordination for different actors including a division of roles and responsibilities between the intelligence services and other state and non-state role-players
2. Review the current recruitment and retention strategies with a view to align the functional structure of the intelligence agencies to the key priority areas. For example, reducing the number of professionals engaged in domestic political intelligence and aligning the human resource capacity more toward economic intelligence, external political intelligence and crime intelligence.
3. Review mechanisms, such as the cluster system at Director-General and Ministerial level, for coordination and communication between the intelligence agencies and economic departments. Economic intelligence is only useful to the extent to which it is utilised to further South Africa's national economic interests. In other words, the consumer-producer relations need to be based not on the secrecy for which the intelligence services are renowned but on a collective understanding of national economic interest. There might also be a need to revise any security restrictions, which hinder such communication.
4. Exercise vigilance over the non-partisanship of economic intelligence in order to avoid the use of public resources to further private sector interests.

**Concluding comments**

The governance and oversight of the intelligence services present a unique challenge to any democratic state. The inherent need to balance secrecy and transparency is a continual challenge. For South Africa, the changed political environment after 1994 set the stage for the transformation of the intelligence services and motivated the established of an intelligence oversight regime based on the principles of democratic oversight, accountability and transparency. The transformation of the intelligence sector has been far-reaching and fundamental but it has not been without challenges. The

structural reorganisation has produced mechanisms for accountability and coordination and the comprehensive legal framework guides the mandate and functions of the intelligence bodies in order to ensure adherence to the rule of law and democratic principles such as non-partisanship.

The primary challenge has been to transform the culture of the intelligence services into a tool in the service of a national security vision which enhances the security of the nation and individuals, allowing the people of South Africa to live free from fear and want. Through mechanisms such as the Ministerial Review Commission on Intelligence, South Africans are able to consider what the role of the intelligence services should be in a democratic state and how best to control this essential state function in the service of broader security interests. Changing the culture of the national intelligence apparatus from one of mistrust and suspicion is a long-term challenge. Misconduct such as the Project Avani instance can only be avoided through changing the manner in which intelligence operations are conceived, intelligence priorities devised and authorised. Mechanisms of control are one aspect of this, the other being fostering a culture of professionalism, respect for the Constitution and rule of law as the driving values of the intelligence services. It is, therefore, with optimism that we proceed in the transformation through initiatives such as the Ministerial Review Commission on Intelligence to address issues of control and legislative grounding and the recently launched Civic Education programme to enhance the development of a values based intelligence service.

We would like to thank you for this opportunity to provide input to the Ministerial Review Commission on Intelligence. Hopefully, this submission makes a positive input into the demanding task ahead for the Commission. We wish you success in your deliberations.

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