HIGH LEVEL REVIEW PANEL REPORT ON THE STATE SECURITY AGENCY

DECEMBER 2018

Preface

The High-Level Review Panel on the SSA and Related Matters is pleased to submit its final report to his Excellency, President Matamela Cyril Ramaphosa. We hope that the findings and recommendations contained in this report respond adequately to the concerns that led the President to establish this Panel, and that those of our recommendations that are accepted and implemented play a decisive role in achieving '*a professional national intelligence capability for South Africa that will respect and uphold the Constitution, and the relevant legislative prescripts*' as required by our Terms of Reference.

We think it prudent to highlight here that our key finding is that there has been a serious politicisation and factionalisation of the intelligence community over the past decade or more, based on factions in the ruling party, resulting in an almost complete disregard for the Constitution, policy, legislation and other prescripts, and turning our civilian intelligence community into a private resource to serve the political and personal interests of particular individuals. In addition, we identified a doctrinal shift towards a narrow state security orientation in the intelligence community from 2009 in contradiction to the doctrines outlined in the Constitution, White Paper on Intelligence and other prescripts. We are concerned that the cumulative effect of the above led to the deliberate re-purposing of the SSA.

The Panel has made many detailed findings and recommendations, but most importantly it is recommending an overarching overhaul of the intelligence and security architecture of the country, the implementation of which will require extensive consultation and a good dose of determination.

The Panel has done its best to meet the requirements of the task given to it, within the parameters of certain constraints. These include the scope and range of issues referred to the Panel, the tight timelines given to it, and the fact that most of the panellists were also in full-time employ elsewhere. One of the challenges the Panel faced was having to keep reminding itself that it was not an investigative commission or task team. There were many issues brought before the Panel that it would have liked to delve into in more detail but re-assured itself by the understanding that 'high-level' in its title refers to the depth of the review rather than the social standing of the panellists.

We would like to express our gratitude to the President for entrusting us with this task, to the Minister and her staff for their support, to the Acting Director-General for his support, and to the Secretariat for their efficiency, constant availability and hard work above and beyond the call of duty. Lastly, we thank all those who submitted inputs and appeared before the Panel for their invaluable contribution to its work.

High-Level Review Panel on the SSA

Contents

Abbreviations

AG – Auditor-General
AGSA – Auditor-General of South Africa
ANC – African National Congress
BMA – Border Management Agency
CASAC – Council for the Advancement of the South African Constitution
CD – Chief Director/Chief Directorate
CFO – Chief Financial Officer
COMSEC – Communications Security Company
CR17 – Cyril Ramaphosa 2017 Campaign
CV – Curriculum Vitae
DB – Domestic Branch
DCAF – Geneva Centre for the Democratic Control of the Armed Forces
DDG – Deputy Director-General
DG – Director-General
DHA – Department of Home Affairs
DIRCO – Department of International Relations and Cooperation
FB – Foreign Branch
FIC – Financial Intelligence Centre
FIS – Foreign Intelligence Service/s
GILAA – General Intelligence Laws Amendment Act of 2013
GP – Gauteng Province
HUMINT – Human Intelligence
IA – Intelligence Academy
IG – Inspector-General
IGI – Inspector-General of Intelligence
JSCI – Joint Standing Committee on Intelligence
KZN – KwaZulu Natal Province
LRA – Labour Relations Act
MI6 – UK Secret Intelligence Service
MK – Umkhonto we Sizwe (ANC's armed wing)
MoU – Memorandum of Understanding
MPD – Ministerial Payment Directive
MTEC – Medium Term Expenditure Committee
NAC – National Assessments Centre
NC – National Communications
NCC – National Communications Centre
NGO – Non-Governmental Organisation
NIA – National Intelligence Agency
NICOC – National Intelligence Coordinating Committee
NIE – National Intelligence Estimate
NIPS – National Intelligence Priorities
NIS – National Intelligence Service
NPA – National Prosecuting Authority
NSC – National Security Council

NSS – National Security Strategy
OIC – Office for Interception Centres
OIGI – Office of the Inspector-General of Intelligence
OoS – Organs of State
PAN – Principle Agent Network
PFMA – Public Finance Management Act
POCA – Prevention of Organised Crime Act
POSIB – Protection of State Information Bill
PRECCA – Prevention and Combatting of Corruption Act
PSA – Public Service Act
RICA – Regulation of Interception of Communications and Provision of Communication-Related Information Act
SABC – South African Broadcasting Corporation
SAHRC – South African Human Rights Council
SANAI – South African National Academy for Intelligence
SANDF – South African National Defence Force
SAPS – South African Police Service
SARB – South African Reserve Bank
SARS – South African Revenue Service
SASS – South African Secret Service
SAVESA – Save South Africa
SDP – Strategic Development Plan
SIGINT – Signals Intelligence
SO – Special Operations
SOE – State-Owned Enterprise
SSA – State Security Agency
TA – Temporary Advance
UK – United Kingdom
US – United States
VAG – Verligte Aksie Groep

1. Executive Summary

The High-Level Review Panel into the State Security Agency (SSA or Agency) was established by President Cyril Ramaphosa in June 2018, began its work in July 2018 and was given six months to submit its report. The key objective for the establishment of the Panel 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.*

The Panel was chaired by Dr Sydney Mufamadi and included nine other members with a wide range of senior level experience and expertise in law, security studies, civil society, academia, the intelligence and security community and other arms of government. The Panel was supported by a Secretariat provided by the Agency.

The Panel had access to an extensive number of documents, including presentations and submissions from SSA units, other sectors of the intelligence community, past and current individual members of the community and other relevant arms of government; policies, legislation, regulations and directives; previous review reports and discussion documents; investigation reports and many others.

The Panel held interviews with a wide range of people, including, *inter alia*, the current and former ministers of intelligence/state security; former and current directors-general and senior leadership of the SSA and its predecessor services; the Inspector-General for Intelligence, the Coordinator for Intelligence, the National Security Advisor, the Auditor-General; the heads of other arms of the broader intelligence community as well as individual members and former members of the community and many others.

The Panel's Terms of Reference provided 12 focus areas for the Panel's work:

- 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.
- The effectiveness of Training and Development Programmes in capacitating members

of the Agency.

- The effectiveness of intelligence and counter-intelligence coordination within the Agency and between the agency and other South African intelligence entities and the capacity and role of the National Intelligence Coordinating Committee (NICOC) in this regard.
- The effectiveness and appropriateness of the existing oversight mechanisms in ensuring accountability and transparency.

Apart from its specific findings and recommendations, the Panel asked itself the question: 'What went wrong?' In answering this question, it must be said that the findings of the Panel do not impugn every member of the SSA and its management, but focus on the things that went wrong. It identified five high-level answers to this question:

- **Politicisation**: The growing contagion of the civilian intelligence community by the factionalism in the African National Congress (ANC) progressively worsened from 2009.
- **Doctrinal Shift**: From about 2009, there was a marked doctrinal shift in the intelligence community away from the prescripts of the Constitution, the White Paper on Intelligence, and the human security philosophy towards a much narrower, state security orientation.
- **Amalgamation:** The amalgamation of National Intelligence Agency (NIA) and South African Secret Service (SASS) into the SSA did not achieve its purported objectives and was contrary to existing policy.
- **Secrecy:** There is a disproportionate application of secrecy in the SSA stifling effective accountability.
- **Resource Abuse**: The SSA had become a 'cash cow' for many inside and outside the Agency.

2 Recommendations

For convenience of reference, we present below the full list of recommendations contained in the individual chapters of the report. We would first, though, like to highlight some overarching recommendations on which many of the others depend, as well as make some general recommendations.

2.1 National 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 full-time 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.

3 Introduction

3.1 Establishment of the Panel

The High-Level Review Panel on the State Security Agency was established by President Cyril Ramaphosa on 15th June 2018 with the main objective **'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.'** [1] The panel commenced work on 1st July 2018 and was initially given three months to complete its task, later extended to six months.

3.2 Terms of Reference

The Terms of Reference note the establishment of the SSA in 2009 through the amalgamation of previously separate institutions – the South African Secret Service, the National Intelligence Agency, the National Communications Centre, the South African National Academy for Intelligence (SANAI) and COMSEC (the communications security company).

The Terms of Reference further note allegations that the SSA has faced serious challenges and violations of the law in recent years.

The Review was to focus on the SSA and the Office for Interception Centres and any related structures.

The Panel was, in particular, to focus on the following issues:

- 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 on, inter alia:
  - Operational Directives;
  - Financial Accounting;
  - Professionalism;
  - Non-partisanship;

[1] High-Level Advisory Panel: Terms of Reference

- Code of Conduct; and
- Service Level Agreements

- 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.
- The effectiveness of Training and Development Programmes in capacitating members of the Agency.
- The effectiveness of intelligence and counter-intelligence coordination within the Agency and between the agency and other South African intelligence entities and the capacity and role of the National Intelligence Coordinating Committee (NICOC) in this regard.
- The effectiveness and appropriateness of the existing oversight mechanisms in ensuring accountability and transparency.

The Panel was given full independence but had no power to subpoena or cross-examine witnesses.

3.3 Panel Members[2]

The President appointed the following ten members to the Panel:

- Dr Sydney Mufamadi (Chairperson)
- Professor Jane Duncan
- Mr Barry Gilder
- Dr Siphokazi Magadla
- Mr Murray Michell
- Ms Basetsana Molebatsi
- Rtd. Lt General Andre Pruis
- Mr Silumko Sokupa
- Professor Anthoni Van Nieuwkerk
- Professor Sibusiso Vil-Nkomo

As required by the Terms of Reference, the SSA provided logistical and administrative support to the Panel.

[2] See Appendix A for brief biographies of the Panel members.

3.4 Methodology

3.4.1 Briefings and Interviews

The Panel received briefings from the Acting Director-General (DG) and members of the top management of the SSA dealing mainly with the mandate, structures, functions and challenges of the various branches and units of the Agency.

It also met with all the provincial heads of the Agency as well as some heads of foreign stations.

The Panel had sessions with the current and a former IGI, the JSCI, the former Chairperson of the JSCI, as well as with the (AGSA) and DG of the National Treasury.

It also interacted with the current and former ministers of Intelligence/State Security plus the current National Security Advisor as well as former directors-general of the SSA and of its predecessor entities and former heads of the Domestic and Foreign branches of SSA.

The Panel also engaged the current and former heads of the NICOC, the heads of the Crime Intelligence Division of the South African Police Service (SAPS) and of the Intelligence Division of the South African National Defence Force (SANDF), the head of the Financial Intelligence Centre (FIC), and former directors-general of the departments of home affairs (DHA) and foreign affairs.

It also had the benefit of the institutional memory and insights of some of its members who had previously served in senior leadership positions in NIA, SASS, NICOC, DHA, SAPS and FIC.

3.4.2 Documents

The Panel perused a large number of documents, including presentations on the structure and functioning of SSA, legislation and policy documents, IGI and other investigation reports, submissions by various SSA units, SSA staff, external bodies and individuals.

Key among these to the Panel's brief were:

- The White Paper on Intelligence
- The 2013 NSS
- The 2007 Draft NSS
- The 1996 Report of the Ministerial Review Commission of Enquiry into the Transformation of the Civilian Intelligence Services (the Pikoli Commission)

- The 2006 Final Report of the Task Team on the Review of Intelligence-Related Legislation, Regulation and Policy
- The 2008 Report of the Ministerial Review Commission on Intelligence (the Matthews Commission) and the 2008 Advisory Report for Minister Kasrils on this report

3.5 Structure of the Report

The body of the report is structured according to Clause 5 of the Terms of Reference as outlined in 2.2 above, assigning a chapter to each point of focus.

Each chapter has the following structure:

- Brief Summary of the Issue
- Summary of Inputs Received
- Discussion
- Findings
- Recommendations

The report ends with a Conclusion (that summarises the Panel's answer to the question: What went wrong?).

4 Policies and Prescripts

Focus Area: The high-level policies and strategies, legislation, regulations and directives governing, or impacting on, the mandate, structure, operations and efficacy of the SSA.

4.1 The Issue

South Africa's intelligence community has faced many challenges, legal and structural vacillations in the years since the birth of democracy. In more recent times – since 2005 to be precise – the civilian intelligence community has been the target of a number of scandals, starting with the hoax email saga of 2005 that led to the firing of then NIA DG, through to more recent allegations against the successor SSA relating to its PAN programme and other alleged abuses.

The question is: to what extent are these apparent abuses of the intelligence mandate and operations, as well as some of the legacy issues, the result of weaknesses in policy, legislation and prescripts?

4.2 Summary of Inputs

The Panel had access to all the relevant policy and legislative documents as well as to previous commission and task team reports on these matters. These included, inter alia:

- The White Paper on Intelligence (1994)
- National Strategic Intelligence Act 39 of 1994
- Intelligence Services Oversight Act 40 of 1994
- Intelligence Services Act 65 of 2002
- Regulation of Interception of Communication and Provision of Communication-Related Information, Act 70 of 2002
- General Intelligence Laws Amendment Act 11 of 2013 (GILAA)
- NSS (as approved by Cabinet in December 2013)
- Draft NSS of June 2007
- Report of the Task Team on the Review of Intelligence-Related Legislation, Regulation and Policies, April 2006
- The Matthews Commission Report of 2008
- The Intelligence Services Regulations of 2014
- Operational Directives

We also received a comprehensive briefing, presentation and documents from the SSA Legal Division on current processes to review legislation and other prescripts. In addition, we engaged many of the institutions and individuals we met on their views on this focus area.

4.3 Discussion

It was not part of the Panel's mandate to conduct a detailed review of all policy, legislation and other prescripts. The Panel's focus was largely on assessing these in relation to the question 'What went wrong?'

The Panel noted the many initiatives since the early days of the democratic intelligence dispensation to review and amend policy and legislation and that many of the recommendations of earlier reviews were never implemented or fell away when a new administration came into office. Thus, many of the observations and findings of the Panel are not new. This is of serious concern and, in the Panel's view, speaks to a significant extent to the dysfunctionality of the intelligence community over the past decade or so.

4.3.1 Constitution

The Constitution is the overarching legislation that governs the security services. Chapter 11 of the Constitution sets out the principles governing national security and provides for the establishment, structuring and conduct of the Security Services comprising Intelligence, Defence and Police.

Section 198 prescribes that the following principles govern national security in the Republic:

> *(a) 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.*
> *(b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.*
> *(c) National security must be pursued in compliance with the law, including international law; and*
> *(d) National security is subject to the authority of Parliament and the national executive.*

Section 199 provides for the establishment, structuring and conduct of security services and states that:

> *(1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.*
> *(3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.*
> *(4) The security services must be structured and regulated by national*

legislation; and
(5) act, teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.
(6) No member of any security service may obey a manifestly illegal order.
(7) Neither the security services, nor any of their members, may, in the performance of their functions —
(a) prejudice a political party interest that is legitimate in terms of the Constitution; or
(b) further, in a partisan manner, any interest of a political party.
(8 To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament. [Our emphases]

Section 209 governs the establishment of the civilian intelligence services by the President in terms of national legislation and section 210 requires that national legislation must regulate the objects, powers, and functions of the intelligence services.

In terms of section 209:

(1) any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation; and
(2) the President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility. [Our emphases]

Section 210 sets out the powers, functions and monitoring of the intelligence services and provides that:

…national legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for —(a) the co-ordination of all intelligence services; and (b) civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members. [Our emphases]

The provisions of the Constitution regarding intelligence reflect the resolve of its drafters that our intelligence and security services should never return to the wanton disrespect for political and human rights that preceded the democratic dispensation.

4.3.2 White Paper

The White Paper on Intelligence of 1994 provides a policy framework for the establishment, principles and functioning of the intelligence services in a democratic South Africa. The White Paper was adopted by Parliament in 1995 and has not been reviewed to date, although there have been a number of recommendations by past reviews and commissions that this should be done, and there has been a further process to do this since 2016.

Importantly, the White Paper reflects the vision and values of the founders of our constitutional democracy as far as democratic intelligence is concerned.

The White Paper sets out the legislative mandate of the new civilian services (domestic and foreign) and aims to address the creation of an effective, integrated and responsive intelligence machinery that can serve the Constitution and the government of the day, through the timeous provision of relevant, credible, and reliable intelligence.

The White Paper describes modern intelligence as organised policy-related information, including secret information 'that may be gathered by covert or overt means, from a range of sources, human and non-human, open or secret'. In addition, it recognises various forms of intelligence including political intelligence, economic intelligence, technological and scientific intelligence, military, criminal and counter intelligence.

It defines modern intelligence and juxtaposes the purpose of intelligence in a democratic and constitutional dispensation vis-à-vis the purpose of intelligence during the Cold War. According to the White Paper, in order for intelligence to remain relevant in the modern, post-Cold War world, intelligence must serve the following purposes:

- Provide policy-makers, timeous, critical and unique information to warn them of potential risks and dangers. This allows the policy makers to face the unknown and best reduce their uncertainty when critical decisions have to be made;
- To assist good governance, through providing honest critical intelligence that highlights the weaknesses and errors of government. As guardians of peace, democracy and the Constitution, intelligence services should tell government what they ought to know and not what they want to know.
- In the South African context, the mission of the intelligence community is to provide evaluated information with the following responsibilities:
    - to safeguard the Constitution;
    - to uphold the individual rights enunciated in the Bill of Rights;
    - the achievement of national prosperity whilst making an active contribution to global peace and other globally defined priorities for the

well-being of human kind; and
- the promotion of South Africa's ability to face foreign threats and to enhance its competitiveness in a dynamic world.

The White Paper underlines the following principles underpinning intelligence organisation:

- Principle of National Intelligence Organisation
  - To uphold the principles of integrity, objectivity and credibility;
  - Be relevant to the maintenance, promotion and protection of national security; and be loyal to the State and the Constitution.
- Principle of Departmental Intelligence Capabilities
  - Recognises the necessity for departmental intelligence capabilities to support line function responsibilities and departmental decision-making, as long as such structures observe the legal obligations, style, character and culture of the departments they serve and observe the same fundamental approach to their tasks that are applicable to the national intelligence services.
- Principle of Political Neutrality
  - A national intelligence organisation is a national asset, and shall therefore be politically non-partisan;
  - No Intelligence or Security service or organisation shall be allowed to carry out any operations that are intended to undermine, promote or influence any South African political party or organisation at the expense of another by means of any acts, including active measures or covert action or by means of disinformation. [Our emphasis]
- Principle of Legislative Sanction, accountability and Parliamentary Control
  - Mission, function and activities shall be regulated by relevant legislation, the Bill of Rights, the Constitution and an appropriate Code of Conduct;
  - Intelligence work shall derive its authority from a legal framework and shall be subordinate to measures of accountability and parliamentary control.
- Principle of the balance between Transparency and Secrecy
  - Effective Intelligence, whilst requiring among others the essential component of secrecy, needs to be sensitive to the interests and values of a democratic society;
  - The development of a more open intelligence community will go a long way towards demystifying and building trust in the national intelligence communities. Where legal limits of secrecy, including criteria and time frames for classification are clearly understood and accepted by society, the dangers of the intelligence system becoming self- serving are averted. [Our emphasis]

- Principle of effective management and organisation and sound administration;
- An ethical code of conduct for Intelligence Work.
- Coordination of Intelligence and liaison with departmental intelligence structures
  - A national security system should include structures and opportunities to facilitate an input by those domestic departmental intelligence/information structures as authorised by law.
  - A well-functioning intelligence coordinating mechanism is essential to coordinate the flow of information, priorities, duplication of resources, the *audi alteram partem* principle with regard to interpretation and other matters pertaining to the other functions of intelligence. [Our emphasis]

While elements of the White Paper refer to the specificities of the time it was drafted and are thus somewhat anachronistic, the fundamental vision, values and principles of the Paper remain valid and relevant to today.

4.3.3 National Security Strategy

The Panel was made aware of efforts in the intelligence and security community to develop a NSS that would serve as an overarching policy to guide the country's understanding of and approach to national security. The Panel had sight of two versions of such a strategy, both prepared by NICOC:

- Draft NSS for South Africa – 2007
- NSS – 2013

The first went as far as the then National Security Council (NSC) Directors-General in June 2007 where, apparently, it stalled. The second was approved by Cabinet on the 4th December 2013.

The 2007 draft NSS involved an extensive process of governmental and public consultation in the drafting process and recommends an open process of public and parliamentary consultation on the Strategy. It includes a proposal for the establishment of a National Security Advisory Council that would include public sector, private sector and civil society representatives.

The 2013 NSS is classified Top Secret and, although it mentions the possibility of wider consultation, the Panel is not aware of any such consultation taking place. Furthermore, the Strategy is not in a form that could be effectively consulted outside of government and the security sector in particular.

4.3.4 Legislation

There is a wide range of legislation that governs the SSA and its related entities.

These include:

- National Strategic Intelligence Act, 1994 (Act 39 of 1994);
- Intelligence Services Act (ISA), 2002 (Act 65 of 2002);
- Protection of Information Act, 1982 (Act 84 of 1982);
- National Key Points Act, 1980 (Act 102 of 1980);
- Intelligence Services Oversight Act, 1994 (Act 40 of 1994);
- Regulation of the Interception of Communications and Provision of Communication-Related Information Act, 2002 (Act 70 of 2002) **("RICA");**
- Financial Intelligence Centre Act, 2001 (Act 38 of 2001) **('FICA");**
- Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act 33 of 2004)
- Secret Services Act, 1978 (Act 56 of 1978);

The Panel was made aware of a number of processes over the years to review and amend the legislative prescripts. Many of the more high-level recommendations of these previous processes are identical or similar but have never been finalised or implemented, and the Panel has come to similar conclusions, as shall be reflected later in this report.

The Panel also considered POSIB and the Secret Services Act of 1978.

POSIB was introduced to Parliament in 2008. It was an attempt by the then civilian intelligence community to replace the apartheid Protection of Information Act to bring the legislation in line with the Constitution and other information-related legislation. It provided for the crime of espionage which, strangely, South Africa had never had before, and it created processes for compulsory declassification of information and it criminalised the classification of information to hide corruption and other malfeasance. However, the Bill raised high levels of public concern and, despite numerous attempts to address these concerns through amendments and the Bill's having been approved by Parliament, it remains unsigned ten years later.

The Secret Services Act is an apartheid-era piece of legislation that enabled the setting up of a special account for funds used for 'secret services'. The main benefit to the State Security Agency of this Act is that it allows it to carry over unspent funds into the new financial year, unlike other departments who have to return unspent funds to the fiscus or apply for a rollover. However, the Act also provides for a committee that has to approve any 'secret service' to be funded from this account. The Panel is not aware that any such committee has been functioning.

4.3.5 Regulations

The Intelligence Services Regulations came into effect on 29 January 2014, in terms of section 37 of the Intelligence Services Act, and the GILAA and repealed the Intelligence Services Regulations of 2003.

Chapter I of the Regulations deals with 'General Provisions'. It provides, inter alia, that:

- the Minister may not require or permit the Director-General (DG) or any other member to engage in an activity or take a decision in breach of these regulations.
- the DG upholds the provisions of the Regulations and other statutory obligations, ensures that other members do the same and deals immediately and effectively with any breach thereof. [Our emphasis]
- that the Agency must provide evaluated information to ensure, inter alia, the safeguarding of the Constitution and the upholding of the individual rights contained in the Bill of Rights.
- that the Agency must be loyal to the State and the constitutional obligations.
- that the attributes and qualities of a successful intelligence officer include:
  - Faithfulness to the Republic of South Africa and the Constitution
  - Obedience to the laws of the Republic of South Africa
  - Disregard for a manifestly illegal order [Our emphasis]

Chapter II of the Regulations deals with 'Organisation and Structures'. It provides for the establishment of the organisational structure of the Agency, the creation and grading of posts for the fixed establishment of the Agency; the filling of posts; additional employment and job descriptions, job titles and a remuneration management system.

Of particular interest to the work of the Panel are the provisions that allocate the powers of appointment:

- The President appoints the DG.
- The Minister, in consultation with the President, appoints deputy directors-general (DDGs).
- The Minister appoints general managers (chief directors), managers (directors) and equivalent levels.
- The Minister appoints heads of foreign stations. The director-general can appoint deployees to foreign stations below head of station level, but in consultation with the Minister.
- The DG can make appointments up to the level of Divisional Head (Deputy Director).

Chapter V of the Regulations specifies the requirements and processes for recruitment, selection, appointment and termination of service in the Agency and conditions of service. Of particular interest are the provisions that:

- all positions in the Agency must be filled on the basis of competition and advertised openly;
- the DG is accountable and the authority for recruitment and selection is vested with him or her;
- recruitment and selection processes in the Agency must be open, transparent and subject to internal scrutiny and audit;
- that a member in a post, one level lower than the vacant post or on an equivalent level to the vacant post or on a level higher than the vacant post, may be appointed by the Minister or the DG, as the case may be, to act in a management post for a period not exceeding twelve (12) months.

Chapter XVI, titled 'Consultations', provides for an internal mechanism to compensate for the limitation of a member's constitutional right to belong to a trade union, on the basis of the following principles:

- To promote sound employee and employer relations in the Agency.
- To provide for effective consultation, in good faith, on matters of interest.
- To strive to reach consensus with the participants.

Chapter XVIII – Disciplinary Procedure – provides, in an appendix, for a list of acts regarded as misconduct, including, among many:

- abusing his or her position inside or outside the scope of his or her official duties to promote or prejudice personal interests or those of any party, group, political organisation or other individual;
- failing to obey a lawful order or instruction intentionally or negligently[3];
- being absent from work without leave or without a valid reason;
- wilfully spreading a false allegation or making a false statement to anyone about another member;
- sexually harassing another member;
- as a supervisor failing to take appropriate corrective action upon becoming aware of sexual harassment and unfair discrimination;
- attempting to secure or abandon any personal advantage, service benefit or activities within the Agency by means of or in aid of a political or any other organisation/institution outside the Agency;
- wilfully contravening or failing to comply with any provision of the Act, regulations, directions, directives and policies issued in terms of the Act, whether such an act constitutes an offence or not;
- failing to report on or investigate any of the above-mentioned.
  [Our emphases]

[3] Seemingly no provision is made for issuing or obeying a manifestly illegal order. See Chapter 9

The Regulation provides for the following sentences:

- Corrective counselling;
- A written warning which must be valid for a period not exceeding one year;
- A fine not exceeding the member's monthly basic salary;
- A reduction of the member's salary, rank or job level or all three;
- A request for the member to resign, and upon refusal, he or she must be discharged;
- Discharge.

Chapter XXVI of the Regulations, dealing with Vetting, provides that a vetting investigation may only be used to:

- protect the Agency from foreign and hostile intelligence operations;
- safeguard the Agency from the unauthorised dissemination or disclosure of classified information and material; and
- determine the person's or member's integrity, reliability and loyalty to the Agency in safeguarding the interests of the Republic of South Africa and its Constitution.

4.3.6 Operational Directives

The Operational Policy and Operational Directives (OD) were approved by the Minister on 23 January 2015. They are consistent with GILAA and the ISA that serve as the legislative genesis of the Policy and Directives.

4.4 Findings

4.4.1 General

The Panel finds that:

a) while there may be changes to be made to policy and prescript impacting on the intelligence community, and that many of the Panel's recommendations to follow may require legislative review, in its view the challenges that led to the appointment of the Panel are due in the main to an almost complete disregard for policy and prescript – in short, serious breaches of the Constitution, policy, law, regulations and directives.

4.4.2 Constitution

The Panel finds that:

b) No changes are required to the Constitution to prevent malfeasance in the intelligence community. What is clear, as later sections of this report shall show, is that members of the SSA in particular, as well as senior politicians, have been in breach of the Constitutional provisions regarding obeying a manifestly illegal order and the injunction not to further the interests of any political party in a partisan manner.

4.4.3 White Paper

The Panel finds that:

c) The White Paper broadly and correctly reflects the vision, values and principles that underpinned the creation of our democratic intelligence dispensation and that these remain relevant and, in recent times, have been more honoured in the breach.

d) Although the White Paper specifically prescribes the establishment of two separate civilian intelligence services – external and domestic – NIA and SASS were amalgamated into the SSA without prior amendments to this high-level policy document and the parliamentary and public consultation this would have required. We deal with this in more detail later.

e) Although still apropos in general terms, there are sections of the White Paper that are anachronistic and relate to the time in which it was drafted and approved by Parliament.

4.4.4 National Security Strategy

The Panel finds that:

f) A credible NSS is a crucial policy tool that sets the broad context in which the security sector functions on behalf of the nation. It is a document on which the white papers and other policy documents of the security departments and other relevant organs of state should be based.

g) The 2013 NSS is a cross between a strategy, intelligence estimate and a

business plan. It is also too time-bound to the period in which it was written. Further, it is very non-committal and unambitious in its proposals on the national security architecture.

h) The 2007 Draft NSS provides a high-level, less time-tied outline of the possible threats the country may face, proposes a sound system of countering threats and a thorough, though radical, new architecture and set of business processes for the security community. Further, it provides for the involvement of the broader society in the national security system.

4.4.5 Legislation

The Panel finds that:

i) There are many concerns and proposals that may impact on legislation as will be shown later in the report but, as stated above, its main finding is that over the past decade or so there has been a marked and increasing disregard of the legislation.

j) Failure to finalise the POSIB has caused a serious hiatus in taking forward this issue and leaves the country reliant on an apartheid-era piece of information protection legislation.

k) The Secret Services Act is an apartheid anachronism and a serious cause of financial malfeasance in the Agency.

4.4.6 Regulations

The Panel finds that:

l) The Regulations appear to be comprehensive and detailed and based on sound principles.

m) There have been numerous cases of breaches of the Regulations and failures to apply the very consequence management measures contained in the Regulations.

4.4.7 Operational Directives

n) There is clear evidence that the ODs were breached by the SO Unit, the

PAN and other deep cover operations.

4.5 Recommendations

The Panel recommends as follows:

4.5.1 National Security Strategy

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.

4.5.2 White Paper

b) Bring the current White Paper up to date, retaining the basic vision, values and principles of the current Paper.

4.5.3 Legislation, Regulations and Directives

c) On the basis of the approved recommendations of this Review Report, 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 the 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.

5 Amalgamation of SASS and NIA

Focus Area: 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.

5.1 The Issue

In 1994, policy and legislation created two civilian intelligence services – a domestic service (NIA) and a foreign service (SASS). During the early 2000s a number of elements of the NIA were hived off as separate entities – SANAI, the NCC, COMSEC and the OIC.

The administration that came in 2009, by proclamation and later legislative amendments, amalgamated all these entities into one department – the SSA.

5.2 Summary of Inputs

The topic of the amalgamation of NIA and SASS into the SSA was frequently discussed with many of the current and past members of the SSA and its predecessor institutions and related entities who appeared before the Panel. It also formed part of some of the submissions made to the Panel.

The relevant policy documents and legislation referred to in the previous chapter formed part of the inputs on this issue, as well as:

- Progress Report: Restructuring Project of the State Security Agency (September 2009 to 06 June 2014)
- Pikoli Commission Report
- Submission by former head of COMSEC and ministerial legal advisor
- Submission by a former member of the SSA Top Management

5.3 Discussion

During the Transitional Executive Council intelligence negotiations in the first half of the 90s, there was intense debate about whether the new intelligence dispensation should have a single civilian intelligence service or two separate services. The former National Intelligence Service (NIS) negotiators argued strongly for one service with the ANC arguing for separate internal and external services based on benchmarking with other democracies and the necessary specialised focus. This latter position held sway as was reflected in the Intelligence White Paper passed by Parliament in 1994.

In 2009, the incoming administration took a decision to reverse this and amalgamate the then NIA and SASS and other entities into the SSA.

The SSA was established by Presidential Proclamation 59 of 11 September 2009, followed by the centralisation of command and control of civilian intelligence in Government Notices (912, 913, 914 and 915) on 17 September 2009 and adoption of the GILAA No 528 in July 2013, which confirmed in law the establishment of the SSA. GILAA also disestablished the NIA, SASS, SANAI and COMSEC.

The impact of the amalgamation process became an important consideration for the work of the Panel because current and former members argued that there was an absence of a clear legislative framework that guided the process of integration and the narrowing of the philosophical orientation and purpose of civilian intelligence.

The 1994 White Paper, after specifying that there will be two separate civilian intelligence services, states:

> *This arrangement will not only ensure that the new intelligence dispensation in South Africa corresponds with general international trends, but will promote greater focusing, effectiveness, professionalism and expertise in the specialised fields of domestic and foreign intelligence.*

The White Paper also specifies the names of the two services – National Intelligence Agency and South African Secret Service. However, the 2009 changes also amended the name from *National Intelligence* Agency to *State Security* Agency which, in the view of the Panel and many of its interlocutors, suggests a significant conceptual shift from security of the nation to security of the state, a shift that appears to have been reflected in praxis in the subsequent years.

Some representations to the 1996 Pikoli Commission argued for the two services to be amalgamated into one, but the Commission recommended that the situation should remain as is but should be reviewed in future. No subsequent reviews or commissions dealt with this issue and the Panel is not aware of any public process that preceded the creation of the SSA.

The main arguments for the creation of SSA centred around the elimination of duplication, cost savings and better coordination and integration of foreign and domestic intelligence. In the view of the Panel and many who gave evidence to it, these proposed benefits were not realised. There was a strong view that, nine years into amalgamation and the formal conclusion of the process in June 2014, the SSA is still not de facto fully integrated. Among core concerns about the amalgamation process were the distribution and centralisation of power, obscured mandates of domestic and foreign intelligence, sharing of systems, duplication of roles, leadership instability and staff displacement, among others.

The Panel understands that part of the pressure for the amalgamation of the predecessor services into the SSA came from National Treasury which had expressed concern over the 'proliferation' of structures in the civilian intelligence community. However, evidence presented before the Panel showed that the total civilian

intelligence budget has almost doubled since amalgamation.

Some quotes of some of the key concerns raised with the panel include:

> *The objective of Proclamation 59 of 2009 was to strengthen operations, trim corporate services and minimize duplication of services. However, that objective was not realized. Integration remains incomplete. Instead we have seen a growing concentration of power in the Director General (emergence of a 'Super DG') who, at the same time, is at the same level as the other two Directors - Domestic and Foreign.*
>
> *Integration is not really a structural issue but very much a cultural matter, a mindset issue, dependent on the value people place on cooperation as opposed to a mere structural arrangement. The individual 'organisational cultures' of NIA and SASS persisted even after formal integration into the SSA. Nine years after amalgamation and the establishment of the SSA the latter still has not in practical terms evolved into a coherent organisational culture, characterised by a shared value system.*

And:

> *This merger of entities was done through a Proclamation without repealing the laws. This was an irregular exercise which got subsequently regularized through General Intelligence Laws Amendment Act (GILAA) which was only promulgated in 2013…*
>
> *…Before collapsing all the structures into SSA, no feasibility study (socio economic impact study) was conducted on the impact on human, technical, financial, collection methods, oversight, checks and balances in operational activities etc. There was just a policy view expressed that in order to cut cost and create efficiencies everything had to be collapsed into one. This collapse of the structures into SSA also resulted in the oversight body created to ensure fair labour practices in the intelligence services to be undermined through depletion of human capacity and oversight focus. This depletion of capacity resulted in low staff morale within the intelligence services, due to non-adherence to fair labour practices and the rule of law.*

There was a view that part of the weakness of the amalgamation process was that it relied on changing old laws instead of creating new ones for the new structure. Legal opinion presented to the Agency in 2010 speaks to the urgent need for the passing of a 'State Security Bill' that would outline the structures and distribution of powers of the SSA. There was overwhelming agreement that amalgamation ought to have been preceded by an extensive policy review 'before behaving according to desired policy'. Of great concern to the Review Panel was the observation that none of the senior leaders of the Agency (past and present), including former ministers, who led the process of amalgamation, were able to speak with confidence and clarity about the legal framework that formed the foundation for integration. A former DG of the

Agency confessed that they were 'not sure whether there was a problem statement to change the service to SSA…It was as if we woke up one day and decided to amalgamate. There is no legislation that outlines the new framework for SSA.'

The constitutionality of the amalgamation process was also brought into question by the leadership that was chosen to lead the restructuring. Their concerns included:

- the change from national intelligence to state security 'narrowed the focus of intelligence as a state institution rather than an arm of intelligence for society.'
- the absence of consultation in the process of developing the State Security Bill, the confusion between the powers of the DG and the Directors of the foreign and domestic branches, and the narrowing of the intelligence mandate.

A senior member of the restructuring leadership explained that "We came into a situation that was established. We never understood it. There was a proclamation being made and we were then brought in …"

Once of the key challenges faced by the civilian intelligence community since 1994 was that the two services then established were forced by practical realities to share certain services and facilities inherited from the old NIS. This included a decision to undertake extensive construction at the intelligence campus inherited from NIS on the Delmas Road in Pretoria East to accommodate the two departments and the services they shared.

Over the years, there had been a number of initiatives to find an acceptable way to share certain services, as well as initiatives to separate out as stand-alone departments certain of these services, such as the IA, the NCC (responsible for signals intelligence on the foreign terrain). All of these shared services were previously housed in NIA, creating some unhappiness from SASS about their lack of sufficient involvement in the management of these services, in spite of the establishment of a Shared Services Board and other initiatives.

It appeared to the Panel that the amalgamation of everything into the SSA, in spite of the intention, did not really solve this problem, but rather created dissonance between the systems and functions inherited from the two previously separate entities, and thus insufficient focus on the special needs of the domestic and foreign branches of SSA. Interestingly, a number of former leaders of the SSA and its predecessors expressed similar views. And many more inside and outside the SSA thought that NIA and SASS should be separated again. Members in both the OIGI and the JSCI pointed out that separate Services would assist the oversight process.

5.4 Findings

The Panel finds that the:

a) Amalgamation of NIA and SASS into the SSA was in breach of the White Paper on Intelligence and, at the very least, should have been preceded by a similar policy process as was involved in the original White Paper, including consultations in Parliament and with the public.
b) Initial establishment of SSA through presidential proclamation was irregular due to the Constitutional requirement that the President can only establish intelligence services through legislation.
c) Stated intention of amalgamating the previous services was not achieved and, in fact, created new and more serious problems, including, inter alia:
    - serious disruption of the functions, efficiency and operations of the two previous services
    - excessive concentration of power
    - an unwieldly hierarchy
    - an excessive top-heaviness of management
    - a lack of proper focus on foreign intelligence
    - duplication of certain functions such as analysis
    - dislocation of personnel
d) That the change of name from National Intelligence Agency to State Security Agency was in breach of the human security philosophy of our democratic intelligence dispensation contained in the Constitution and the White Paper.

5.5 Recommendations

The Panel recommends that:

a) The SSA should be separated 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, be located inside the foreign service at least as an interim measure.
c) The OIC should be given independent organisational status as outlined in Chapter 6 of RICA and should be capacitated to receive and manage its budget independently of the SSA. The OIC should revert to its pre-SSA reporting structure and the Director of the OIC should have full control and accountability over the resources of the OIC.
d) The President establish a task team, consisting 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.

e) Any process of major changes to the SSA be thoroughly consulted and change-managed with Agency staff at all levels.
f) 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.

6 Structure

Focus Area: The appropriateness of the current structure of the agency to its core mandates and to effective command, control and accountability

6.1 The Issue

Over the years since 1995, there have been numerous structural changes to the civilian intelligence community, the largest being the amalgamation of SASS and NIA into the SSA dealt with in the previous chapter and, more recently, the introduction of the Strategic Development Plan (SDP) in 2017 and its reversal by the current Minister in 2018. Are these frequent and sometimes drastic structural changes necessary and logical?

6.2 Summary of Inputs

In the early stages of its work, the Panel received extensive briefings from the different arms of the SSA and related entities on their respective structures and functions in presentational and documentary form. Of particular relevance and interest to its work were the following additional submissions:

6.2.1.1 Structural Evolution of the Civilian Intelligence Community
6.2.1.2 Implementation of the Strategic Development Plan 2035
6.2.1.3 Interview with former SSA DG
6.2.1.4 Interview with Staff Council

6.3 Discussion

6.3.1 The Structural Evolution of the Civilian Intelligence Services

The general trend in the civilian intelligence community over the years since 1994 has been an exponential growth and 'seniorisation' of structures. In fact, this has been a trend in much of the public service in the democratic years. The following statistics are of interest in this respect:

- 1994 – NIS[4] – 1 DG, 1 DDG and 7 Chief Directors (CDs)
- 1995 – NIA and SASS – 2 DGs, 2 DDGs, 8 CDs
- 2001 – NIA and SASS – 2 DGs, 4 DDGs, 19 CDs
- 2008 – NIA, SASS, NCC[5], SANAI[6], OIC[7] – 2 DGs, 9 DDGs, 29 CDs

[4] National Intelligence Service
[5] National Communications Centre

- 2009 – SSA – 3 DGs, 12 DDGs, 38 CDs
- 2016 – SSA – 3 DGs, 7 DDGs, 30 CDs

In addition, the Panel took note that the structural evolution of the civilian intelligence structures over the years reflected a gradual and relatively dramatic expansion of the span and depth of management and control over the years and, in the case of the SSA, the huge concentration of power and management responsibility in the DG. It may be interesting to compare the management span of the old NIS, a single service with both a foreign and domestic mandate, which was facing a major security threat from inside and outside the country, with that of the current SSA which faces no serious threat to the constitutional order. The DG of NIS oversaw seven chief directorates with the help of one DDG. The SSA DG has overall responsibility for two directors, seven DDGs and 30 chief directorates.

6.3.2 Strategic Development Plan

Following a change in SSA DG on 26th September 2016, the Agency launched what was called the 'Strategic Development Project' on 17th October 2016. The plan arising from this project was approved by the then Minister on 9th March 2017 with the intention that it should be implemented in the 2017/18 financial year.

The project was an ambitious and far-reaching attempt to foresee the state of the country, the threats it might face and the required SSA capacity to counter these by 2035. The project involved a scenario planning exercise, identifying various possible scenarios for the country by 2035, based on the outcome that the NDP envisions, and then spelt out the vision for the structure and functioning of the SSA by 2035 with various milestones along the way.

The effect of the proposed structure for the SSA by 2035 would be to slightly reduce the high-level management of the SSA to 1 DG, 7 DDGs and 27 chief directors (from the current 3 DGs, 7 DDGs and 30 CDs). The main effect is to do away with the two posts of Director: Foreign Branch and Director: Domestic Branch both at director-general level. The number of DDGs and chief directors remains more or less the same. One effect of removing the two Directors would be that Section 4 of the National Strategic Intelligence Act would have to be amended as these two posts are legislated as being part of the NICOC Principals.

Interestingly, a new programme is introduced – Strategic Risk Analysis and Management. The SDP document describes this function as follows:

> *Strategic Risk Management is a key function that indicate* [sic] *the potential pitfalls in delivery. Analysing and tracking strategic risk*

[6] South African National Academy of Intelligence
[7] Office of Interception Centres

management in OoS [8] is a key indicator to potential threats. As a risk management capacity of government, SSA will be tracking and analysing strategic risks in all OoS with the view of projecting their impact on national security. Monitoring and Tracking of Strategic Risks will be undertaken at a national, provincial and local government levels. In addition this process will also be undertaken for State Owned Companies thus the function will be organised into these categories allowing for specialisation.

The addition of this function adds an immense and overarching responsibility to the SSA's mandate which is not envisaged in the founding philosophy or even current legislation for the civilian intelligence community. Further, the SDP envisions the SSA housing and having access to all government departments' databases.

It is worth quoting one section from the submission to the then Minister[emphases are ours]:

The SDP projects an SSA in 2035 whose operations are completely covert. In addition to collection of intelligence, the cover capacities of SSA will conduct influencing operations and generate revenues. The official operational SSA capacity will be responsible for operational coordination and standard setting. SSA Analysis capacity will be integrated and reflective of all sources of information. SSA operations will be supported by cutting edge technologies. The SSA will be capacitated by the best minds, who possess technical competencies, occupationally relevant personality attributes and are multi-lingual. The organisational design will be lean and mean focused on facilitating effective delivery.

A few points in the above need further engagement:

- **Completely Covert Operations:** What this means in practice is that all the operations of the SSA, both domestic and foreign, will be carried out through cover companies or organisations set up by the SSA, rather than through official SSA structures. SSA staff will be employed by these companies and the necessary assets (fixed and movable) will be purchased and owned by these cover entities. Given the abuse that the Panel has found (dealt with later in the report) of the bypassing of proper financial and procurement controls in the comparatively small cover structures of the current SSA, the moving of the whole of SSA operations into covert mode opens up the possibility of even more abuse. It also raises the question of how this myriad of cover entities will be effectively managed by the SSA management, given their physical and institutional separation from the central command and

[8] Organs of State

control structures of the Agency.

- **Influencing:** The notion of intelligence services playing an influencing role is a tricky one. Yes, on the foreign terrain, intelligence services do play a role in trying to influence the policies and actions of other governments in pursuit of their own national interests. Sometimes this is relatively benign, much the same as the role of diplomats. But sometimes it involves recruiting agents of influence in governments to push their interests and agenda. This is trickier on the domestic terrain, except perhaps in extreme cases of organised crime or severe anti-constitutional activities where agents of influence might be infiltrated into crime syndicates, terrorist organisations etc in order not just to gather intelligence, but also to try to prevent or mitigate the actions of such entities.
- **Revenue Generation:** It is concerning that the SSA envisages its cover entities having a revenue-generation role, presumably to 'top up' the revenue it gets from the fiscus. This opens up the Agency to many risks, including abuse of such revenue, failure to declare it to the fiscus and, of course, that some or all of these cover entities might give more attention to generating profit than to the intelligence functions they are supposed to perform.
- **Lean and Mean Organisational Design:** It is clear from the proposed SSA structure that it will be anything but lean and mean, and even less so if it further consists of a host of cover entities domestically and internationally.

One aspect of the SDP that arouses concern is that it appears to completely ignore the role of NICOC in providing intelligence estimates and assessments to government by collating the information from all the intelligence services as well as other government departments and external experts. The implication of the SDP is that the SSA seems to abrogate this role largely to itself. There is no mention of NICOC in its thinking.[9]

The SDP also recommends an interim structure for the Agency to be implemented in the 2017/18 financial year. This comprises eight programmes (i.e. 8 DDGs) – Research Development and Analysis, Domestic Operations, Foreign Operations, Counter Intelligence, Technical Operations, Strategic Risk Analysis and Management, Intelligence Academy and Corporate Services. The only difference with the proposed 2035 structure appears to be that foreign and domestic operations remain separated into two branches, while in the 2035 structure they both fall under one Operations branch.

With the ministerial approval of the SDP in March 2017, this structure was implemented, resulting in a number of posts being made redundant and their incumbents redeployed, put in lower positions or forced out. A former member of the SSA executive describes it as follows:

[9] See the later chapter on coordination for the Panel's view on the role and place of NICOC

While I was pursuing the implementation of the corrective measures[10], I was made redundant through the Strategic Development Plan process at the end of March 2017. This is the so-called 'Vision 2035' that purported to take the SSA to the future. Although I had misgivings about the SDP, in particular its compliance with the General Intelligence Laws Amendment Act I had to put the interest of the service and the country above my own. After all, I was assured that the Minister and President endorsed the Plan. The SDP, rather than promoting greater integration, coordination and effectiveness, actually aggravated the situation.

The then DG admitted to the Panel that he was the 'sponsor of the SDP'. When questioned about the displacements and other negative implications of the SDP that resulted from the restructuring, he accepted that 'in retrospect, I can see the damage that was done in the implementation of SDP'.

Leaders of the Staff Council expressed to the Panel that at the time of SDP restructuring 'there was serious fighting' between the Staff Council on the one hand and the DG and Minister on the other. They expressed the view that the SDP was 'imposed' on them, in spite of the then DG's assertion that the SDP was a consultative process.

When the current Minister came into office in 2018, she instructed that the Agency go back to the pre-SDP structure. This caused further confusion and dislocation of personnel who had recently been appointed to posts in the SDP structure, albeit many of them in acting capacities.

6.4 Findings

The Panel finds that:

a) As per its findings in the previous chapter, the amalgamation of NIA and SASS into the SSA did not achieve the purported intention of rationalisation and saving of resources.
b) The structure of SSA is unwieldly, top heavy and has a span and depth of command and control that gives the director-general excessive power on the one hand and makes effective management difficult on the other.
c) The civilian intelligence community needs genuinely 'lean and mean' structures with focused mandates and priorities as part of an overall re-design of the intelligence and security community.
d) While there can be some appreciation for the SSA's attempt to envision a long-term future for the country and the Agency in its Strategic Development Plan, the plan itself is out of tune with the philosophy, and does not comply with

[10] Measures to rein in Special Operations

policy and legislation governing the intelligence community, and that:

- The intention to make all operations of the SSA covert is not desirable
- The intention to use cover structures for revenue generation should not be allowed
- The intention to house all government databases in the SSA is impractical and undesirable.

6.5 Recommendations

The Panel recommends that:

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 in the previous chapter 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.

7 Mandate and Capacity

Focus Area: The mandate and capacity of the SSA and to examine the compatibility of its structure in relation to this mandate

7.1 The Issue

As outlined in the previous chapter, the SSA has become a large and unwieldly structure and has experienced a range of challenges since the amalgamation of SASS and NIA and the other entities into it. The mandate of the SSA and its related responsibilities are set down in legislation. But is the SSA capacitated to fulfil these responsibilities professionally and is it optimally organised to do so?

7.2 Summary of Inputs

The mandate of the SSA is drawn from the legislation, in particular, the National Strategic Intelligence Act of 1994 as amended. Further, the Panel received briefings and presentations from all of the relevant structures of the SSA, assessed some of its intelligence products, considered the views of previous commissions and task teams, and engaged many of the members and management on the capacity challenges they face.

The Panel also received submissions from some individual SSA members that dealt with capacity and related issues. It should be noted that, while the Panel received many inputs on the various capacities and challenges of the Agency, it did not have the time nor opportunity to visit some of these for on-site assessment. This applies particularly to the technological capacities.

7.3 Discussion

7.3.1 Mandate

The mandate of the SSA is taken from the National Strategic Intelligence Act of 1994 as amended, in particular, by the GILAA that formalised the establishment of the SSA.

Section 2 of this Act sets out the functions of the Agency as follows:

(a) to gather, correlate, evaluate and analyse domestic and foreign intelligence (excluding foreign military intelligence), in order to—

(i) identify any threat or potential threat to national security;

(ii) supply intelligence regarding any such threat to NICOC;

(b) 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 –

(i) identify any threat or potential threat to the security of the Republic or its people;
(ii) inform the President of any such threat;
(iii) supply (where necessary) intelligence relating to any such threat to the South African Police Service for the purposes of investigating any offence or alleged offence;
(iv) supply intelligence relating to any such threat to the Department of Home Affairs for the purpose of fulfilment of any immigration function; and
(ivA) supply intelligence relating to any such threat to any other department of State for the purposes of fulfilment of its departmental functions; and
(v) supply intelligence relating to national strategic intelligence to Nicoc; and

(c) to gather departmental intelligence at the request of any interested department of State, and, without delay to evaluate and transmit such intelligence and any other intelligence at the disposal of the Agency and which constitutes departmental intelligence, to the department concerned and to NICOC.

Further, in terms of section 2(b), in the prescribed manner, and in regard to communications and cryptography –

(i) *to identify, protect and secure critical electronic communications and infrastructure against unauthorised access or technical, electronic or any other related threats;*
(ii) *to provide cryptographic and verification services for electronic communications security systems, products and services used by organs of state;*
(iii) to provide and coordinate research and development with regard to electronic communications security systems, products and services and any other related services;

In addition, the Act sets out the Agency's role in **Vetting**.

Section 2A provides that a vetting investigation be conducted in the prescribed manner to determine the security competence of a person if such a person –

(a) is employed by or is an applicant to an organ of state; or
(b) is rendering a service or has given notice of intention to render a service to an organ of state, which service may –

(i) give him or her access to classified information and intelligence in the possession of the organ of state; or
(ii) give him or her access to areas designated national key points in terms of the National Key Points Act, 1980 (Act No. 102 of 1980);

7.3.2 Capacity

The Panel was not in a position to assess the capacities of the Agency in relation to its range of responsibilities as outlined in legislation nor to interact in any significant way with its clients except those that are internal to the community. However, the Panel identified six areas of capacity concern from the information available to it.

- Provincial Offices
- Foreign Stations
- Intelligence Products
- Vetting
- Analysis
- Technology

7.3.3 Provincial Offices

The Panel met all nine provincial heads. A number of common concerns arose:

- Some provinces experienced either distrust from provincial governments or attempts by the government or governing party to involve them in political issues.
- Some management posts were not filled, and many were filled with acting appointments.
- The high cost of renting offices as opposed to purchasing. There were some provincial managers who motivated for working through 'virtual offices'.
- One unanimous complaint was the lack of response from head office to their intelligence or other reports, particularly a lack of feedback or further tasking from the head office analysis arms.

7.3.4 Foreign Stations

The Panel was only able to meet one recent SSA Head of Station but engaged with the management of the Foreign Branch and others with insight into the challenges. Key among these challenges are:

- There are huge weaknesses in the process of selecting members for placement abroad.
- There are also complaints of favouritism in the placing of members abroad.
- Concern was also expressed about the lack of responses from head office to intelligence and other reports.
- There were more or less consistent complaints that the amalgamation of SASS into the SSA had reduced focus on foreign intelligence.

7.3.5 Intelligence Products

The Panel did not have an opportunity to extensively assess intelligence products, except for recent National Intelligence Estimates (NIE), which are community-wide products produced through NICOC, and a few SSA products. However, through the NIEs seen, the few SSA products seen and the observations of a number of clients, ministers and personnel of the SSA or related entities, the Panel was given the impression that the quality of the intelligence products of the SSA had deteriorated in recent years.

7.3.6 Vetting

The security vetting of government officials and others by the SSA (and previously NIA) has been a problematic area for some time. The following observations were noted by the Panel:

- There continues to be a huge backlog of outstanding vetting requests and routine vetting investigations. This has caused extreme frustration from government departments at national, provincial and local levels as well as state-owned enterprises (SOEs).
- The SSA appears to have gone 'over the top' in terms of the entities whose members it believes should be vetted. One example of this is the South African Broadcasting Corporation (SABC). The Panel struggled to understand why members of a national broadcaster should be security cleared outside of the standard integrity checking steps of normal recruitment processes. We were also told that the SSA was vetting public health doctors.
- In the early to mid-2000s, the former NIA had instituted an initiative to place vetting officers in key government departments to manage and

coordinate the vetting of members of those departments and thus assist in bringing down the backlog. This appears to have been discontinued in SSA's time.

- In the early 2000s, the then NIA was introduced to an electronic vetting system by an external Intelligence Security Service that allowed the bulk of vetting processes to be handled electronically and thus automated. The system would allow applicants for security clearance to apply electronically. The system would then automatically check a range of relevant databases (in our case, for example, Home Affairs, SAPS criminal records, perhaps credit checks etc.) plus intelligence records. At least for clearances to Confidential level, there would be no need to interview the applicant (unless there were concerns that arose from electronic checking), thus saving many person-hours in the vetting process. In addition, the system automated all the information into an in-house database, thus reducing administration time and paperwork.

  The Panel was shocked to find that, about 15 years later, the system had only been advanced to the stage of a database for entering vetting information, but that the ability for applicants to apply online and for online access to the relevant databases had still not been implemented, thus requiring the continued effort and person-hours in conducting all levels of vetting. The SSA vetting officers interviewed by the Panel blamed this on lack of resources.
- The Panel was informed that the former SASS, when given the mandate to conduct its own internal vetting, had introduced a vetting panel that had collectively assessed the results of a vetting process. It seems that this practice was not carried over into SSA, leaving decisions to individuals and their chain of command.

7.3.7 Analysis

The Panel was made aware of a number of challenges relating to Research and Analysis in the SSA:

- As mentioned earlier in the report, both provincial and foreign offices complained about the lack of response from Analysis to their reports. One manager in Analysis told the Panel that this was an organisation-wide systemic problem.
- Although one of the intentions of the creation of the SSA out of NIA and SASS was to achieve integration of foreign and domestic intelligence, the domestic and foreign branch analysis functions remained separate and, it appears, there was little cross-pollination between them. The intention of the SDP was to change this by putting them under one deputy director-general, although still creating separate chief directorates for 'Thematic

Analysis' and 'Geographic Analysis'. The lack of integration of analysis in the SSA was a commonly expressed concern to the Panel. Further, the approval and implementation of the SDP in 2017 and its suspension by the current Minister in 2018, created much confusion.

- The Panel was told that there is a ceiling on the occupational levels that analysts in the provincial offices can reach without being transferred to head office.

7.4 Findings

The Panel finds as follows:

- On Mandate:
  a) The mandate of the SSA as reflected in legislation, as well as in the SSA's interpretation of this mandate, is excessively broad and open.
  b) The role envisaged for the SSA in the SDP is in breach of the constitutional and policy philosophies and values of South Africa's democratic intelligence dispensation and, to the extent that this plan still reflects attitudes in the SSA to its mandate, is of serious concern.
- On Capacity:
  c) The intelligence collecting capacities of the SSA in its provincial and foreign offices are seriously under-resourced in terms of quality and quantity of personnel, as well as in terms of financial and other resources.
  d) The interrelation between the collecting and analysis arms of the SSA is seriously dysfunctional in terms of tasking to operational arms, responses to operations' reports and other respects.
  e) The general sense of SSA products is that their quality has declined over time.
  f) The scope and praxis of the SSA's vetting mandate is overly broad and that no effective measures have been taken for over 15 years to address the legacy challenges of the backlog of vetting applications.
  g) The analysis functions of the SSA have become worryingly disorganised over time due to frequent restructuring and there has been a failure to properly achieve the analytical synergy between the foreign and domestic branches.
- On Structural Compatibility with Mandate:
  h) As noted in the previous chapter, the SSA is an unwieldly structure and frequent restructuring and leadership changes have made its structure unsuitable for even the broad mandate it has given itself.

7.5 Recommendations

The Panel recommends that:

a) As part of the community-wide architectural and legislative review recommended earlier, serious attention be given to clearer and more focused definitions of the mandate/s of any resulting service/s.
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) 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 be conducted.
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.

8 Controls

Focus Area: The effectiveness of controls to ensure accountability on, inter alia:

- Operational Directives;
- Financial Accounting;
- Professionalism;
- Non-partisanship;
- Code of Conduct; and
- Service Level Agreements

8.1 The Issue

One of the main *raisons d'être* for the appointment of this Review Panel lies in the question as to whether the abuses that the SSA is accused of are a result of a lack of sufficient controls in and on the Agency and/or whether the controls that do exist have been effective in curbing abuses or, in fact, have been adequately applied.

8.2 Summary of Inputs

Almost all the documentary and verbal information provided to the Panel touched, in one way or another, on the issue of controls. Many aspects of this are dealt with in other chapters of this report. Key among the inputs, inter alia, are the following documents:

- Legislation, Regulations and Directives
- SSA Financial Statements
- AG Reports
- Reports on SO
- Internal and IGI investigation reports on the PAN
- Benchmark Report on the Audit of the South African Intelligence Community
- Matthews Commission Report
- 2006 Report of the Legislative Review Task Team
- Special Report of the Legislative Review Task Team on the Superintendence and Oversight of the Conceptualisation, Planning and Execution of Political Intelligence

The Panel engaged, inter alia, with the following:

- AGSA
- DG of National Treasury

- Former and current Chief Financial Officer (CFO) of SSA and its predecessor services
- Acting SARS Commissioner
- IGI
- Members of the SSA finance team
- The PAN investigations team
- Management and members involved in SO

8.3 Discussion

8.3.1 General

The issue of the effectiveness of controls on the SSA is an all-encompassing one including the highest level of controls such as political and parliamentary oversight; IGI oversight; constitutional, legislative and prescriptive controls, procedural controls and the various levels of leadership, management and supervisory control. A number of these elements of control of the SSA are dealt with in other chapters of this report.[11]

A key issue for the Panel was to what extent paper controls – that is, the various prescripts committed to writing – are, in themselves, the key mechanism for control? Throughout this report, the Panel has found that the major factor leading to the abuses identified has, in fact, been the consistent failure to comply with these prescripts – right from the lofty heights of the Constitution itself down into the SSA directives and even just plain common sense and moral rectitude.

Thus, control is perhaps not so much about the prescripts put in place, but about the people required to comply with them – in other words, about *integrity*. But is integrity a quality one is born with or is it learnt? Perhaps the truth is simply that, if there are no consequences for a lack of integrity, there is no compunction. Self-discipline thrives in an atmosphere of discipline.

8.3.2 The Prescripts

Chapter 2 of this report deals in detail with Policies and Prescripts. It makes the point that it was not part of the Panel's mandate to conduct a detailed review of all policies, legislation and other prescripts. The main finding in that Chapter is, indeed, that the problem was not so much with the prescripts but with the blatant disregard for them.

In this section the Panel would like to flag a few issues on the controls relating to the authorisation of operations, and particularly those that invade privacy.

[11] See Chapters 2, 8, 9 and 12.

In 2005, the then Minister of Intelligence appointed a task team to review intelligence legislation and other prescripts. At the time, there was public controversy surrounding the hoax emails saga, the surveillance of a prominent businessman and a supposedly political intelligence project of the then NIA. These were the subject of investigation by the IGI at the time. In light of this, the Minister at the time instructed the legislative review task team to urgently provide him with a separate report on the governance of political intelligence by the then NIA. Although that report was intended to look at so-called political intelligence, its recommendations seem to remain largely apropos:

1. *That the Minister for Intelligence Services issues a Regulation – probably under the National Strategic Intelligence Act on the Coordination of Intelligence as an Activity – which achieves the following:*
    a. *Regulates the National Intelligence Priority-setting system as contained in the 2005 NIE, namely:*
        i. *That the system band priorities according to the level of threat against national security and interest, and that each band determines the extent of resources and the intelligence collection techniques applied to each of the priorities.*
        ii. *That the Services are obliged to apply the National Intelligence Priorities as approved by Cabinet in determining their own priorities and in their operational planning.*
        iii. *That a system of monitoring the delivery of the Services on the National Intelligence Priorities be instituted.*
    b. *Obliges the Services to prepare each year an operational plan based on the National Intelligence Priorities that sets out the targets and operational techniques to be applied to each target and submit such plan for Ministerial approval. This would in effect provide a general Ministerial pre-approval for the conduct of intrusive intelligence operations against generic targets.*
    c. *Requires the Services to consult the Minister where intelligence operations or monitoring reveal the need to conduct intrusive operations that carry a high risk of political embarrassment to the Government.*
    d. *Mandates the Heads of Services to issue directives for the conduct of intelligence operations that:*
        i. *Determine specific internal processes for priority-setting and targeting arising out of the National Intelligence Priorities*
        ii. *Specify the criteria to be applied in authorising the use of intrusive intelligence techniques*
        iii. *Outline the levels of authority required to authorise such intrusive operations, dependent on the levels of risk of compromise involved.*
        iv. *Determine the level of supervision of the conduct of high-risk intelligence operations and the system of such supervision.*

v. *Specify the procedures to be followed in authorising specific methods of intrusive intelligence collection.*
vi. *Determine the requirement and procedure for discarding incidental information collected during intrusive operations unless such information indicates a new threat.*
vii. *Details the system of record-keeping of all processes involved in authorising and managing intrusive intelligence operations.*
viii. *Obligates the Services to establish internal mechanisms for monitoring compliance with these directives and dealing with failures of compliance.*

e. *Empowers the Minister to institute a community-wide system of monitoring of compliance with the Regulation.*

2. *That the Minister for Intelligence Services initiates an engagement with the Inspector-General for Intelligence Services and the Joint Standing Committee on Intelligence to ensure more effective routine and ad hoc monitoring of compliance with Ministerial and Service prescripts governing the conduct of intelligence operations.*

3. *That the Minister for Intelligence Services, together with the Heads of Services and the SANAI, institute a programme of education in the Services on the need for constitutionality, legality, accountability, integrity and professionalism in the conduct of intelligence operations as well as an intensive internal communication programme to inform all members of the services on the regulatory changes recommended above, once they are instituted.*

The above recommendations, although perhaps slightly dated, gel with many of the observations and findings of the Panel but the Panel understands that these have been unevenly implemented. If they had been fully implemented (and complied with) at the time, they may well have prevented the abuses that the SSA has been subjected to. While an adaptation of these recommendations may still be relevant in preventing future abuses, the same document also makes the point that the success of the measures it recommends still ultimately rests on the integrity of the people implementing and overseeing them.

The Panel also discussed various other elements of tightening up controls, particularly over the utilisation of intrusive methods of intelligence collection. These included the effectiveness of the current system of obtaining authority for intercepting communications in terms of RICA, the possibility of judicial authority being required for surveillance, infiltration and other intrusive methods, judicial authorisation for the conduct of signals intelligence on the international terrain and others.

These issues are the subject of some controversy and a 'tug-of-war' between intelligence practitioners and human rights advocates around the world. However, the general trend seems to be in the direction of more stringent

controls (and oversight) over intrusive intelligence techniques that are otherwise in breach of human rights in general and invasion of privacy in particular. The Panel has done some international benchmarking in this respect but feels more work may need to be done on this. A few examples:

- In Country A, specially designated judges in the Federal Court approve warrants to conduct electronic and other forms of surveillance (although this does not currently extend to signals intelligence).
- Country B includes two types of warrants for otherwise unlawful activities. Type 1 intelligence warrants authorise illegal activities in relation to citizens or permanent residents and require both ministerial and judicial authorisation by a Chief Commissioner of Intelligence Warrants (a retired judge), while type 2 intelligence warrants ('used in circumstances where a type 1 warrant is not required' – presumably against foreigners) must be approved by the Minister only.
- Country C has recently established an Investigatory Powers Commission, consisting of a commissioner and a number of other judicial commissioners who hold or have held high judicial office. They are appointed for a period of three years by the Prime Minister on recommendation of the country's most senior judicial officers and are responsible for keeping under review (by way of audit, inspection and investigation) the exercise by public authorities of various intrusive powers, including communication interception, metadata access and retention, equipment interference and covert and human intelligence sources.

Whatever intensification of controls of intrusive operations may be considered, there is also the argument of not disempowering intelligence services from their ability to collect intelligence on legitimate targets who themselves operate in secret.

8.3.3 Financial Controls

A key concern for the Panel has been the failure to implement financial controls in the SSA. In particular, this applies to the failures in the adherence to operational directives and especially those which apply to special operations.

A key element of this is the fact that most of the operational financial transactions of the Agency are done by means of cash. This is to hide the fact that the origins of the payments are the SSA. This would, inter alia, apply to the payment of sources, purchases of certain fixed and moveable assets, running costs of cover entities etc. This fact is a major vulnerability in the system of financial controls given that, often, proof of the legitimate disbursement of such cash payments has to avoid revealing the identity of the recipient or that, indeed, the intended recipient received the funds.

This system of cash disbursements is handled through what are called Temporary Advances (TA). How the system is supposed to work is that a member applies for the TA on the basis of an approved submission. That member is then required to account for the expenditure of that TA and return any unused amount. There is supposed to be a rule that says that a member may not receive a second TA until he or she has reconciled the previous one.

Notwithstanding these control measures, it became clear to the Panel that a practice has developed in which members are able to acquire subsequent temporary advances, even when the previous ones have not been settled. In the operational environment, some of these advances sometimes run into millions of Rand. This has led to a situation in which certain members have accumulated several advances that they have not accounted for. However, the Panel was informed that where steps are taken to recoup the funds through deductions made against salaries, the amounts can be too large to be realistically settled over time. Furthermore, the Panel was made aware of a number of members so affected who have left the Agency before they were able to settle the balance and are thus owing large sums of money, which they are unlikely to ever be able to pay back.

In addition, the temporary advance system does not guarantee that the cash leaving the agency is indeed paid as intended to the ultimate recipient. Of concern to the Panel is that the consequence management in many of these matters has been completely absent or inadequate. Often sanctions involve repayment of pocketed money through salary deductions with no consequence for the criminal act of theft of state funds. The Panel noted that there is a fine line between such losses incurred being administrative or criminal.

The Panel received briefings on the theft of over R17 million from a safe inside the SSA complex in December 2015. In spite of video footage of the perpetrators and the outcome of internal investigations, there appears to have been no consequence management for this incident. Of particular concern is the report the Panel received that the Head of the DPCI ('Hawks') at the time failed to take the investigation of the burglary to its logical conclusion.

One of the key challenges of the SSA lies in its planning processes and the budgeting process arising out of them. The Panel was provided with documentation and heard evidence from numerous members about strategic and operational planning deficiencies within the SSA. Over the past decade or so the Agency has been riven by a series of senior management changes and each time such changes occur, the strategic and operational plans that had been developed were either adjusted or replaced by a new set of plans. This has had a deeply damaging impact on the SSA's ability to plan and see through those plans to fruition. A consequence has also been that budget planning within the SSA has suffered and has become nothing more than an annual allocation with a small percentage increase. The AG has regularly raised the concern that there seems

not to have been a serious attempt in the SSA to define strategic programmes or identify clear, measurable targets and indicators. Neither have the plans been underpinned by a rational allocation of budgetary resources.

One of the key control weaknesses as far as financial management in the SSA is concerned lies in the fact of a perceived (perhaps falsely) impermeable border between the 'covert' SSA and the 'open' SSA. From evidence heard by the Panel, it seems even the CFO of the SSA is restricted in terms of information he or she can obtain from the covert structures and, in many cases, is not taken into confidence. In fact, the Panel heard of incidents where serious tensions and conflict arose between the CFO and operational management when the CFO tried to impose basic financial and budgetary management controls on them. It surprised the Panel that a CFO of an intelligence agency should have any restriction on the information she or he is entitled to and the controls she or he can effectively impose. It seems that even the IGI has, *de jure*, more entitlement to access than the CFO has *de facto*.

Related to this is the issue of the AG's inability to effectively audit all of the SSA's financial, procurement and performance activities. The AG was interviewed by the Panel to provide it with a perspective on the audit process involving the SSA. The AG conducts an annual audit of the SSA in terms of the Public Audit Act (PAA), No 25 of 2004 as is the case with all national departments.

The AGSA noted, however, that every year he is forced to automatically provide a qualified audit of the SSA.

- Firstly, this is because he is not provided with access to information to allow him to verify the finances and assets of the SSA.
- Secondly, he is not able to determine the extent to which performance targets have been met.
- This situation pertains notwithstanding attempts by the AGSA and the SSA to develop mechanisms to enable a thorough audit process to be conducted.

In addition, the AG has regularly made findings on the internal control environment. In his report on the 2017/18 financial year, he noted for example:

- Lack of consequence management and not holding staff accountable for poor quality of financial and performance reporting;
- Inadequate internal review processes by management leading to material misstatements as required in section 40 (1) (a) and (b) of the Public Finance Management Act (PFMA);
- Non-compliance with supply chain processes going unnoticed;
- Absence of approved standard operating procedures to guide collection collation verification, storing and reporting of actual performance information;
- Numerous senior acting positions have created instability, which resulted in delays in the audit of performance management; and the
- Lack of monitoring and implementation plans by the Accounting Officer and senior management to address key control deficiencies.

The AG's Report also complained about the incomplete assessment of the useful life of assets which have recurred year-after-year as a result of information being withheld. While this is assumed to be because the SSA is reluctant to disclose this information because of the covert nature of the assets, it could also be because the Agency is intent on hiding indications of serious management weaknesses.

The Panel recognised that the AG, as a result of limited access to information, could only provide a qualified audit and nor could he publish his annual Report. This is a matter of great concern.

8.3.4 PAN

The Panel was presented with the results of several investigations into the so-called PAN which the Agency (NIA at the time) had implemented over several years until 2011, when it was suspended.

The implementation of a principal agent network is accepted practice in intelligence agencies. In essence, it is a method of 'force multiplication' in which principal agents are recruited outside the Agency who in turn are trained and capacitated to recruit and handle sources and agents in or close to targets of legitimate interest to the Agency. This is primarily a HUMINT (human intelligence) collection initiative. However, it appeared to the Panel that PAN evolved into a methodology designed to avoid or bypass the procedural requirements for recruitment of staff, disbursement of funds and procurement. As an example, the Panel became aware that one person was recruited into the PAN to provide analysis support. The analysis function does and should reside in the Agency itself and be conducted by full-time employees of the Agency and should be the capacity that receives intelligence from PAN agents. An analyst is not a principal agent. There were plenty of other examples of breaches of the principal agent network concept. Indeed, apart from this, the PAN Project has gained notoriety for alleged wide-ranging illegality which has led to several investigations as well as seeped into the media in recent times.

Several investigations have been conducted into this project by internal Agency investigators, as well as two investigations which were conducted by the OIGI. The Panel heard the views of several persons involved in the investigations, as well as those of the IG.

The Panel noted that the nature of the accusations and the evidence collected during the various investigations painted a disturbing picture. Allegations of malfeasance, procedural transgressions and criminal behaviour were placed before the Panel. These ranged from accusations that individual members had not adhered, for example, to proper procurement processes; signed fraudulent

contracts or made payments to persons without contracts having been signed; the employment of family members and close associates outside of formal processes; procurement of assets without adherence to formal procedures; abuse of assets; missing funds; missing assets and several other matters.

In his interactions with the Panel, a former member of top management confirmed the appointment of his son as an employee of a warehouse that was a front company for the SSA. He also confirmed initiating the employment of the wife of the Manager of the Cover Support Unit (CSU).

It appeared to the Panel there had been instances of serious criminal behaviour which had taken place under the guise of conducting covert work and that this behaviour may have involved theft, forgery and uttering, fraud, corruption, and even bordered on organised crime and transgressions of the Prevention of Organised Crime Act (POCA).

The Panel was concerned whether the reporting requirements were followed by the responsible individuals in management when the allegations were discovered. This includes reporting of fruitless and wasteful expenditure to the National Treasury in terms of the PFMA and to SAPS under section 34 of the Prevention and Combatting of Corruption Act (PRECCA).

Of particular concern for the Panel was that, apart from suspending the programme in 2011, it appears that no formal action or consequence management has taken place by the Executive or the Agency management. The absence of consequence management has become a theme running throughout the Agency over several years.

The Panel received reports that members of the Agency's internal investigations team into the PAN project had been subject to various forms of intimidation and some had their offices broken into.

The Project has had other consequences which seem not to have been addressed with the seriousness warranted. One such is the large number of claims made against the Agency and the Minister by former PAN members involving allegations of breaches of contract by the Agency. These have amounted to hundreds of millions of Rands.

8.3.5 Special Operations

The report deals in Chapter 8 in more detail with the SSA's SO unit in terms of its serious breaches of the Constitution, legislation and other prescripts, mainly related to the politicisation and factionalisation of intelligence as well as executive overreach. It just needs to be noted here that SO became a law unto itself, particularly in terms of the utilisation of, and accounting for, SSA funds and its very existence and functioning was a prime example of the devastating impact

of a lack of controls and the crude evasion of existing controls.

8.3.6 To See or Not to See

One of the key challenges for intelligence services, the governments and the publics that they serve, is agreeing on the appropriate balance for those services between secrecy and transparency.

One of the common 'wisdoms' in the thinking about intelligence (among practitioners themselves) is that 90 per cent of intelligence information comes from open sources and 10 per cent from secret sources (the figures differ slightly, depending on who you are talking to). This 'wisdom' is basically an injunction not to use covert and intrusive methods to collect information that is openly available. It is perhaps necessary to define 'open' here. Apart from its usual meaning of open source media etc, in the intelligence world, they also talk of 'grey' information sources. Grey sources are really those sources that are not secret or covert but are not generally public in the same way that the media are – academic research, subscription databases, government reports and databases, interviews with experts etc.

One of the challenges for intelligence services is that their client – the government – also has access to open sources and, through its engagements with its counterparts in the international arena, for instance, often has more insights and knowledge than the intelligence services themselves. For this reason, intelligence services tend to talk about providing 'unique' rather than just 'secret' intelligence. Providing unique intelligence could, in some cases, simply mean providing secret information that would not otherwise be available to a client, or organising, processing and packaging a range of secret, open and grey sources of information to produce intelligence that again would not normally be available to the client.

The reality is, however, that intelligence services are designed and organised primarily for the collection of secret intelligence. Otherwise, we would not need them. The rest of it – the 90 per cent – is, in essence, the back-office work. In simple terms, the focus of intelligence work should be on those (legitimately authorised) threats and targets who themselves operate in secret – terrorist groups, crime syndicates, corrupt networks, etc.

Arising out of this reality is the simple truth that, for the sake of the success of intelligence operations against such targets or threats, for the safety of the service's operatives and sources, there needs to be an element of secrecy surrounding the work of an intelligence service. The purpose of such secrecy is not (or should not be) to keep such information from the public but from the (legitimate) adversaries of the service and, of course, information that goes to the public goes to the adversaries (through their own open source collection).

The point is that the balance between secrecy and transparency should revolve

around the question: what is it that we absolutely do not want our adversaries to know? Our sources, our methods, our technologies, our information about them? What else?

Those members of the Panel who previously served in senior positions in the intelligence services prior to 2009, remarked how, when they visited their counterparts abroad (often in countries that could be considered as major adversaries who were conducting espionage against South Africa) the two services would get to know each other's leaders and sometimes more junior officers, would share each other's organisational structures and, of course, often share intelligence. Of course, these exchanges were 'secret', but the question remains – if we are willing to share such information with these adversaries, how much of it should be kept from the public?

The downside of legitimate secrecy should be clear from much of this report – it provides opportunity for bypassing necessary accountability, controls, supervision and oversight. The corollary – the more the transparency, the less of such opportunity.

The South African intelligence community has erred on the side of excessive secrecy and this can largely explain the various forms of malfeasance that this report (and others before it) have identified.

8.4 Findings

The Panel finds as follows:

a) While there can be improvements to the prescripts and other written control measures, the real problem in the period under review has been the almost complete disregard for, and non-compliance with, the existing controls, in some cases constituting criminality.
b) In respect of the above, there has been, as far as the Panel could determine, almost no consequence management for these breaches of controls.
c) Adherence to control measures is primarily about the integrity of the personnel required to apply them. Integrity can only thrive in an atmosphere of integrity. Consequence management is a key tool to ensure this.
d) There has been unevenness in the application or implementation of the recommendations of earlier review processes regarding improving the controls over authorisations of intrusive collection methods, largely due to leadership and management changes, as well as an apparent negative attitude towards previous executive and management leadership.
e) There is a need to review the legislative and other controls and mechanisms for the authorisation of intrusive methods of collection beyond communications interception, raids and searches, based on an international benchmarking with consideration for South African conditions and history.

f) There have been pervasive and serious breaches of financial controls in the Agency involving, in some cases, serious criminality.
g) The excessive use of cash transactions in the Agency undermines effective financial controls.
h) The temporary advance system in the Agency is also a serious vulnerability and has not been strictly applied, resulting in critical financial losses.
i) There is an absence of effective planning and budgeting in the Agency.
j) The inability of the AG to properly audit the Agency's finances is a major concern and needs to be urgently addressed.
k) The apparent division between the so-called 'open' and 'covert' sections of the Agency needs to be addressed with particular attention to the ability of those charged with managing and overseeing financial, procurement and human resource processes to do so without hindrance.
l) While the initial concept of a Principal Agent Network was valid, the reality proved that the PAN became in fact an attempt to bypass normal control and accountability mechanisms and processes and was an attempt to apply excessive utilisation of cover structures and personnel beyond the legitimate needs of the Agency, and that this created serious malfeasance including criminality.
m) There was an almost total breaching of financial and other controls by the SO unit resulting in excessive expenditure and, in some cases, criminality.
n) There is an overemphasis on secrecy in the Agency that needs to be rebalanced against transparency and accountability.
o) The Security Services Special Account Act No. 81 of 1969 and the Secret Services Act, No. 56 of 1978 are apartheid-era pieces of legislation designed at the time to facilitate the regime's secret operations such as sanctions-busting, assassinations, propaganda etc and have no place in our constitutional democracy and are a key factor in facilitating the avoidance of financial controls and accountability.

8.5 Recommendations

The Panel recommends as follows:

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 expediting 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 non-cash methods for the 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 DG and IG.
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.

9 The Executive

Focus Area: 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.

9.1 The Issue

In a democratic dispensation such as our own, there should be a clear separation between the role, powers and functions of an intelligence service and those of the responsible political executive/s. In the Panel's Terms of Reference, concern was expressed that this boundary had been breached in numerous ways, particularly with regard to the political executive's direct involvement in intelligence operations.

Further to this, various submissions to the Panel called into question the need for a Minister of Intelligence/State Security.

9.2 Summary of Inputs

The Panel received numerous briefings and conducted many interviews that touched on this issue, including from the IG, five former and current ministers of intelligence/state security as well as former SO operatives, leaders and members of the Agency and others.

In addition, the Panel reviewed relevant legislative prescripts, investigation reports, reports from SO and other documents.

9.3 Discussion

9.3.1 General

Democratic governance requires the public service, including intelligence service departments, to serve the policies and plans of the duly elected governing party as promised by it to the electorate. However, this requirement of intelligence departments in a democracy needs a professional and 'dispassionate' intelligence service able to serve the legitimate intelligence needs of the government of the day and, of course, a government of the day that understands and respects this, in principle and in practice.

Such an approach would allow the relevant political authority to convey the government's intelligence requirements to the service, appraise the service's

delivery on these and generally oversee the efficacy and efficiency of the service and its compliance with policy, legislative and other prescripts. Ultimately, it is these political authorities who are accountable to the electorate that put them into power.

This issue is not just relevant to the intelligence services. Chapter 13 on *Building a Capable and Developmental State* of the National Development Plan (NDP)[12] makes a similar point for the whole of the public service:

> *Although public servants work for elected leaders, their role is non-partisan and the potential to forge a collective professional identity as public servants requires that this distinction is kept clear.*

One of the biggest dangers to this delicate balance between political authority and functional authority over intelligence services is the imposition by political authority of the provision of intelligence that serves its narrow political needs. In our own circumstances, there is often the requirement from politicians of their intelligence service to find adversarial scapegoats for their own failures.

9.3.2 Legislative Provisions

Sections 209 and 210 of the Constitution specify, inter alia, that only the President can establish an intelligence service (other than the intelligence divisions of the police and defence force) and that this must be done in terms of national legislation. Also, that the President must 'appoint a person as head of each intelligence service and must either assume political responsibility for the control and direction of those services, or designate a member of cabinet to assume that responsibility'. [Our emphasis]

The Intelligence Services Act and other relevant legislation give extensive powers to the duly designated minister over the management of the service/s, including powers to create structures and posts in the service/s, make appointments, issue regulations etc.

Section 12 of the Intelligence Services Act reads:

> ***12 General powers of Minister***
>
> *(1) The Minister may, subject to this Act, do or cause to be done all things which are necessary for the efficient superintendence, control and functioning of the Agency.*
> *…*
> *(2) Without derogating from the generality of his or her powers in terms of subsection (1), and notwithstanding anything to the contrary contained in any other law, the Minister may-*

[12] National Development Plan – Our Future – Make it Work

(a) acquire any immovable property, with or without any buildings thereon which is necessary for the efficient functioning of the Agency and, subject to section 70 of the Public Finance Management Act, 1999 (Act 1 of 1999), supply guarantees, indemnities and securities for that purpose;

…

(aA) erect or maintain buildings on the property so acquired;

…

(b) sell or otherwise dispose of immovable property which is no longer required for any purpose contemplated in paragraph (a);

(c) acquire, hire or utilise any movable property and any other equipment which may be necessary for the efficient functioning of the Agency;

…

(d) sell, let or otherwise dispose of anything contemplated in paragraph (c), which is no longer required for the said purposes.

[Our emphasis]

It is true that the Minister has the power to delegate many of these functions to the DG and below and, in fact, has done so. Of concern, however, is that many of these legislated powers seem to cut through the necessary boundary between political and administrative management and that their delegation downwards may be at the whim of a particular minister.

9.3.3 The Ministerial–Accounting Officer Interface

The clear delineation of the boundary between ministerial and DG functions and responsibilities is not a problem unique to the intelligence service in South Africa. This has long been a bone of contention in the post-apartheid administration in the whole of the public service and has been subject of a number of reviews and processes, including through the National Development Plan.

The provenance of this challenge goes back to the early days of democratic governance when it was required of ministers to drive and ensure policy, demographic and functional transformation of the departments they largely inherited from the apartheid dispensation. Thus, ministers were given (through the Public Service Act and other prescripts) extensive powers over the administration of their departments, including extensive powers over human resource processes. The PFMA, on the other hand, made accounting officers fully responsible (and accountable) for the efficient management of their departments. As noted in the NDP:

> *Following the end of apartheid, there was good reason to give political principals wide-ranging influence over the public service to*

promote rapid transformation of a public service that had previously represented a minority of the population.

While this is a problem throughout the public administration and has often led to the rapid turnover of directors-general, it should be of particular concern for the intelligence departments as it opens them up to political interference with administrative processes and thus defeats the ideal of a professional service with an appropriate remove from day to day politics. This danger also includes the possibility of presidential interference in the administration and conduct of the intelligence services.

9.3.4 Politicisation of Intelligence

In unpacking its mandate and Terms of Reference, the key question the Panel agreed it needed to find answers to was: 'What the hell happened?' In other words, what were the key factors that led to the situation that necessitated the appointment of this Panel? Invariably, the most common answer the Panel received when it put this question to many interviewees was the increasing politicisation of the intelligence and security community in general, and the SSA in particular, over the past decade or more.

The term 'politicisation' can be misleading. It is used here in a specific context. As stated above, it is a normal democratic governance requirement that an intelligence service should dutifully serve the legitimate policies and plans of the duly elected government of the day. But this has to be distinguished from such services serving the political interests of a political party, *qua* party, or of factions of such parties, or the political interests and aspirations of individual politicians, even when (perhaps, especially when) such politicians occupy positions of formal authority over the service.

Any breach of these principles ultimately destroys the integrity of an intelligence service and undermines the value of its intelligence products to the legitimate needs of the government. And, this is precisely what has happened to South Africa's civilian intelligence community (and also to Police intelligence) over the past 10 to 13 years. It has become extensively embroiled in the politics and factionalism of the ruling party.

The beginning of this was evidenced, for example, in the hoax email saga of 2005 when the then NIA, or elements within it, provided false intelligence purporting the existence of emails and chat groups that sought to prove a conspiracy against the then deputy president. In spite of an investigation into this by the then IGI that proved the emails etc to be fabricated, the veracity of the IGI's findings were themselves challenged by the JSCI and within the ANC itself.

But, this factionalisation of intelligence had become particularly marked in the period since 2009. This view was expressed by many of the interlocutors who

appeared before the Panel and by documentary evidence available to the Panel. In the view of the Panel the politicisation and factionalisation of intelligence is the main answer to the question 'What the hell happened?'

In its interviews with former members of the SSA top management, the Panel heard that a report was submitted to the then Minister about the emerging influence of a certain family over government officials and the then as a threat to national security. In response to growing concerns about the influence of that family, domestic operations undertook an investigation into them. According to the Minister at the time, he was unhappy with how the investigation was conducted. As a result of this investigation, the former president was advised to reconsider his relationship with the family because it may damage his reputation. According to the former members of the SSA top management, this report was suppressed and in part led to a change of leadership within the SSA.

One of the things that surprised the Panel was that the revised Oath of Allegiance that SSA members are expected to take requires members to swear allegiance to the Constitution, the laws of the country AND the President. It also requires them to 'recognise the authority of the Minister of State Security'.

The more recent intensification of the factionalisation of the SSA in particular was primarily evidenced for the Panel in the presentations and interviews on the functioning of the SO unit of the SSA from about 2011 onwards.

9.3.5 Special Operations

According to information provided to the Panel, a SO unit was first set up in the then NIA in or around 1997, was subsequently shut down (date not known) and re-opened again in or around 2002/03 and, apparently, carried over into the SSA.

The notion of a SO unit in intelligence, military and police services is not at all unusual. Normally it entails units who work under deeper cover than other units of a service and who work on particularly sensitive operations against particularly serious targets or issues, and usually at a national level. Members of such units are supposed to be highly trained and particularly competent. In the case of NIA and SSA, such a unit would be based at head office and work on national projects of particular seriousness that cannot be assigned to a provincial or other structure.

The Panel probed relatively deeply and widely into the issue of SO. Towards the end of its deliberations, it received a briefing from the OIGI on an investigation it is currently conducting into SO that it hopes to conclude by the end of the current financial year. The Panel will make recommendations regarding this below. For the purposes of this chapter of our report, we highlight key elements of what was presented to the Panel on SO, particularly in relation to the naked politicisation of intelligence in recent years.

The Panel was able to identify the key player in the politicisation of SO and the SSA in general (the member is currently serving government in a senior capacity). According to reports, he was 'deployed' to SSA by the then President via the Minister at the time to head up the SO chief directorate. This was in spite of allegations that he left his previous employ under a cloud of corruption allegations. According to his CV, the member served in the ANC underground structures and Department of Intelligence and Security. The Panel needs to put on record that this member was the most recalcitrant and evasive 'witness' it had encountered in all its interviews. He invoked the 'need to know principle' to withhold information – particularly with regard to his interaction with the Executive – from the Panel.

It is clear to the Panel that the SSA's SO unit, especially under the watch of the member mentioned above, was a law unto itself and directly served the political interests of the Executive. It also undertook intelligence operations which were clearly unconstitutional and illegal. Information made available to the Panel indicated that these operations included, *inter alia*:

- The training of undercover agents in VIP protection and assigning some of these to provide protection to the then President, as well as to others who were not entitled to such protection, such as the former Chairperson of the South African Airways (SAA) Board; the former National Director of Public Prosecutions (NDPP); the ANC Youth League (ANCYL) President and former Acting Head of the Department of Priority Crimes Investigations (DPCI- the Hawks). VIP protection is a mandate of the SAPS and, although the Panel is aware of initiatives some years ago to try to make this a then NIA responsibility, this did not happen.
- Infiltrating and influencing the media in order, apparently, to counter bad publicity for the country, the then president and the SSA.
- The Panel also heard testimony and was provided with legal papers about a union that was established with the support of the SO Unit of the SSA (the Workers' Association Union) ostensibly to neutralise the instability in the platinum belt. The Panel also heard testimony from the IGI about the SSA having put under surveillance unions that were critical of the then President.
- Intervention in the #FeesMustFall protests to influence the direction of the student movement which was justified as supporting 'young bright minds' to be patriotic and to be strategically deployed to institute counter measures and ensure stability and peace in universities.

These are just some of the SO projects that the Panel was made aware of. In addition, the Panel was given access to a document which was purportedly a report to the then DG on the SO unit's 'achievements' in the 2016/17 year:

- During the 2016 ANC January 8 statement in Rustenburg, the unit

'initiated 3 countering operations to impede the distribution of CR17 regalia, impede transportation system of dissident groups from GP…'

- During the February 2016 State of the Nation Address the unit was 'able to infiltrate and penetrate the leadership structure' of the movement against the then President. Indications were that more than 5 000 people would embark on parliament, but with efficient and effective countering actions, and the dissemination of "disinformation" to supporters, only approximately 50 anti-president supporters attended the march.'
- During the ANC's manifesto launch in Port Elizabeth in 2016, the unit 'initiated a media campaign to provide positive media feedback through the placement of youths of various ethnic groups in photographic vision [sic] of media personnel, thereby promoting social cohesion.' [Our emphasis]

The report 'boasts' of various other similar operations, including that 'Active monitoring of the South Africa First, Right to Know, SAVESA, CASAC and Green Peace was done due to the penetration ability of the group.'

It is clear from the above information and other information available to the Panel that SO had largely become a parallel intelligence structure serving a faction of the ruling party 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, the relevant legislation and plain good government intelligence functioning.

9.3.6 Executive Involvement in Operations

Although the focus area of this chapter is indeed on the involvement of members of the executive in intelligence operations, we have gone to some length to discuss the politicisation of the SSA and the activities of its SO arm, as these issues relate directly to the extent of executive overspill in the last decade or so.

There was more than enough information before the Panel that the then Minister, in particular, involved himself directly in operations. The Panel interviewed one member of SSA who had previously served in the Minister's office during his time as Minister of State Security, who confirmed to the Panel that he had, from time to time, been asked by a member of SO to pass parcels containing cash to the Minister.

One concern that was brought to the Panel's attention by a number of its interlocutors was the extent to which members of the Executive were able to be manipulated by information peddlers. Information peddlers have been a bane of the South African intelligence community since the dawn of democracy. These are people, often with an apartheid security background, who approach politicians and security services with apparently 'juicy' information. They usually know well what these politicians and services *want* to believe and thus tailor

their information to these needs. There have been numerous examples of this in the democratic years – the 'Meiring Report', the 'VAG Report', the 'Browse Mole Report' and many others. We were informed that the then Minister, in particular, was susceptible to such peddlers. One person told the Panel, in fact, that all or most of SOs' sources were peddlers.

Another concern brought to the Panel's attention was that the annual NIE had in recent years been presented to Cabinet by the Minister of State Security. The involvement of ministers of intelligence/state security and sometimes defence and police in the preparation of the NIE is a long-standing problem dating back before the period being specifically reviewed by the Panel. In the view of the Panel, this is another factor that muddies the boundary between executive and intelligence department functions. This is particularly so if the relevant minister presents the NIE to Cabinet him or herself.

The power to appoint a Head of Service lies with the President while the Minister, in consultation with the President, appoints deputy directors-general. In the period being reviewed by the Panel, the president and minister have played key parts in deploying 'their people' into the SSA. This makes the appointees beholden to the appointers and this is particularly damaging when the intelligence service is as politicised as the SSA has become.

On this issue the NDP argues:

> *In South Africa, the current approach to appointments blurs the lines of accountability. The requirement for Cabinet to approve the appointment of heads of department makes it unclear whether they are accountable to their minister, to Cabinet or to the ruling party. Where the minister makes appointments below the level of director-general, it becomes unclear whether these officials report to the director general or to the minister. This makes it difficult for directors-general to carry out their day-to-day responsibilities in running the department. Reforms are needed to ensure that directors-general are accountable to their minister, and that departmental staff are accountable to their director-general.*

The NDP goes on to make recommendations about changing the way directors-general are appointed:

> *For top appointments, the recruitment system needs to be capable of ensuring that a political principal has confidence in his/her head of department, that heads of department have the necessary experience and expertise, and that the appointment is seen to be fair and based on merit. To achieve this balance, the plan proposes a hybrid model similar to that used in Belgium. A selection panel convened by the chair of the PSC and the administrative head of the public service would draw up a shortlist of suitable candidates for senior posts, from*

which the political principal would select a candidate. This allows independent oversight to ensure that candidates are suitably qualified, while also ensuring that the final selection is compatible with the priorities of the political principal.

It should not be difficult to adapt this approach to the appointment of a head of intelligence service. There is no reason for the appointment of such a person to be secret.

9.3.7 To Minister or Not to Minister

A number of people who appeared before the Panel raised the question of whether South Africa should have a Minister of Intelligence/State Security. We hasten to state that this matter does not arise from the specific problems identified above. It has been a debate at least since the second half of the 1990s.

As mentioned above, the Constitution provides for the President to assume political responsibility for the civilian intelligence services or to delegate this to a member of Cabinet. The provenance of a minister for intelligence in South Africa goes back to the early years of democracy when the late Joe Nhlanhla (formerly head of the ANC's Department of Intelligence and Security) was initially appointed Deputy Minister for Intelligence under the Justice Ministry and later as full Minister for Intelligence. The reasoning behind this was the need for a policy maker to drive and oversee the transformation of civilian intelligence on the basis of the constitutional principles, the White Paper and legislation, as well as on the policy and planning requirements of the new democratic government.

But it was also a reality that the two new intelligence services – NIA and SASS – having been forced to develop their capacities on the physical and other logistical infrastructure inherited from the NIS, were in a sense 'joined together at the hip', making a single ministry logical.

The question needs to be asked whether the original need for a minister to oversee and drive transformation of the civilian services still remains. But it is also necessary to ask whether a ministry of intelligence or state security does not further aggravate the issue of over-centralisation of intelligence power as raised earlier in this report, whether over one service such as the SSA or over two separate domestic and foreign services. However it also needs to be kept in mind that the role of such a Minister adds a further element of oversight and control. This issue would need to be carefully considered as part of the review of the architecture of the whole of the security community and government.

9.4 Findings

In making its finding in this chapter in particular, the Panel once more stresses that it

was not an investigation task team, although it was often tempted to become one in the light of the extremely concerning information put before it in the topics covered by this chapter. These findings, therefore, are at a high level and further down recommendations are made to take these findings further.

The Panel finds as follows:

a) The current legislative provisions regarding the role of the Minister of State Security vis-à-vis the department itself give too much scope for a Minister to interfere in the administration and operations of the department.
b) There has been an extremely serious politicisation and factionalisation of the civilian intelligence community, and this has worsened since the creation of the SSA.
c) The manipulation of the SSA for factional purposes has emerged from the top – the Presidency – through the Ministry of State Security and into the management and staff of the SSA.
d) The failure of the Executive to heed the intelligence warning about the threats posed by the influence of a certain family over government officials and especially the former president, has cost the country dearly. However, the failure of the SSA to address state capture could not be considered a significant intelligence failure, as the Minister at the time was made aware of the threat and failed to act on the intelligence that was at his disposal.
e) The activities of the SSA and attempts at social engineering, through its SO arm, and the involvement of the President and Minister in these constitute a serious breach of the Constitution and law for which there must be consequences.
f) It is of extreme concern to the Panel that South Africa is represented in a senior government capacity by the person who headed up SO and is directly responsible for the breaches mentioned in e) above.
g) The then Minister directly participated in intelligence operations in breach of constitutional and legal prescripts and the desired boundary between the executive and the department.
h) The attempts to influence the trade union movement and civil society organisations in South Africa, through surveillance, was an improper use of public resources and violated the constitutionally mandated role of the SSA to remain politically impartial.

9.5 Recommendations

The Panel recommends as follows:

a) The current legislative provisions on the role of the Minister should be reviewed with regard to the Minister's powers as it relates 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.

10 Illegal Orders

Focus Area: The development of guidelines that will enable members to report a manifestly illegal order as envisaged in section 199 (6) of the Constitution.

10.1 The Issue

The Constitution makes it illegal for members of the security services to obey a manifestly illegal order. To what extent is this constitutional requirement reflected in intelligence policy, legislation and prescripts? And to what extent are there processes and practices in place in the civilian intelligence community to report and deal with manifestly illegal orders?

10.2 Summary of Inputs

The Panel referred to the Constitution, policy, legislation and other prescripts, and also researched relevant case law.

In particular, the Panel asked many of those who came before it whether they had every been given a manifestly illegal order and, if so, what had they done about it.

10.3 Discussion

10.3.1 Legislative Provisions

Chapter 11 of the Constitution is titled 'Security Services'. Section 199, under the heading 'Establishment, structuring and conduct of security services', in sub-section 1 says:

> *The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.* [Our emphasis]

Section 199 (6) says:

> *No member of any security service may obey a manifestly illegal order.* [Our emphasis]

The Panel is not aware of any way in which this Constitutional provision has been substantially cascaded down into intelligence legislation or prescript. Interestingly, in the 2013 General Intelligence Laws Amendment Act, there is a provision to insert the following clause into Section 5 of the National Strategic Intelligence Act of 1994:

Compliance with the Constitution

5B. *When performing any function provided for in this Act, the Constitution, in particular section 199 (5) and (7), must be duly complied with.*

Section 199 (5) says:

The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

Section 199 (7) is the one that deals with prohibiting the prejudicing of a legitimate political party interest or acting in a partisan manner towards any political party.

Although this amendment to the National Strategic Intelligence Act can be interpreted to require adherence to all the provisions of the Constitution (a somewhat obvious point), it is perhaps interesting that the two sub-sections are stressed, while sub-section 5, dealing with the injunction about manifestly illegal orders, is left out.

Section 11 (1) of the Intelligence Services Act 65 of 2002 says:

A member must, in the performance of his or her functions, obey all lawful directions received from a person having the authority to give such directions.

This formulation in the Act *implies* the right to disobey an *unlawful* direction but does not expressly deal with this. Similarly, Chapter XVIII of the Intelligence Services Regulations that deals with disciplinary procedure includes the offence:

failure to obey a lawful order or instructions intentionally or negligently

But again, there is no provision for an offence of *issuing* an illegal order, nor a procedure for how to refuse such an order or process for reporting it under protected disclosure, except under the Protected Disclosures Act.

10.3.2 What is a Manifestly Illegal Order?

The notion of a manifestly illegal order arises mainly in the military domain, dealing with acts of war that are clearly outside the 'rules of war' or are clearly a severe breach of human rights, such as civilian massacres, rape and other war crimes. In this context, a soldier should have the right – in fact, the duty – to refuse to obey an order to commit one of these acts. In modern days, the

concept arises in particular from the Nuremberg Trials, in which the Nazis on trial for war crimes claimed in their defence that they were just following orders – *Befehl ist Befehl* (an order is an order).

Article 33 of the Rome Statute says:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;
(b) The person did not know that the order was unlawful; and
(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Again, this formulation is obviously designed for war crimes and one can assume that the inclusion of the clause on manifestly illegal orders in our Constitution reflects the intention of its drafters that South Africa should comply with this international value relating to the conduct of war. But, as reflected above, this injunction in our Constitution applies to *all* the constitutionally-defined security services, including the intelligence services.

A review of some relevant case law by the Panel, revealed the following:

- Many of the cases found pertaining to unlawful instructions fell within the employment sphere. Section 5 (2) (c)(iv) of the Labour Relations Act 66 of 1995 (**"LRA"**) states that: '*no person may prejudice an employee for failure or refusal to do something that an employer may not lawfully permit or require an employee to do*'[13]. Section 187(1) of the LRA states that dismissal for failure to obey an instruction constitutes an automatically unfair dismissal.
- In **R v Smith**[14] the court held that 'if a soldier honestly believes he is doing his duty in obeying the commands of his superior and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer.'
- In relation to obeying superior orders, the court in **R v Van**

[13] Section 5 (2) (c) (iv) of the Labour Relations Act 66 of 1995.
[14] (1900) 17 SC 561

Vuuren[15] applied a purely objective test. The court stated that an obligation to obey an order from a superior only arises in a case where the order given is a lawful order, that is *'one not contrary to the ordinary civil law and justified by military law'.* The court in R v Van Vuuren rejected the test formulated in R v Smith.

- In the case of **S v Banda**[16], the court accepted the test formulated in R v Smith and reformulated it. The court reformulated the test to mean '*A soldier must obey orders issued by a lawful authority and is under a duty to obey all lawful orders, and, in doing so, must do no more harm than is necessary to execute the order. Where, however, orders are manifestly beyond the scope of the authority of the officer issuing them and are so manifestly and palpably illegal that a reasonable man in the circumstances of the soldier would know them to be manifestly and palpably illegal, he is justified in refusing to obey such orders. The defence of obedience to orders of a superior officer will not protect a soldier for acts committed pursuant to such manifestly and palpably illegal orders.'*
- The defence of obedience to superior orders was further discussed in the case of **Johannes Hendrik Mostert and Others v The State**[17] where the court held: '*the test that has been devised by our courts is that the defence of obedience to orders will be successful, provided that the orders were not manifestly and palpably unlawful'.*

So, what constitutes a manifestly illegal order in the intelligence context?

In simple terms, it could be any order that is *clearly* in breach of the Constitution, legislation, regulations or directives. At the highest level, for instance, it could be an order to conduct an intelligence operation that prejudices the legitimate interests of a political party (Section 199 (7) of the Constitution) or, at a more 'tactical' level, an order to intercept a target's phone without first acquiring the necessary judicial permission in terms of the RICA Act.

The question may arise: how *serious* should the breach be before the order is deemed manifestly illegal? Obviously, in the intelligence context, we are not usually dealing with the 'magnitude' of manifestly illegal orders as outlined in the Rome Statute (although, of course, if intelligence services start involving themselves in assassinations – as we know has happened with some of the services on the global stage – they would be getting close to that level).

There has been a debate for some time locally and internationally about the balance between legality and operational necessity. The authors of a paper issued by the Intelligence Working Group of the Geneva Centre for the Democratic Control of the Armed Forces (DCAF) in 2003 argue, for instance:

[15] 1944 OPD 35.
[16] (1990) (3) SA 466.
[17] [2006] 4 All SA 83 (N).

> *Inevitably, intelligence is an activity where there will at times be the temptation, and perhaps even the need, to transgress the conventional limits of moral or legal conduct in the hope of achieving some greater aim. Though this may be justified on occasions, it is natural that there should be misgivings by others who may be unaware of what is at stake.*[18] [Our emphasis]

Later in the same paper the authors argue that:

> *rigid adherence to what are claimed to be constitutional principles can, if applied without perspective – or common sense – be as great a danger to the constitutional order as profligate departures from those principles.*[19]

These appear to reflect the views largely of a practitioner or practitioners from the Western intelligence services dealing with international terrorism. The Panel is not necessarily supporting these views in our context; certainly not in terms of justifying breaches of the Constitution no matter how serious the threat. However, there may be a need to recognise that the more detailed prescripts (as with any piece of legislation) cannot anticipate every possible circumstance in which they might apply and there may need to be provision for certain permissions for authorisation of invasive operations in emergency situations, for example, to be obtained post facto, or for other processes, where urgency is all-pervasive, for condoning an otherwise legitimate action that may be in breach of one or other prescript.

The above argument is presented simply to make the critical point of the need to find a workable delineation between a *manifestly* illegal order and an order that is in breach of some lesser prescript for otherwise valid reasons. The purpose of this, of course, is to deal with the other side of the balance between *disobeying a manifestly illegal order* and *defying an otherwise legitimate instruction*.

10.3.3 How to Deal with a Manifestly Illegal Order

The last sentence above leads us to perhaps the most difficult aspect of this discussion – how does an intelligence officer know with certainty that she or he has been issued with a manifestly illegal order and how does she or he respond to such an order?

The answer to the first part of the above question would be that an intelligence officer should have a comprehensive knowledge and understanding of all the prescripts (from the Constitution downwards) that apply to the conduct of intelligence and, obviously, a commitment to complying with them. This would

[18] DCAF, 2003, *Occasional Paper No. 3: Intelligence Practice and Democratic Oversight – A Practitioner's View,* p42
[19] Ibid. p72

apply both to those issuing orders and those who are expected to carry them out. Of course, if those issuing orders comply with the above, there would be no problem regarding what to do about receiving a manifestly illegal order – they would not happen.

The other side of this coin, particularly of concern to intelligence leadership and management, is the danger that officers will indiscriminately use the right to disobey a manifestly illegal order to refuse or defy instructions that are not really *manifestly* illegal or that they misinterpret to be so. This could have a detrimental effect on the level of discipline required, by the nature of the work, in an intelligence organisation.

And, naturally, there is the question on the part of intelligence officers (at all levels) of what would be the danger for them in refusing to obey a manifestly illegal order. Doing so requires a high level of integrity, courage and determination and, without doubt, an effective system of protection from victimisation. If, for instance, you are the director-general of an intelligence service and you get a manifestly illegal order from the President or Minister, what would be the consequence of refusing to obey it and what protection would you have against those consequences? It might be easier, relatively speaking, lower down in the hierarchy, but at that highest level your ability to refuse would depend on the integrity and understanding of the issuer of the order.

The most common tactic for dealing with manifestly illegal orders that the Panel was made aware of was to ask for the order to be committed to writing. Apparently, in most cases the order never came in writing and was no longer insisted upon.

10.3.4 Were Manifestly Illegal Orders Issued?

In the period being reviewed by the Panel, it seems there were certainly a large number of manifestly illegal orders issued, reportedly from the level of the Executive downwards. These ranged from breaches of the constitutional provisions regarding prejudicing or furthering the interests of political parties, down to the conducting of intrusive intelligence operations without compliance to the law and including conducting intelligence operations that breached the legislatively prescribed mandates of the SSA.

The Panel asked many of those who appeared before it: Have you ever been given a manifestly illegal order and, if so, what did you do about it?

Some, whom the Panel knew had been issued such orders, simply answered ‘no’ – they lied. Or, in some cases, they had no understanding that orders that were issued were indeed manifestly illegal. Among those who admitted to receiving such orders, some dealt with it by calling on the Nuremberg Defence (‘an order is

an order') or 'how do you defy your Executive?' Others claimed they had asked for the order in writing and others that they had simply defied. Some reported subsequent victimisation.

10.4 Findings

The Panel finds as follows:

a) In the period under review (and perhaps beyond) the Panel heard enough evidence that there have been orders issued to and within the SSA, including from the Executive, which in the Panel's view were manifestly illegal.
b) There appears to have been no consistent consequence management for the issuing or obeying of such orders.
c) Intelligence legislation, regulations and directives do not adequately address the issue of manifestly illegal orders and how to deal with them.

10.5 Recommendations

The Panel recommends as follows:

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 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, 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.

11 Training and Development

Focus Area: The effectiveness of Training and Development Programmes in capacitating members of the Agency.

11.1 The Issue

The education, training and development of intelligence officers is an obviously critical element for ensuring an understanding of the constitutional, policy, legislative and prescriptive requirements of intelligence, for its professional and efficient conduct, an ever-developing knowledge-base, and a measure to ensure career development and progress for intelligence officers.

11.2 Summary of Inputs

The Panel interacted with the current management of the SSA's IA, a former Principal of the then SANAI, as well as various members of management and staff and others who expressed views on intelligence training over the years.

The Panel also had access to the Intelligence Academy Prospectus. The Organisational Survey 2014 Report also had relevance to this topic as discussed in an earlier chapter.

11.3 Discussion

At the formation of the new intelligence services (NIA and SASS) in 1995, an Intelligence Academy was established as a Chief Directorate under NIA, intended to provide training to both NIA and SASS. The Academy was located on the main intelligence campus (now called 'Musanda') on the Delmas Road in Pretoria East. At the time, there was some consternation on the part of SASS that they had limited influence on the content and management of the Academy, in spite of various attempts at creating bodies to coordinate shared services between the two entities.

Around 2002, the then Minister for Intelligence Services had a vision of creating the intelligence academy as a separate entity, serving both NIA and SASS, with its own campus. A training campus was created in Mahikeng from a facility inherited from the former Bophuthatswana Intelligence Service. The 2002 Intelligence Services Act created the SANAI as 'an organisational component in terms of the Public Service Act, 1994 (Proclamation 103 of 1994), of which the management and administration is under the control of the Minister'. That Act specified that the Academy:

> *(a) must provide training for persons in, or conduct such examinations or tests as a qualification for the appointment, promotion or transfer of persons in or to, the Intelligence Services or departments, as the case may*

be, as the Minister may prescribe; and
(b) may issue diplomas or certificates to persons who have passed such examinations or tests.

The Act also prescribed that the Academy should set up a training fund.

While this newly-established 'stand-alone' academy served both NIA and SASS and was answerable to the Minister instead of NIA, the Panel understands that SASS was still not happy with this arrangement and set up its own small training capacity to supplement the training offered by SANAI.

The 2013 General Intelligence Laws Amendment Act undid all of this, disestablished SANAI and gave its functions and the administration of the training fund to the SSA. As shown in previous chapters, SANAI became the IA as a spending centre of the SSA reporting to the DG. In 2017, with the implementation of the SDP, the IA was further reduced to a chief directorate reporting to the DDG Corporate Services. Although the organisational structure of SSA as of 2016 shows it as a separate branch, the Panel was astonished to hear that, at the time of its deliberations, the DDG Corporate Services was also Acting Principal of the IA[20]. The Panel was also somewhat disturbed to find, in its meeting with the IA management, that all of them were in acting capacities.

The Panel was not able to visit the Mahikeng campus of the IA, but some of its members who had previously served in the intelligence community knew the campus. The campus offers residential, administrative, teaching and recreational facilities. A number of submissions to the Panel expressed concern about the distance of the campus from the SSA headquarters. There are advantages and disadvantages to this in the Panel's understanding:

- Especially for longer courses, it makes sense to have a residential campus that keeps students (and staff) away from the distractions of head office (and perhaps home). The Panel understands that the IA has established a satellite campus at the Musanda facility in Pretoria for shorter courses.
- The Panel understands that teaching and administrative staff deployed to the IA are often reluctant to move to Mahikeng from the 'big cities'. This may impact on the quality of staff assigned to the IA. The distance from Gauteng to Mahikeng is a little over 300km, making a daily commute impractical.
- Concern was also expressed to the Panel about the effects of the deterioration of the town of Mahikeng on the IA and its campus, further aggravating the willingness of staff to base there.

The Panel was not able to comprehensively evaluate the quality of teaching at the IA, but a number of issues arise from the engagements it had with a range of direct and indirect stakeholders:

[20] The Panel understands that this has recently been rectified.

- The training provided is precisely that – training – instead of training, education and development. It is focused largely on imparting skills.
- There is a need for effective leadership and management training.
- Intelligence training is still stuck in the 'post-WWII' intelligence philosophy.
- There is not enough, or any, technology training.
- The views expressed earlier arising from the 2014 Organisational Survey[21] are worth repeating here:
    - training at the IA is not up to standard;
    - the location of IA in Mahikeng is not conducive due to the distance;
    - training is not customised to operational environments and that the centralisation of the budget for training at IA has resulted in lengthy processes that impact on members willingness to attempt to obtain approval to attending training;
    - the selection criteria for training is unclear and not standardised which leads to unfairness and favouritism in the selection of members who may attend training.
- The Panel also heard the view that members of the SSA are often sent on training to 'get rid of them' or 'get them out of the system for a while'.
- There is no systematic utilisation of training, education and development as part of a career progression and performance management system.
- The Intelligence Academy has been systematically 'hollowed out' since 2009 and there has thus been no effective training for some time.

A perusal of the IA's current curriculum indicates the need for:

- Continued emphasis throughout on the significance of a democratic state. That means having a good sense of why democracy is a point of departure for this nation.
- Training and development in resource economics – i.e. agricultural economics, water resources economics, mineral resources, etc.
- A comprehensive study and training in economics is a prerequisite particularly in an emerging market economy and globalisation.
- Quantitative analysis and study must be strengthened.
- The research module needs attention in advanced data gathering and understanding the logic of inquiry,
- The economics emphasis should include a focus on geopolitics (historic and contemporary) and with it, discussion on South Africa's national interest and the strategies that follow in pursuit therefrom.

By way of emphasis, given the Panel's findings earlier in this report about the systematic non-compliance with the Constitution, White Paper, Legislation,

[21] See Chapter 6

Regulations and Directives, the question arises as to what extent training has been used, especially over the last decade or so, to inculcate a knowledge and understanding of these prescripts and an attitude of the inviolability of compliance.

Thought needs to be given to whether a single curriculum is appropriate for domestic and foreign intelligence operatives. Of course, there are certain elements (such as the one mentioned in the previous paragraph) that are common. But, operating on the foreign terrain has important differences to the domestic terrain. For one, you are operating in 'enemy territory' and breaking the laws of the target country with possibly very serious consequences. In the domestic terrain (assuming you operate within the prescripts) you are operating in 'friendly territory'. More importantly, an intelligence officer working in the foreign terrain needs a profound knowledge and understanding of international relations, diplomacy and, of course, a detailed knowledge of the country and region he or she will be working in, plus language ability. A domestic operative, on the other hand, needs a detailed knowledge of the various prescripts governing the conduct of intelligence in the domestic terrain, a profound understanding of South African society, political economy etc. There is also the question of a difference of culture between foreign and domestic services.

The Panel was informed about some initiatives on the part of the IA and its predecessor to partner with institutions of higher learning. This seems a commendable idea, but perhaps needs to be properly strategized, structured and managed, based on the needs of the Academy rather than simply the 'offerings' of these institutions. It may also be important to partner with other training institutes within government, such as the training entities of Defence and Crime Intelligence, the National School of Government, the DIRCO Academy, the SARB Academy and others.

11.4 Findings

The Panel finds as follows:

a) Education, training and staff development are not given the necessary attention by the SSA, resulting in a haphazard and inferior training system.
b) In recent years the Intelligence Academy has been hollowed out with frequent staff changes and acting appointments, bereft of effective leadership and insufficient attention and priority given to it, leading to a toxic environment.
c) Training and development are not an integral part of career-pathing and performance management in the Agency.
d) Education, training and development should be an integral part of developing a professional, conscientious and effective intelligence service.

11.5 Recommendations

The Panel recommends:

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 and develop a plan for its use, if any, as well as other internal training facilities.

12 Coordination

Focus Area: The effectiveness of intelligence and counter-intelligence coordination within the Agency and between the agency and other South African intelligence entities and the capacity and role of NICOC in this regard.

12.1 The Issue

In all the commissions and reviews that followed major intelligence failures in western democracies (such as 9/11 and the Iraqi non-existent weapons of mass destruction), the key finding has always been a lack of coordination between intelligence services and sometimes within services. And these findings have always led to a marked strengthening of coordination mechanisms. The question arises as to whether South Africa must wait for a major intelligence failure before it addresses its own weaknesses in intelligence coordination.

12.2 Summary of Inputs

The Panel received briefings from the current and past Intelligence Coordinators plus present and past NICOC staff members and also solicited the views of current and former ministers of Intelligence/State Security as well as former and current senior leaders of the SSA and its predecessor services. It also had interviews with the heads of the Crime Intelligence Division of SAPS and of the Intelligence Division of the SADF.

A number of documents proved very useful to the Panel's deliberations on these issues, including, inter alia:

- *The Ideal NICOC Coordinating Mechanism* – submitted to the Panel by the current NICOC Coordinator
- Input on Intelligence Coordination – submitted to the Panel by the Minister
- The Challenges of Intelligence Coordination in South Africa – developed in 2005

12.3 Discussion

This report has already dealt to some extent with the challenges of coordination inside the SSA, especially as it relates to coordination between the foreign and domestic arms as well as between the analysis and operations arms. We have also stressed that the sheer size of the SSA makes effective management and thus coordination difficult.

In this chapter we focus on the coordination of the broader intelligence community, including defence and crime intelligence and other relevant arms of the state, with

particular focus on the role of NICOC and the Coordinator for Intelligence.

It is important to understand the crucial place that NICOC occupies in the overall intelligence value chain, at least as conceived by the founders of our constitutional democracy and post-apartheid intelligence dispensation. It is supposed to be the key interface between the agencies that *collect* intelligence and the clients who need to make use of it, ensuring *all-source* input into the intelligence picture and effective processing and evaluation of the assessment product that goes to the policy-makers.

The Constitution, White Paper and laws of our country are very clear on the mandate and powers of NICOC.

The Constitution says in Section 210:

> *National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for—*
> *(a) the co-ordination of all intelligence services;* [Our emphasis]

The White Paper spells this out in more detail. It says:

> *an interdepartmental intelligence coordinating mechanism, the National Intelligence Coordinating Committee (NICOC) will coordinate the activities of the intelligence community and will act as the key link between the intelligence community and policy-makers. NICOC will be chaired by a Co-ordinator for Intelligence who will be accountable to the President.* [Our emphases]

It further defines the functions of NICOC as, inter alia:

- *to advise the government on policy relating to the conduct of intelligence at national, regional and local levels*
- *to coordinate the conduct of all intelligence functions and the collective intelligence resources of the country*
- *to coordinate the production of national strategic intelligence*
- *to avoid and to eliminate conflict, rivalry and unhealthy competition between the members of the intelligence community* [Our emphases]

Section 4 of the National Strategic Intelligence Act defines the functions of NICOC as:

> *(a) to co-ordinate the intelligence supplied by the members of the National Intelligence Structures to Nicoc and interpret such intelligence for use by the State and the Cabinet for the purposes of-*
> *(i) the detection and identification of any threat or potential threat to the national security of the Republic;*
> *(ii) the protection and promotion of the national interests of the Republic;*

(b) for the purposes of the functions contemplated in paragraph (a)-

(i) to co-ordinate and prioritise intelligence activities within the National Intelligence Structures;

(ii) to prepare and interpret intelligence estimates;

(c) to produce and disseminate intelligence which may have an influence on any state policy with regard to matters referred to in paragraph (a) for consideration by the Cabinet;

(d) after consultation with the departments of the State entrusted with the maintenance of the security of the Republic, to co-ordinate the flow of national strategic intelligence between such departments;

(e) at the request of any Department of State, to co-ordinate the gathering of intelligence and without delay to evaluate and transmit such intelligence and any other intelligence at the disposal of the National Intelligence Structures and which constitutes departmental intelligence, to the department concerned; and

(f) to make recommendations to the Cabinet on intelligence priorities.

[Our emphases]

One of the problems long identified with the wording of the legislation is that it gives these powers and responsibilities to 'NICOC' – literally the committee of the heads of services – and does not provide for NICOC as an organisation or for the powers of the Coordinator. It is obvious that it is not possible for a committee to successfully perform all the functions legislated to it through some sort of consensual decision-making.

The composition of the NICOC committee prior to the establishment of SSA consisted of the Coordinator for Intelligence, the DG of SASS, the DG of NIA, the Head of the SAPS Crime Intelligence Division and the Head of the SANDF Intelligence Division. In addition to the statutory membership, the Committee also co-opted the DG in the Presidency, DG of Foreign Affairs/DIRCO, the Head of the Financial Intelligence Centre (FIC), the DG of Home Affairs and others. With the establishment of the SSA, the Directors Foreign and Domestic branches of the Agency became statutory members of the Committee in place of the previous DGs of NIA and SASS.

The Panel received a number of inputs from NICOC staff and from members of the analysis arms of the SSA, saying that the DG of SSA had given instructions to limit the provision of intelligence reports to NICOC. We also received a report that one former Minister had wanted to turn NICOC into a unit in the Ministry.

The challenges of intelligence coordination in South Africa have been with the country since the early days of democracy. The key view of most of those engaged by the Panel on this issue is that the policy and legislative prescripts on intelligence coordination are basically sound but that they are more honoured in the breach. The coordinated entities resist the functions of NICOC specified in the White Paper and legislation and thus, over the years, the Intelligence Coordinator has struggled to achieve the aims and purposes of intelligence coordination, in spite of many reviews,

strategic retreats and high-level discussions between the various players.

Currently, NICOC is a spending centre of the SSA. This means that it is financially and, to some extent, logistically and administratively dependent on one of the services that it is supposed to coordinate. There have been recommendations in various reviews over the years that it should be established as an independent entity with the Coordinator for Intelligence as accounting officer. In addition, concern was expressed to the Panel by Defence Intelligence that NICOC was 'dominated' by the SSA.

As noted earlier in the discussion on the SSA's Strategic Development Plan, the SSA, in its long-term vision and thinking, totally ignored the statutory role of NICOC and gave itself many of the functions that should be carried out at the NICOC level.

A majority of the pertinent interlocutors of the Panel on intelligence coordination and NICOC expressed the view that NICOC should be located in the Presidency or closer to the Presidency. The current Minister disagreed with this largely on the grounds that the problem was not structural but functional.

12.4 Findings

The Panel finds as follows:

a) South Africa's intelligence coordination has faced serious challenges since the beginning of the democratic dispensation that various reviews and initiatives have failed to address. The time is now opportune to address these courageously and fundamentally.
b) While there are a number of improvements that can be made to the legislation governing intelligence coordination, the fundamentals of the White Paper and legislation are correct but there has been a consistent failure on the part of the coordinated entities to comply with these principles and legislation. This lack of compliance has become worse in the last decade or so.
c) It is not appropriate that NICOC should be located in one ministry while two of the entities it is supposed to coordinate report to two different ministers.
d) NICOC analysts should be able to draw on, not only the intelligence from the intelligence departments, but on the relevant knowledge of all government departments, academia, research institutes and other experts.

12.5 Recommendations

The Panel recommends as follows:

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 earlier in this report 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.

13 Oversight

Focus Area: The effectiveness and appropriateness of the existing oversight mechanisms in ensuring accountability and transparency.

13.1 The Issue

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. The question is: given the abuses and infractions identified in this report, did these oversight mechanisms function effectively and if not, why not?

13.2 Summary of Inputs

The Panel received inputs from:

- The current IGI and his office
- A former IGI
- The former Chair of the JSCI, current National Security Advisor
- The JSCI

Key documents relating to the oversight issue include:

- The Constitution
- The White Paper
- The Intelligence Services Oversight Act 40 of 1994
- The Matthews Commission Report
- Report of the Task Team on the Review of Intelligence-Related Legislation, Regulation and Policies, April 2006

The Commission also looked at the oversight mechanisms of other democratic intelligence jurisdictions.

13.3 Discussion

Oversight can be conducted by the executive (principally, but not exclusively by the relevant Minister), the judiciary, the legislature and administrative bodies that are independent of the executive. In the case of South Africa, oversight responsibilities are distributed between the Minister of State Security, the JSCI, the IGI, Chapter Nine institutions such as the South African Human Rights Commission (SAHRC), the Public Protector and the AGSA and the judiciary, including the judge responsible for lawful communication intercepts in terms of the RICA.

This chapter deals primarily with the specialised intelligence oversight mechanisms

created via the Constitution, the White Paper and the Intelligence Services Oversight Act – viz. the Parliamentary Joint Standing Committee on Intelligence and the Inspector-General of Intelligence. Other chapters deal with the role of the Minister for State Security, the AG and other entities.

13.3.1 Legislative Provisions

Section 210 of The Constitution says national legislation must provide for:

> *…civilian monitoring of the activities of those services* [the intelligence services] *by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.*

The White Paper on Intelligence, under the heading 'Control and Coordination of Intelligence', says:

> *It was agreed by the TEC that a number of control measures to regulate the activities of the civilian intelligence community should be implemented. The control mechanisms include the following principles and practical measures:*
>
> - 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 - one each for the two civilian intelligence services;
> - Ministerial accountability;
> - The absence of law enforcement powers.
>
> [Our emphases]

It further says:

> *Of these measures, the most important is a proposed mechanism for parliamentary oversight over the different services and departments with functions relating to intelligence (see Parliamentary Committee on Intelligence Bill). The bill makes provision for the following:*
>
> - *A Joint Standing Committee for Parliament with functions and powers that will allow it to receive reports, make recommendations, order investigations and hold hearings on matters relating to intelligence and national security. The committee will also prepare and submit reports*

to parliament about the performance of its duties and functions.

- *Two Inspector-Generals[22] – one each for each service – whose functions will include reviewing the activities of the intelligence services and monitoring their compliance with policy guidelines. These two persons will have unhindered access to classified information.*

The Intelligence Services Oversight Act gives effect to these high-level policy positions on oversight of the intelligence community, extending the roles of the JSCI and the IGI to also cover the Defence and Crime Intelligence services.

According to the Act, the functions of the IGI, inter alia, are:

- 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 him or her 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 maladministration, abuse of power, transgressions of the Constitution, laws and policies;

The Act says that the IG:

> *… shall be a South African citizen who is a fit and proper person to hold such office and who has knowledge of intelligence.* [Our emphasis]

It further gives the IGI extensive access to the information of the Services. It says the IGI:

> *shall have access to any intelligence, information or premises under the control of any Service if such access is required by the Inspector-General for the performance of his or her functions, and he or she shall be entitled to demand from the Head of the Service in question and its employees such intelligence, information, reports and explanations as the Inspector-General may deem necessary for the performance of his or her functions;*

In terms of the JSCI, the Act defines its functions, inter alia, as:

- 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;

[22] Note: this was later reduced to one IGI to cover all four intelligence services (SASS, NIA, Defence Intelligence and SAPS Crime Intelligence)

- to consider any legislation and regulations relating to the intelligence services;
- to review and make recommendations regarding inter-departmental cooperation;
- to order investigation by the head of a service or the IGI on any complaint received by the committee;
- to refer any relevant matter to the SAHRC;
- to deliberate upon, hold hearings, subpoena witnesses and make recommendations on any aspect relating to intelligence and the national security, including administration and financial expenditure;
- to consider and report on the appropriation of revenue or moneys for the functions of the Services.

The Committee's access to information is not as extensive as that of the IGI. The Act says the head of a service is not obliged to disclose to the Committee, inter alia:

- the identity of any person or body engaged in intelligence or counter-intelligence activities
- any information that was provided to a service under express or implied assurances of confidentiality

13.3.2 Inspector-General for Intelligence

The recent controversy between the IGI and the former DG of SSA around the withdrawal of the IGI's security clearance has raised once more an issue that has been on the intelligence community's agenda for some years – the issue of the independence of the office of the IGI from one of the entities that it oversees.

The 2006 *Report of the Task Team on the Review of Intelligence-Related Legislation, Regulation and Policies* had this to say on this matter:

> *Similarly to NICOC, the Office of the Inspector-General for Intelligence has a mandate that extends beyond the civilian intelligence services, but has to account financially and administratively to one of the services that it is expected to inspect – NIA. While this may be administratively convenient, from the point of view of the need for actual and perceived independence, this arrangement is untenable… It is therefore important to provide the OIGI with an organisational status that gives its head Accounting Officer status and allows it to receive and manage its budget independently of NIA.*

The 2008 Matthews Commission Report agreed with the findings of the 2006 report:

> *The Task Team recommended that the OIGI be given independent*

organisational status, allowing it to receive and manage its budget independently of NIA and affording the Inspector-General full control over the resources and activities of the Office. The OIGI could be established as either a government agency or a Schedule 3 organisation in terms of the Public Service Act No. 103 of 1994. The Inspector-General would remain functionally accountable to the JSCI but would be financially and administratively accountable to the Minister for Intelligence Services for the purposes of the Public Finance Management Act No. 1 of 1999.

We agree that the OIGI should have independent status. The process of establishing this status was underway in August 2008.

In fact, the process to establish this status has never happened or at least was put aside with the change in intelligence management in 2009.

The Panel was not an investigation task team and was therefore not able to form an evidence-based judgement on the issue of the withdrawal of the current IGI's security clearance. The Panel was not able to make final sense of these claims and counter-claims, but noted that there are some concerns regarding the current IGI. The Panel was particularly concerned with his taking the issue of his independence to court instead of handling it, as others have done before him, through community-wide review processes. In relation to the withdrawal of his security clearance, the IGI did not use the legally provided recourse to appeal to the Minister, who, in the end, did indeed reinstate his clearance.

Over the years, there have been a number of issues raised about the role and functioning of the IGI and his or her office apart from the issue of independence, particularly in the two reports quoted from above.

The 2006 Task Team Report made the following findings:

- The Task Team agrees that the Office of the Inspector-General for Intelligence should be given independent status, allowing the Inspector-General to have full control over the resources and activities of the OIGI.
- The Task Team agrees that the legislative mandate of the Inspector-General should be amended to exclude investigations into human resource complaints or grievances.
- On the issue of the powers of the Inspector-General, the Task Team agrees that:
  - The Inspector-General should not have powers to subpoena witnesses.
  - Persons appearing before the Inspector-General for purposes of an investigation or inspection should have no automatic right to legal representation.
  - The findings of the Inspector-General in any investigation or inspection should not be enforceable, but should serve as recommendations.

- The Task Team strongly supports the need for the urgent issuing of regulations governing the conduct of investigations and inspections by the Inspector-General.
- On the issue of obligatory consultation with the Inspector-General in the drafting or amending of legislation or regulations, the Task Team finds that this would be an unnecessary additional step in the legislation-making process, but agrees that such consultation should take place as a matter of good practice wherever possible.

The 2008 Matthews Commission Report agreed with most of the findings of the 2006 report, except:

- It did not agree that persons appearing before the IGI should not have automatic right to legal representation.
- It did not agree that it should not be mandatory for legislation to be consulted with the IGI.

Over a decade has passed since these two sets of findings on the OIGI were made by ministerial-appointed entities. It appears to the Panel that, with the change in administration in 2009, there was no follow-up on these recommendations. The Panel understands, however, that there has been an attempt to draft and promulgate the regulations governing the OIGI. These were drafted in 2010 and submitted to the then Minister and the JSCI, but it was decided to put these on hold until the promulgation of the GILAA – the Act which amended all related intelligence legislation to provide for the establishment of the SSA. After GILAA was promulgated in July 2013, the regulations were redrafted and provided to the then Minister in 2014 who did not respond. The regulations were provided to the then Chair of the JSCI in November 2014, but the OIGI has heard nothing since.

One of the key concerns of the Panel is the long periods of time that the IGI post has been vacant. Between 1995 and 2004 there had been two short-lived IGIs – one for six weeks and one for six months. Arising from this concern, the Panel received a number of proposals that a Deputy Inspector-General of Intelligence post should be created to allow the incumbent to act in the absence of the IGI.

A question of concern to the Panel was to what extent the OIGI had played a role in identifying and curbing the abuses that had occurred in recent years in the SSA. Of course, the fact that the post was vacant for two years at a crucial time did not help. However, the Panel did have sight of a number of IGI reports on abuses, such as the report on the Principal Agent Network and others which did indeed identify problems and recommend corrective action. But, as far as the Panel could ascertain, no action or consequence management took place in response to the IGI's reports. This raises the question as to whether the services should be obliged to act on the findings and recommendations of the IGI similar to the status of the recommendations of the Public Protector. This would need further thought.

The IGI noted that there were a series of legacy issues from previous certifications that remained unaddressed. These include the following:

- The involvement of the Minister of State Security in operational work and administrative decision-making of the SSA;
- Certain forms of intrusion such as surveillance and targeting are not regulated through legislation or ministerial regulation, in spite of the fact that there is a constitutional requirement to legislate such objects and powers;
- Intermittent restructuring within the SSA had created restructuring fatigue;
- Continued politicisation of the SSA remained a problem;
- The blurring of the lines between covert and overt operations, where covert resources are being used for overt purposes;
- Poor or inadequate training on SSA Operational Directives;
- The SSA approved framework for the Cover Support Unit may not be in compliance with the Constitution and applicable laws;
- The appointments of senior managers of SSA are often made outside the prescribed recruitment processes;
- There is a culture of non-accountability in the SSA;
- There are a large number of acting capacity appointments;
- The SSA does not have an internal collective bargaining mechanism;
- The SSA does not maintain adequate integrated electronic audit trails and logs on the use of intrusive measures;
- The administration of applications for intercept of communication is inadequate;
- There is inadequate access to the OIC's real-time intercepts by the SSA's Domestic Operations;
- There are numerous barriers to effective foreign intelligence collection and liaison;
- Intelligence and counter-intelligence activities at provincial level have been seriously compromised by the lack of dedicated human capacity in strategic areas.

This long list of issues that remained unaddressed includes many of the issues identified by the Panel and suggests that the IGI was not being taken seriously by the SSA.

13.3.3 Joint Standing Committee on Intelligence

The JSCI is a committee of Parliament and is therefore comprised of members of Parliament – both houses – variously representing their political parties: in other words, politicians. In the vision of the founding mothers and fathers of our constitutional dispensation, it was designed as a mechanism for our intelligence services (as required by other departments of state) to be accountable to Parliament while taking into account the sensitive nature of intelligence work.

Ultimately, the effectiveness of the JSCI rests on the integrity of its members, in particular their ability to rise above narrow party-political interests in pursuance of their oversight role. It also rests on the ability of members of the committee to understand the complexities of the intelligence world. The current National Security Advisor, who served as a member of the Committee for three years, more recently as its Chair, expressed concern with the quality of some members of the Committee.

However, it did seem to the Panel that the JSCI played little role in recent years in curbing the infractions of the SSA and that no effective oversight on its part was carried out. In fact, it would seem that the Committee, with an ANC majority, was itself affected by the politicisation and factionalisation seen in the ANC, in Parliament, in the intelligence community and in other arms of government.

The JSCI was unable to engage substantively with the Panel. The Panel was told that most of the Committee members were new and had no institutional memory. In addition, the Chair of the Committee was changed thrice since 2014 and the process of replacement took time; rendering the Committee rudderless. Members of the Committee further pointed out that they do not serve in the Committee on a full-time basis and were only able to meet once a week for a few hours. The cumulative effect of these issues was aptly captured by one member who admitted that the Committee had 'lost control' of their oversight role and that three of their annual reports had not been presented to Parliament.

13.4 Findings

The Panel finds as follows:

13.4.1 General

a) The fundamentals of South Africa's intelligence oversight mechanisms are sound, although, over the medium-term, they can be finessed with reference to recent international developments in this area.
b) The oversight mechanisms have failed to act effectively in recent years, especially in relation to the infractions identified in this report, largely due to neglect or politicisation and factionalisation.
c) Whatever the architecture and specifics are for the intelligence oversight mechanisms, it is important that they should have the confidence and trust of the intelligence services in order to ensure the services play open cards with them.

13.4.2 Inspector-General of Intelligence

d) The findings and recommendations of the 2006 and 2008 reviews cited in this chapter, insofar as they deal with the IGI, are fundamentally correct.
e) 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.
f) The OIGI should be established as a separate entity, independent of the SSA or any successor service, with its own administration and budget.
g) The legislative requirement for the IGI to have knowledge of intelligence is a valid and important requirement in order to allow him or her to be able to detect any attempts to pull the wool over his or her eyes, but also to allow the services to have confidence and trust in the incumbent.
h) 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.
i) The Office of the IGI should be given some legislated status.

13.4.3 JSCI

j) The JSCI over the past few years has been largely ineffective and impacted by the factionalism of the ANC.
k) The Committee is divided and unable to articulate a coherent collective response on the state of intelligence in the country.
l) 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.

13.5 Recommendations

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.

14 Conclusion (What Went Wrong?)

Throughout its deliberations, every now and then, the Panel had to raise itself above the vast amount of written and verbal information before it and ask itself the question: 'What on earth went wrong?' The Panel accepted that it was established precisely because there was a concern in the mind of the President and the recently appointed leadership of the civilian intelligence community that things had indeed gone wrong. And much of the information available to the Panel confirmed that things had gone badly wrong.

It must, however, be said that the findings of this Panel on what went wrong do not impugn every member of the State Security Agency and its management. The information available to the Panel and the interviews it conducted did show that there were many things going right and many members doing their best in a difficult environment.

With some exceptions, the Panel has not pointed fingers at particular individuals. This was largely due to the fact that it was not an investigative commission or task teak – it was not able to ascertain blame without having had the time and capacity to hear additional evidence, to re-examine witnesses on the basis of further testimony heard, or to examine in minute detail documentation and other records that might have served as evidence. Such work will need to follow the outcome of this Panel's findings and recommendations where appropriate.

In sum, and at a high level, these are the key things, in the view of the Panel that 'went wrong':

- From about 2005, with the emergence of the divisions in the ANC, there has been a growing **politicisation and factionalisation** of the civilian intelligence community based on the factions in the ANC. This has been partly aggravated by the fact that many of the leadership and management of the intelligence services have come from an ANC and liberation struggle background and have seemingly, in some cases, not been able to separate their professional responsibilities from their political inclinations. This became progressively worse during the administration of the former President, with parallel structures being created that directly served the personal and political interests of the President and, in some cases, the relevant ministers. All this was in complete breach of the Constitution, the White Paper, the legislation and other prescripts.
- From about 2009, we saw a marked **doctrinal shift** in the civilian intelligence community, away from the prescripts of the Constitution, White Paper and legislation and plain good practice. This was most publicly reflected in the change of name from 'national intelligence' to 'state security'. But, more seriously, it was reflected in the increasing turn to covert structures and projects, the PAN and SO projects, and was taken to extremes in the proposals contained in the Strategic Development Plan.
- The **amalgamation of NIA and SASS into the SSA** was a monumental blunder. Apart from the fact that it did not take place on the basis of a formal change of policy

involving parliamentary and public consultation and was initially irregularly effected, it did not achieve its stated intentions of reducing expenditure, effecting better coordination, reducing duplication and so on. It might have achieved some of those in small measure, but it created more problems than it solved.

- There is a **disproportionate application of secrecy** in the SSA stifling effective accountability and facilitating serious non-compliance with controls including blatant criminality.
- Due to **wide-ranging resource abuse**, the SSA became in effect a 'cash cow' for many of its members and external stakeholders.

These, in the view of the Panel, are the key answers to the question: What Went Wrong? But, of course, there are many subsidiary answers in the body of the report.

[End of Report]

Appendix A – Panellist Biographies

PANELISTS

Dr Sydney Mufamadi (Chairperson): is Director of the School of Leadership in the Faculty of Management at the University of Johannesburg. He has previously served as Minister of Safety and Security and as Minister for Provincial and Local Government.

Professor Jane Duncan: is a professor and Head of the Department of Journalism, Film and Television at the University of Johannesburg. Before that she held a Chair in Media and the Information Society at Rhodes University and was Executive Director of the Freedom of Expression Institute.

Mr Barry Gilder: is currently Director Operations at the Mapungubwe Institute for Strategic Reflection (MISTRA) and was previously deputy director-general of the South African Secret Service, deputy director-general of the National Intelligence Agency, director-general of the Department of Home Affairs and Coordinator for Intelligence.

Dr Siphokazi Magadla: is a Senior Lecturer at the Political and International Studies department at Rhodes University. She is a former Research Consultant at the Institute for Security Studies.

Mr Murray Michell: is the former Head of the Financial Intelligence Centre (FIC).

Ms Basetsana Molebatsi: is a qualified attorney, co-founder and director of Harris Nupen Molebatsi Inc. Her experience includes constitutional law, public law, and general commercial law. She was previously the Chairperson of the Women's Legal Centre Trust.

Rtd. Lt General Andre Pruis: From 1995 served on the Advisory Committee of the Minister of Safety and Security. Served as Divisional Commissioner Operational Response Services and Deputy National Commissioner Operational Services of the South African Police Services (SAPS). Retired from the SAPS in 2011 with rank of Lieutenant-

General.

Mr Silumko Sokupa: is a former Provincial Head of NIA in the Eastern Cape; former Counter Intelligence General Manager in the South African Secret Service and Deputy Director-General, SASS, responsible for the African continent.; Special Envoy for President Thabo Mbeki in Cote d'Ivoire; Coordinator for National Intelligence until retirement.

Professor Anthoni Van Nieuwkerk: Coordinates peace and security studies at the Wits School of Governance. He is a founding member of the Institute of Global Dialogue and served on the steering committees of the South African Council on International Relations and the Concerned Africans Forum.

Professor Sibusiso Vil-Nkomo: Senior Research Professor at the University of Pretoria, Chairperson of the Board of Governors of the Mapungubwe Institute for Strategic Reflection and former Public Service Commissioner of the democratic government of South Africa. Knowledgeable in organisational development, policy and governance.