

https://dspace.org/

Accountability and oversight of intelligence services in South Africa post 1994

Dube, Brian Fikani

2014-03-18
http://hdl.handle.net10539/14198

Downloaded from a DSpace repository. https://dspace.org/

ACCOUNTABILITY AND OVERSIGHT OF INTELLIGENCE SERVICES IN SOUTH AFRICA POST 1994

BY

BRIAN FIKANI DUBE

STUDENT NO: 692488

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

MMPP

JULY 2013

SUPERVISOR: PROF ANNE MC LENNAN

UNIVERSITY OF WITWATERSRAND

ABSTRACT

The work to keep a nation safe from threats or potential threats has become very difficult in the 21st century. The advent of globalisation and the advances in technology resulted in borderless societies and a complex world of changing global threats. It is inconceivable that there would be a government worth its salt that would not create and sustain security institutions to safeguard its people, installations and critical infrastructure that form the bedrock of the economy and government operations in terms of services.

Post 1994, South Africa developed an oversight model for the country's intelligence services, in an effort to ensure that abuses associated with the apartheid era of intelligence remain a thing of the past.

Noting that a number of design, functional and implementation changes have occurred in the past 18 years within the accountability and oversight model, this study sought to establish the extent to which the current accountability and oversight model is effective and still relevant in dealing with the 21st century challenges of intelligence. This was the main research question. The study was grounded in the institutional theory in its different variants.

This study argued that the South African accountability and oversight model needs to be reviewed and aligned with the latest international developments which bring an institutionalised civilian oversight as part of the central pillars of the model.

Through a combination of documentation analysis and interviews of a targeted sample of experts, the study found that while a sound legislative framework is in place within an appropriately designed model, there are inadequate skills at the parliamentary level for oversight. Policy gaps in respect of the control of intelligence at the ministerial level have also been found to be a serious limitation of the current accountability model. The study also found that civilian oversight suffers from a lack of an institutionalised framework.

The study concluded with a number of recommendations pertaining to amendments of legislation to provide for an institutionalised framework for civilian oversight, introduction

of mandatory training programmes for members of the parliamentary committee on oversight, as well the need to close prevailing policy gaps.

DECLARATION

I, Brian Fikani Dube, declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirements of the degree of Master of Management (in the field of Public Policy) in the University of the Witwatersrand, Johannesburg. It has not been submitted previously, in part or in its entirety, for any degree or examination to this or any other university for the purpose of obtaining a qualification

_____

Brian Fikani Dube

_____ day of _____ 2013

ACKNOWLEDGEMENTS

This research report is offered as part of enriching the knowledge process in relation to governance issues pertaining to the intelligence services, a field considered by many as a closed, secretive sector. The intention is to contribute to the debate on governance reform in the security sector in a manner that enriches public debate.

In the first instance, I wish to thank my Creator for affording me the strength to undertake this project and for the spiritual guidance throughout the journey.

I wish to thank my supervisor, Prof Anne McLennan, for her commitment, guidance and advice in the face of many other pressing engagements. I also wish to thank my friends and colleagues for their support in what may appear to be an easy undertaking. Indeed, nothing can come between a united, motivated and focused circle of good friends.

Finally, I wish to acknowledge the support of my wife and my family for the immense sacrifices they made for me and for the moral support and unending love they provided during this time. Ours is a lifetime story of encouragement, love and unity!

Ora et Labora

TABLE OF CONTENTS

ABSTRACT 2

DECLARATION 4

ACKNOWLEDGEMENTS 5

ABBREVIATIONS 10

CHAPTER 1 11

INTRODUCTION AND BACKGROUND 11

1. Introduction and background 11

1.1 Research Problem 13

1.1.1 Changing nature of global threats 14

1.1.2 Changes to mandates and functions of intelligence services 15

1.1.3 Increased civilian demands for transparency and openness 17

1.2 Field of study 18

1.3 Primary research question: 19

1.4 Value of the research project 19

1.5 Research objectives 19

1.6 Research proposition 20

1.7 Chapter outline 20

CHAPTER 2 22

LITERATURE REVIEW AND THEORETICAL FRAMEWORK 22

2.1 Introduction 22

2.2 Definition of concepts 22

2.3 Content of the review 24

2.3.1 Case for oversight 24

2.3.2 Executive control 25

2.3.3 Parliamentary oversight 27

2.3.4 Judicial oversight 30

2.3.5 Civilian oversight 31
2.3.5.1 Office of the Inspector General 31
2.3.5.2 Civil Society Oversight 32
2.3 Summary 34
2.4 Theoretical framework of the study 35
2.4.1 Introduction 35
2.4.2 Understanding institutionalism as a theoretical concept 35
2.4.2.1 Historical institutionalism 36
2.4.2.2 Rational institutionalism 37
2.4.2.3 Sociological institutionalism 38
2.4.2.4 Critique of institutionalism 39
2.5 Conclusion 40
CHAPTER 3 41
RESEARCH METHODOLOGY 41
3.1 Introduction 41
3.2 Research design 42
3.2.1 Approach 42
3.2.2 Data collection 43
3.2.3 Documentary analysis as a data collection technique 44
3.2.4 Operationalising the study 45
3.2.5. Data analysis 47
3.2.5.1 Analytical framework 48
3.2.5.1.1 Adequate constitutional provisions: 48
3.2.5.1.2 Institutional safeguards against ministerial abuse 48
3.2.5.1.3 Adequate parliamentary oversight 49
3.2.5.1.4 Active civilian oversight 49
3.3 Reliability and validity 50
3.4 Ethical considerations 50
3.5 Conclusion 51

CHAPTER 4 52
DATA PRESENTATION 52
4.1 Introduction 52
4.2 A description of the oversight model 52
4.3 Presenting data using the elements of the analytical framework 54
4.3.1 Adequate constitutional provisions 54
4.3.2 Institutional safeguards against ministerial abuse 57
4.3.3 Adequate parliamentary oversight 59
4.3.4 Active civilian oversight 66
4.4 Conclusion 70
CHAPTER 5 71
ANALYSIS AND INTERPRETATION 71
5.1 Introduction 71
5.2 Institutional theory: providing a sound theoretical grounding. 71
5.3 Analytical tool for understand research data 72
5.3.1 Adequate constitutional provisions 72
5.3.1.2 Institutional safeguards against abuse 76
5.3.3 Adequate parliamentary oversight 80
5.3.4 Active civilian oversight 85
5.4 Implications 87
5.4.1 Local implications 87
5.4.1.1 Leadership 88
5.4.1.2 Common and shared vision on intelligence priorities 89
5.4.1.3 Active citizenry 89
5.4.2 Global implications 90
5.5 Conclusion 91
CHAPTER 6 92
FINDINGS, RECOMMENDATIONS AND CONCLUSION 92

6.1 Introduction 92
6.2 Key findings 93
6.2.1 Sound legislative framework in place 93
6.2.2 Appropriate design of the model 94
6.2.3 Inadequate skills set on parliamentary oversight structures 95
6.2.4 Policy gaps 95
6.2.5 Civilian oversight not institutionalized 96
6.3 Recommendations 96
6.3.1 Amend legislation to provide for an institutionalized framework for civilian oversight 97
6.3.2 Introduce mandatory training programs for members of the JSCI 97
6.3.3 Close policy prevailing policy gaps 98
6.3.4 Institutionalize civilian oversight 98
6.4 Conclusion 99
Bibliography 101
APPENDICES 107
Appendix 1: List of government acts, policies and reports 107
Appendix 2: List of interview questions 108

ABBREVIATIONS

ANC	African National Congress
COSATU	Congress of South African Trade Unions
DA	Democratic Alliance
DCAF	Democratic Control of Armed Forces
ECOWAS	Economic Community of West African States
ICT	Information Communications Technology
IG	Inspector General of Intelligence
JSCI	Joint Standing Committee on Intelligence
NDP	National Development Plan
NEC	National Executive Committee
NIA	National Intelligence Agency
NICOC	National Intelligence Coordinating Committee
NUMSA	National Union of Metal Workers in South Africa
POSIB	Protection of State Information Bill
RSA	Republic of South Africa
SSA	State Security Agency

CHAPTER 1

INTRODUCTION AND BACKGROUND

1. Introduction and background

The maintenance of internal and external security of the State is one of the fundamental responsibilities that any government must fulfil in order to protect its sovereignty, its people and more importantly, its values. This protection must also extend to the full protection of citizens' human rights, the bedrock of any democratic dispensation (European Commission for Democracy Through Law, 2007, p. 13).

States use intelligence to "prevent or protect themselves against threats to the national security" thus making intelligence "an inescapable necessity for modern governments" (European Commission for Democracy Through Law, 2007, p. 4). From time immemorial, nations have practiced some form of intelligence collection and analysis in order to have an advantage over others (DCAF, 2003, p. 89). Born and Leigh (2007, p 18) even refer to 'spying' as 'the second oldest profession'.

By its very nature, intelligence work involves secrecy as a basic requirement to be effective - the budgets of services are secret, their operations are secret, and both their products and their achievements are secret. Intelligence services cannot disclose their activities to the public without disclosing them to their targets at the same time.

Intrinsic to democratic systems of governance is the adherence to specific values and rights, such as basic human rights, an independent judiciary and the rule of law, etc. One of the major strengths of the democratic political system is its culture of openness and guaranteed freedoms that are awarded to all citizens. At the same time, this openness and guaranteed rights are also the principal weaknesses of the democratic system insofar as they create the space for those who do not accept and adhere to the values and norms of the democratic system.

Effective security and intelligence operations rely on secrecy, otherwise they will be operating with one hand tied behind their backs. The need for transparency and accountability must be balanced with the need to protect sources and methods from unauthorised disclosure, especially if disclosure could lead to loss of life or loss of intelligence capability (Born & Caparini, 2007). In order to fulfil its legal charge, an intelligence organisation has a responsibility to protect, from unauthorised disclosure, any information owned by, produced by or for, or under the control of it, as well as the national security of the country. But secrecy must not be an end in itself, or a cover for abuses.

Given the wide-ranging powers that intelligence services have in pursuit of their work, there is a danger that if not properly kept under close watch, they can abuse these powers for narrow political and illegitimate interests, thus compromising the very same constitutional order they are meant to protect.

However, there seems to be an intrinsic conflict between secrecy, a necessary precondition for intelligence functions, and accountability, “the operative mechanism for democracy” (Bruneau, 2001, p. 325). The question that is often asked is: how can those who operate within relative secrecy be held accountable within the context of democratic “constitutionalism” (Nathan, 2010, p. 99). Oversight serves as one of the critical measures in ensuring that intelligence services operate within the framework of the law and that they do not abuse their powers for personal or political gain.

Post 1994, South Africa developed an oversight model for the country’s intelligence services, in an effort to ensure that abuses associated with the apartheid era of intelligence remain a thing of the past.

This oversight model is anchored on a sound legislative framework in order to provide “the ultimate legitimacy and authority” (European Commission for Democracy Through Law, 2007, p. 6). The Intelligence Services Oversight Act, Act 40 of 1994, provides for the establishment of institutions that will implement oversight over the country’s intelligence services. However, with the passage of time and new changes taking place

in the manner intelligence is conducted, this model has revealed intrinsic limitations that render it ineffective, thus requiring a review based on intimate knowledge of the purpose, role, functions, and missions of the intelligence services. Such knowledge and understanding is needed for any reform of intelligence services commensurate with democratic norms and standards.

This chapter will deal with the background to the question of accountability and oversight of the intelligence services, with specific reference to South Africa in its 18 years of the democratic dispensation. The focus is in relation to the research question on the South African oversight model.

Dealt with in this chapter is also the element of the research problem, particularly the three main issues pertaining to the changes that have taken place since the oversight model was developed. This chapter also discusses the primary and secondary research questions. One will also look at the specific objectives that the research seeks to achieve.

1.1 Research Problem

South Africa developed a new model of intelligence accountability and oversight 18 years ago, as a result of the transitional arrangements following the 1994 first democratic elections.

Such a model has three pillars, namely executive, parliamentary and civilian oversight. These pillars are anchored on judicial oversight, which provides the legislative framework for the entire model. The first element is built around the Minister who is a member of Cabinet assigned by the President to exercise executive authority over the services (Constitution of RSA, 1996).The second aspect is based on a parliamentary committee, the Joint Standing Committee on Intelligence (JSCI). The last pillar, that of civilian oversight, finds expression in the work done by the Office of the Inspector General of Intelligence (Dlomo, 2004). The legal framework on which this model is based is meant to provide safeguards in line with the constitutional order. In this regard,

there are three pieces of legislation that give expression to the establishment and functioning of such a model and these are:

- The Intelligence Services Act, 65 of 2002 , Act 65 of 2002: which provides for the establishment of the intelligence services of the country and sets out various structures,
- National Strategic Intelligence Act, Act 39 of 1994: which sets out the powers and functions of the Minister, amongst others, in relation to his/her role in discharging accountability, and
- The Intelligence Services Oversight Act, Act 40 of 1994: which provides, amongst other items, for parliamentary and civilian oversight mechanisms.

A number of developments have occurred in the intelligence community since this oversight model was introduced, 18 years ago. These include 1) the changing nature of global threats, 2) modifications in the mandates and functions of the services and 3) an increased civilian awareness and demands for openness, transparency and accountability.

I now turn to look briefly at each of these three major changes.

1.1.1 Changing nature of global threats:

The National Development Plan (2012, p 8) defines globalisation as “the rising global trade and increased flows of people, capital, ideas and technologies across borders in recent decades”. The opening of borders for trade and people movement, while a positive development in many respects, has led to a situation where international criminal syndicates, terrorists and those with ulterior motives have “been quick to capitalize on this fluidity” (Aldrich, 2009, p. 45). The rhino poaching industry, for example, is a thriving illegal trade and involves a number of players with international links to countries located in the Far East (savingrhinos.org, 2012) . Human trafficking is another, and so is the drug trade.

National security threats are no longer what they used to be, two or three decades ago. “With conventional military threats diminishing - except in war torn countries and high

conflict areas - new risks and dangers connected with globalization, destabilization, information revolution terrorism, proliferation and organized crime have gained prominence" (Born & Caparini, 2007, p. 89).

Since the end of the Cold War and the aftermath of 9/11 in the United States (US), most countries, including South Africa, amended the powers and functions of their services in order to deal more effectively with the threat of terrorism. Many states, including those in Africa, have been grappling with new forms of challenges that have led to what Aldrich (2009) calls "global intelligence". This form of cooperation amongst intelligence services, has led to formal ties being established and memoranda of understanding being signed amongst these services, this in a bid to deal with the global nature of threats facing nation states (Aldrich, 2009, p. 67).

To illustrate this point, in Denmark, a relatively small country in Europe, the country's intelligence service has signed over 80 Memoranda of Understanding with services in over 50 countries (Aldrich, 2009, p. 120). It is this type of cooperation of 'liaison' that has created an additional challenge in that while services are cooperating and working closely with each other, the oversight and accountability functions have not been adapted to these new forms of cooperation and lag behind. In the words of Aldrich (2009, p 70),

> "There is an obvious mis-match between the emerging new style of operational activity and the traditional patterns of accountability which look increasingly parochial. The scope of cooperation amongst services renders traditional forms of oversight - that are rooted in sovereign nation states - increasingly outdated and incomplete".

1.1.2 Changes to mandates and functions of intelligence services

As has been argued here, the world today is different in all aspects to the world of the 1990s. A lot of technological advancements, for example, have since taken place and with these come new security challenges that intelligence services must grapple with. "The surge in technological innovation has led to greater vulnerabilities from an increasingly diverse and disparate array of sources" (Schreier & Stocker, 2006, p. 65).

These technological advances in the field of data collection in particular, have provided intelligence services with a greater capacity in the conduct of their work (European Commission for Democracy Through Law, 2007, p. 13).

In South Africa, we have seen, as recent as 2009 and 2011, a number of attempts by the country's Intelligence Minister to restructure the services, in a bid to position them for the challenges of the 21st century (Cwele, 2012, p. 11). These changes have resulted in the establishment of a single intelligence agency, the State Security Agency. In motivating for the changes to the institutional arrangements of the services, the Minister cited the following challenges:

- *The proliferation of statutory structures within the civilian intelligence community has led to an absence of sufficient coordination, overlapping mandates, unnecessary turf-battles, insufficient focus and wasteful duplication.*
- *Each intelligence structure had its own respective Corporate Services component. This resulted not only in a bloated Corporate Services component, but more importantly in significant funding being directed to corporate support at the expense of operations and technical support. Whilst endeavours had been undertaken over the years to rationalise Corporate Services across the community through the establishment of a Shared Services dispensation, the implementation of this process did not yield any progress.*
- *Despite the legislative requirement for coordination at strategic and operational levels, there was an absence of information-sharing and co-operation amongst the civilian intelligence structures. This did not only constitute a major risk to our national security, it is also a vulnerability that is exploited by our adversaries.*

Source: (Cwele, 2012)

It is clear that the restructuring of the country's intelligence services will have implications for mandates and functions and it stands to reason that those who are exercising accountability and oversight must alter their mechanisms and systems in order to better conduct their work, having regard to the changes in the intelligence

environment. In other words, the changes that have occurred must also be reflected in the mechanisms for conducting intelligence.

1.1.3 Increased civilian demands for transparency and openness

The advent of democracy in South Africa has led to a new form of citizenry, one that has basic rights enshrined in the Constitution. Some of these rights deal with access to information, freedom of association, freedom of expression and freedom of the media, amongst others (Constitution of RSA, 1996).

It is no wonder, therefore, that we have witnessed a gradual development of a strong global society "that manifests itself in the form of citizens groups and transnational bodies campaigning on various thematic issues" (Aldrich, 2009, p. 93). In South Africa, we saw similar developments with regards to opposition to the proposed Protection of State Information Bill (POSIB, 2010). The rise of civilian activism in respect to openness and transparency has implications for the South African oversight mechanism and actually calls into question whether the current model allows adequate space for civil society and independent bodies to exercise some accountability within the space provided by the country's constitution.

As the National Development Plan (2012, p 26) notes, "in many respects our country has an active and vocal citizenry that is necessary for democracy and development to flourish". Given this, it is a matter of concern that the country's accountability and oversight model has remained relatively unchanged in the last 18 years of the democratic dispensation. Born and Caparini (2007, p 102) argue that legal safeguards and oversight mechanisms have not kept pace with the "developing methods and capacities of the intelligence community".

It can be argued, therefore that there is currently a mis-fit between the way intelligence work is being conducted, by the intelligence services, and the manner in which oversight mechanisms work. Aldrich (2009, p 76) refers to this mis-fit as "increasingly parochial". In essence the mis-fit is a function of both design and implementation. In respect to the former, the design lacks an institutionalised framework of civilian oversight and in respect to the latter, implementation by various institutions suffers from

the design limitation. In other words, the manner in which these institutions will discharge their responsibility in terms of accountability and oversight could be hamstrung by the manner in which the system is designed.

To illustrate the point further, the following practical problems make the case for a review of the oversight model:

- Reports on public complaints investigated by the Inspector General, for example, are not made public, but are processed by the Joint Standing Committee on Intelligence (JSCI), the parliamentary oversight committee on intelligence which meets behind closed doors (Dlomo, 2004).
- The JSCI does not have a public affairs unit that facilities much more open and coordinated interaction with the public on matters of policy, legislation and related matters.

It can thus be argued that the lack of an institutionalised mechanism for civil oversight is the major limitation of this current oversight model. To this end, the question that must be posed is whether this oversight model is still relevant in the 21st century and does it afford space for adequate civil society accountability.

1.2 Field of study

This study will falls within the realm of public policy and governance. A large focus of it falls on the prevailing policy and legislative arrangements, including a number of public sector institutions that are charged with various roles and responsibilities. Given the central role played by accountability in strengthening the democratic dispensation, the study also focuses on governance issues, particularly the role of civil society in matters of security and intelligence.

It is important to indicate that as a researcher, I am in the employ of the State Security Agency and that this subject of oversight constitutes an area of work that is not classified and hence very much in the public domain. Documents to be used are not classified and the study itself will form part of the on-going open, public engagement.

1.3 Primary research question:

De Vos (1998, p 122) notes that the research process "must be guided by research questions that are anchored in the problem". Linked to the problem statement that has been outlined above, the following is therefore the research question that is the focus of this study:

> *Is the South African model of accountability and oversight of intelligence services still effective and relevant 18 years later*?

The following two secondary research questions have been formulated to help answer the primary question:

> *What are the challenges in the pillars of the oversight model in respect to design and implementation and what are the implications of these in promoting constitutional accountability?*
>
> *How can the role of civil society be institutionalised in improving the quality of accountability and oversight of the intelligence services?*

1.4 Value of the research project

In seeking to explore this question, one hopes to unearth new aspects pertaining to the role of civil society in strengthening the accountability and oversight of the intelligence services through increased public scrutiny on the decisions taken by those charged with the responsibility. In my view, this will contribute to the body of knowledge that exists with regards to the research area.

1.5 Research objectives

This study focuses on the following research objectives that are linked to the primary research question:

1.5.1 The extent to which the accountability and oversight model is effective in dealing with intelligence challenges of the 21st century

1.5.2 The extent to which the accountability and oversight model is reflective of the changing nature of the intelligence sector and the emerging trends in global security threats

1.5.3 The extent to which civil society and independent institutions are able to exercise scrutiny and oversight of the intelligence services

1.6 Research proposition

This study will argue that the South Africa's accountability and oversight model needs to be reviewed and aligned with the latest international developments which bring an institutionalised civil oversight as part of the central pillars of the model. Such an approach ensures that the model is multi-dimensional and includes executive, parliamentary, judiciary pillars, together with civil society. Such an argument is also supported by the constitution which identifies public participation as a key element of South Africa's young, but developing, democracy.

1.7 Chapter outline

Chapter 1

Deals with the introduction and background to the research problem. It also looks at the primary and secondary research questions, objectives of the study and the research proposition

Chapter 2

Focuses on the literature review and the theoretical framework which underpins the study

Chapter 3

Unpacks the methodology that will be employed in collecting data, the sources to be used and related techniques

Chapter 4

Presents the data collected during the in-depth interviews and documentary analysis

Chapter 5

Focuses on the analysis and interpretation of the data using the theoretical framework referred to in Chapter 2

Chapter 6

Deals with the recommendations arising from the findings and provides a conclusion

CHAPTER 2

LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.1 Introduction

The focus of this chapter is on reviewing the literature that exists in relation to the subject of the research. The intention is to provide a contextual review, locating the question of intelligence oversight as a governance issue. There has been no study that has sought to review the model for intelligence oversight post 1994. As a result, there is limited literature on this particular subject, although a number of scholars and researchers have written on some aspects of executive, parliamentary and civilian oversight of the South African intelligence services. These include, amongst others, Dlomo (2004), Duncan (2011), Nathan (2010) and Fazel (2009).

The main thematic approach of the review focuses on the democratic control and oversight of intelligence services, the policy actors and the challenges that render oversight difficult to implement successfully. The main point, that most of the literature review highlights, is the element of providing an institutionalised framework for the public to conduct more oversight of the intelligence services.

Given the limited availability of scholarly work focusing on the research problem, one has made use of some material that is older than five years. While this was unavoidable, the point it raises, once more, is the knowledge gap that one hopes to fill by undertaking this research project.

Before embarking on the various reviews, it is important to look at some of the concepts that are used throughout this chapter and research project.

2.2 Definition of concepts

A number of definitions have been offered on what intelligence is. Decaf (2003, p39) offers a definition of intelligence that comprises three elements: “a particular knowledge, the type of organization producing it and the activity pursued by this organization”. For

purposes of this discussion, one would prefer to work with the definition offered in the South African legislation, owing to its clear and precise articulation of this concept.

The South African Intelligence Services Act, Act 65 of 1994, defines intelligence as “a process of gathering, evaluation, correlation and interpretation of security information, including activities related thereto, as performed by the intelligence services”. This definition finds favour with the broad thrust of this research, given that it defines intelligence as an activity as opposed to an event.

In this study, the concepts of ‘control’ and ‘accountability’ are used a lot in reference to the oversight model. A distinction needs to be drawn between the two: the former refers mainly to those activities that are administered at the executive level, by the Minister responsible for intelligence, and include such things as laws, regulations, policies and directives (DCAF, 2003, p. 42). The latter deals with the process by which the “intelligence services are obligated by law to appear before a parliamentary committee that has been given the responsibility, in law, to monitor and to apply scrutiny over the agency’s performance” (Hannah, O'Brien, & Rathmell, 2005, p. 24). Accountability can, for the purposes of this study be defined as the relationship between the executive and the services based on the obligation of the latter to account for their activities and demonstrate and be responsible for performance in light of agreed expectations. In essence, one is arguing that the oversight model consists of various players, each exercising certain aspects that in totality leads to some form of oversight being exercised over the intelligence services.

In the context of this discussion, the concepts of ‘effective and relevant’ oversight would refer to an oversight mechanism that consist of adequate constitutional provisions which provide for proper safeguards against executive abuse as well as adequate parliamentary oversight which facilitates civilian participation. To this end, the aim is to establish the extent to which South Africa’s oversight has been useful, appropriate and valuable.

International literature shows that there is ‘no single-rule book’ on developing democratic oversight of the intelligence services (Born & Caparini, 2007, p. 167). The

result of any country's intelligence oversight dispensation will be a function of that country's "unique culture, history and politics" (Born & Leigh, 2007, p. 02). The same can be said about South Africa's model: it is a result of lengthy engagements that followed as part of the 1994 democratic transition.

2.3 Content of the review

In seeking to outline the various studies and literature written on the subject of intelligence oversight, it is critical that one begins by outlining the case for oversight in the intelligence services. This will link well with the remainder of the literature review and will provide a better context within which to locate the review.

2.3.1 Case for oversight

The Constitution of the Republic of South Africa and the White Paper on Intelligence set the tone for oversight in respect to the intelligence services. Generally, however, four reasons can be advanced for why there is a strong need for ensuring a sound model for intelligence oversight is in place.

First, as indicated in the previous chapter, intelligence services the world over conduct their work and collect information by using a number of mechanisms that are ordinarily not available to other government departments, entities or even members of the public. In order to guard against possible misuse and or abuse of these mechanisms, including special powers that have a potential of negatively impacting on certain human rights, there is a need to ensure that proper governance and oversight is exercised over them.

Second, in democratic societies, such as South Africa, there are elected public representatives who have to account for the performance of public institutions in terms of budget allocations and related issues. Intelligence, though a special kind of service, cannot be excluded from being accountable (Wills, 2010, p. 31).

Third, one of the main functions of intelligence services in democratic states is to protect the constitutional order and to uphold national security. However, a possibility exists that the information gathering process can potentially disrupt the work of other legitimate societal structures including political parties and the media. In South Africa, the former

National Intelligence Agency (NIA) was accused, in 2005, of conducting illegal surveillance on a member of the ANC National Executive Committee and a prominent businessman. This happened in the run up to the party's 2007 elective congress. Subsequent investigations conducted by the Inspector General found that NIA had abused its powers, amongst other things, and this led to the dismissal of the Director General and two senior officials (Institute of Security Studies, 2010). The entire Project Avani, as it was known, also revealed gaps in the oversight and governance of the intelligence community.

The final point in the justification for an oversight mechanism for intelligence services revolves around the functional secrecy within which they conduct their work, given that "intelligence services are not subject to the same level of public scrutiny as other government departments, the potential for ineffective or illegal practices is high" (Wills, 2010, p. 32). It is for this reason that some control needs to be exercised so that those who use special powers can account for their actions in compliance with the law. Such oversight and review will therefore contribute to the legitimacy and an acknowledged role within Government and society and will not result in the services becoming ineffective or incapable

The South African model of intelligence oversight has four pillars, namely executive, parliamentary, judicial and civilian oversight. The literature reviewed considers each pillar in varying degrees and hence the contextual review is clustered under each of these four pillars or themes.

2.3.2 Executive control

Executive control of the intelligence services is mandated by the Constitution, which provides in Section 209 (2) that "the President as head of the national executive must appoint a woman or a man 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 the Cabinet to assume that responsibility" (RSA Constitution, 1996, p126). Further, the Intelligence Services Act 65 of 2002 and the National Strategic Intelligence Act 39 of 1994 sets out the mandates in terms of powers of the Minister on such matters as appointments, creation of posts, formulation of directives and regulations etc.

The grounding of the executive control on sound legislation is essential for a number of reasons. One critical reason is the need to “institutionalize key functions in order to insulate intelligence from being abused by those in power” (DCAF, 2003, p. 197). The insulation from political abuse should be done without necessarily isolating it from the executive (European Commission for Democracy Through Law, 2007). If intelligence is to be effective, intelligence must be brought into the policy arena, close enough to be in tune with the policy-maker’s goals. At the same time, policy-makers should not expect intelligence to become a policy advocate, or a "team player." Should it do so, its credibility and therefore its usefulness to the policy-maker will be compromised, and the stage will be set for failure (DCAF, 2003). The politicisation of the intelligence process and product has a high risk of stunting the command and control, oversight and accountability of the intelligence services and can impede their abilities to truly serve the national interest. Political neutrality must be maintained by enforcing compliance with the regulatory provisions governing this matter as encapsulated in section 199 of the Constitution and applicable legislation.

In South Africa, the issue of the politicization of the intelligence was a subject of immense public debate in the run up to the ANC’s elective conference in 2007.The Mathews Commission also raised a number of concerns with regards to the gaps in the current legislation in relation to executive control. “These gaps are most problematic with respect to intelligence functions that are politically significant and sensitive, like intrusive operations, counter-measures, political intelligence and the decision to target individuals and organizations for investigation” (Mathews Commission, 2008, p. 231). This concern led, in the view of the Commission, to a situation where policies and rules that should be decided by the executive are determined by operational heads of the intelligence services, an untenable situation that does not inspire public confidence.

Jansen van Rensburg (2006) notes, in his research paper, that the Inspector General for Intelligence was scathing about the inability of the National Intelligence Agency (NIA) to simply ignore executive authority and control in their operations. This was after the infamous Project Avani, the scandal of the illegal surveillance of a member of the ANC’s National Executive Committee and prominent businessman, Mr Saki Macozoma. “The

exclusion of the Minister for Intelligence Services in the conceptualization, planning and execution of this project resulted in a void in the requisite executive supervision and oversight of an extremely sensitive project" (Jansen Van Rensburg, 2006, p. 117)

Given that Project Avani was a classic example on the need for proper executive control of the intelligence services, the Inspector General of Intelligence recommended, amongst other things "the need for appropriate superintendence and oversight of the conceptualization, planning and execution of political intelligence projects and to establish the defining parameters and a regulatory framework for its practice" (Inspector General , 2006, p. 19).

In democratic societies, executive control of intelligence services is therefore an important pillar of the oversight model. As the first important cog in the system, it can be deduced that if there are serious weaknesses at this level, the other elements of the model will also experience serious challenges, resulting in a weakened and ineffective oversight model.

The next section of the review will focus on parliamentary oversight.

2.3.3 Parliamentary oversight

In what appears to be the only study done to review the South African Parliamentary oversight mechanism, Dlomo (2004) sought to do an analysis on the effectiveness of the parliamentary oversight that is conducted by the Joint Standing Committee on Intelligence (JSCI). The JSCI is mandated by the Intelligence Services Oversight Act 40 of 1994 to conduct oversight over the country's intelligence services.

In his analysis, Dlomo (2004) looked at the extent to which members of the committee understood their mandate and the extent to which the institutional arrangements related to these processes are effective. While he found that the system was effective, he also found that what was lacking was "a public affairs programme that will seek to reach out to the general public on what the JSCI was doing and how it was doing it". He also found that there is a need for "changing the accountability culture of intelligence structures such that more members are exposed to the work of the JSCI in order to

appreciate the values of oversight" (Dlomo, 2004). It is this analysis, by Dlomo that is relevant to this study, given that the JSCI forms part of the oversight model.

Another study which looked at South Africa's oversight mechanisms is that conducted by Hannah, O'Brien, & Rathmell, (2004), It found that oversight mechanisms in South Africa "looked good on paper if one considers the institutions that are charged with this responsibility i.e. the executive, parliament and the inspector general of intelligence" (p 23). However, the study noted that "the system remains fragile, if one considers the scandals that have rocked intelligence" (Hannah, O'Brien, & Rathmell, 2005, p. 24). Some of these scandals involved the investigation by the Inspector General following complaints that a civilian, who was also a senior ANC Executive member, was placed under illegal surveillance by the country's domestic intelligence service and unlawful interception of communications of politicians and opposition members (Nathan, 2010, p 202). If the oversight structures are fragile, the question becomes: what can be done to improve this fragility, thus pointing to the work which needs to be done with regards to the oversight model.

In seeking to answer this question, one possible solution might be to look at the design of the oversight model. Zegart and Quinn (2010, p 748) speaks of two concepts, 'fire alarm oversight' and 'police-patrol oversight'. The former is described as oversight that is largely "reactive, relying on concerned citizens and interest groups to determine precisely when elected officials should enter the fray" (Zagart & Quinn, 2010, p. 748). The latter is oversight that is centralized, active and direct, like the police, who are patrolling the streets, catching wrongdoers and correcting the problems they come across. Contrary to 'fire alarm oversight', it does wait for someone to raise the alarm but is more pro-active.

Extending this analogy to the South African context, it can be argued that ours is a hybrid model that leans towards the fire alarm oversight, with some weakness. The powers and functions of the JSCI, as provided for in the Intelligence Services Oversight Act, appear to provide for a more reactive than proactive approach to oversight. For instance, if one has to consider the following JSCI functions, the point is made even clearer:

- *Order investigations into intelligence and counter intelligence matters*
- *Refer matters for investigations pertaining to human rights abuses to the Human Rights Commission*
- *Review and made recommendations regarding interdepartmental cooperation and rationalization and demarcation of functions relating to intelligence and counter intelligence*
- *Consider reports on the appropriation of funds*
  Source: Intelligence Services Oversight Act 40 of 1994

The weaknesses are based on the fact that an assumption is made that our public representatives have the requisite skills and political will to proactively engage with potential problems and deal with them before they become scandals. As we have indicated earlier on in this section, the intelligence services has been hit by scandals which, it can be argued, indicate a weakness in the design of the oversight model.

The other assumption that is made is in relation to the level and depth of the civil society actors when it comes to matters of security in general and intelligence in particular. The 'fire alarm oversight' relies on others to sound the alarm. This requires the third parties to be active and knowledgeable on intelligence and governance issues. As it will be shown in the section dealing with literature review of the civilian oversight pillar, we have very few 'alarm ringers' in this country mainly limited to the media.

In order to address this difficulty on the manner in which the parliamentary oversight is designed, Nathan (2010, p 102) called for a more open and direct interaction with the public, through such mechanisms as website and parliamentary debates. Such an interaction, it can be argued, will facilitate the process of active, knowledgeable 'fire-alarm ringers' in society.

The challenges of oversight are not limited to the South African context. The United States Congressional oversight of intelligence has been described as "dysfunctional and counterproductive" by Halchin and Kaiser (2012, p2) in their review of the current structure and alternatives. Their criticism of the system stems from the same design issues that have also been the subject of this discussion. Given the events of 9/11, the

authors noted that despite the changes that were made in respect of powers and functions, the system is still “inadequate, ineffective or worse” (Halchin & Kaiser, 2012, p. 01).

The authors argue that the problem that lies at the heart of institutional dysfunction is the number of oversight committees and their functions, and thus they propose the establishment of a single joint committee for both houses.

Dealing with difficulties of the parliamentary oversight requires the recognition of the reality of the interdependence and interconnectedness of all the pillars of the model, as this reduces the temptation to overlook one pillar for another.

2.3.4 Judicial oversight

The South African constitution provides for the judiciary as one of the three arms of the state. As the custodian of the law, the judiciary plays an important part in controlling and overseeing the intelligence services. As one noted earlier, the intelligence services have special powers which are utilized, in some instances, to gather information. Given the potential to misuse such, the judiciary is called upon to authorise, in certain instances the use of such powers.

In the South African context, the intelligence services are obliged to seek judicial approval when conducting telephonic and other communication intercepts. This is done in terms of the Regulation of Interception of Communication and Provision of Communication Related Information Act (RICA). The investigation that was launched by the Inspector General in 2005 following irregularities in the NIA Project Avani was based, in the main, on the non-compliance of this act (Mathews Commission, 2008).

Wills (2010) further identifies two critical roles of the courts in intelligence related matters. In the first instance, courts can be called upon to adjudicate in cases dealing with disclosure of information relating to intelligence services. In the case of *Masetlha v Minister of Intelligence Services*, the courts were called upon to decide on the veracity of the so called ‘hoax emails’ that were purported to have been developed under Masetlha’s watch as the accounting officer of NIA (Mail and Guardian, 2009). The

second area where courts could prove instrumental is in cases where there are claims “concerning information about or held by an intelligence services” (Wills, 2010, p. 33).

It can be argued therefore that the judiciary is the ‘bedrock’ upon which the intelligence service is anchored in terms of the legislative framework underpinning their existence, operation and conduct.

2.3.5 Civilian oversight

Existing literature indicates that civilian oversight can be categorized into two areas, the formalized, institutionalised office of the Inspector General of Intelligence and civilian oversight conducted by what can be referred to a civil society organizations (CSOs)

2.3.5.1 Office of the Inspector General

The Inspector General (IG) is appointed by Parliament, through the Joint Standing Committee on Intelligence and is accountable to this committee in terms of his or her functions and is accountable to the executive through the Minister of Intelligence in terms of administration. In terms of the Intelligence Services Oversight Act (40 of 1994), the main function, inter alia, of the Inspector-General is to monitor compliance by the intelligence services with the Constitution, applicable laws and relevant policies on intelligence. In this regard, the IG’s mission talks about “providing assurance to the people that the intelligence services operate within the values of the Constitution of the Republic of South Africa” (Office of the Inspector General of Intelligence, 2011)

In a research report titled "*Who shall guard the guards",* Fazel (2009) sought to put the case of an effective civilian oversight performed by this office, as mandated by the Intelligence Services Oversight Act, act 40 of 1994. Such an office did not exist prior to 1994 and it was established as part of the intelligence reform aimed at ensuring that the intelligence atrocities of the apartheid era were a thing of the past (Fazel, 2009, p. 33).

Fazel (2009) argues that the IG performs a number of broad functions aimed at providing “assurance and comfort on the legality and efficacy of intelligence activities. The emphasis is on monitoring and reviewing the intelligence and counter intelligence

activities of the intelligence services". These measures include pro-active and reactive activities, both at strategic and operational levels.

Other authors (Duncan, 2011) have however, decried the capacity of this office to carry out its constitutional mandate of civilian oversight. In its recommendations, the Mathews Commission raised the concern on the mandate of this office, arguing that it should be confined to an ombud role. "The mandate should not cover significant intelligence failures, the effectiveness and efficiency of intelligence and counter-intelligence operations and human resource complaints" (Mathews Commission, 2008, p. 123). The Commission also raised the question of independence of this office as regards its administrative accountability to the executive. It recommended that in order to ensure that the office is truly independent from the executive, "it should receive and manage its own budget independently of NIA".

Another author who has criticized the independence of the IG is Duncan (2011). She argues that the Inspector General "is not sufficiently independent from the executive, lacks the resources and does not release reports publicly" (Duncan, 2011, p. 04). The fact that reports are not published but sent to the JSCI, who themselves meet behind closed doors, defeats the whole process of creating, in the words of Zargat and Quinn, 'fire alarm ringers"

While the Office of the Inspector General is crucial in the oversight of the intelligence services, it appears from the foregoing that there is room for improvement in strengthening the governance of the intelligence services.

2.3.5.2 Civil Society Oversight

Duncan (2011) decries the poor appetite displayed by the public when it comes to issues of intelligence. She opines:

> South Africans seem to have accepted unquestioningly that intelligence matters are inherently secret and therefore lie outside the public domain. Unless these assumptions are challenged and citizens start to demand accountability from these most secretive areas of government, then activism may well revert back to being a dangerous, even life threatening activity (p.04).

Duncan's assertions are shared by a number of other authors, including Hendricks and Musavengana (2010), who have observed that traditionally the level of participation in intelligence governance in this country has not been so high. They argue that the White Paper on Intelligence "was drafted by a single drafter and was published without public or parliamentary engagement" (Institute of Security Studies, 2010, p. 139).

This discussion leads to the introduction of the concept of civilian oversight, where the public plays a crucial role in holding those exercising power to account. This concept was espoused by Hryniewicz (2011) in his research paper dealing with civilian oversight as a public good. He contends that "civilian oversight provides a political platform that all citizens, in theory, can access. Through civilian oversight, citizens engage the state in public dialogue, raising concerns that are responded to and considered within policy forms" Hryniewicz (2011, p 80). So what Dlomo (2004) was advocating - a public affairs programme for the JSCI - Hryniewicz (2011) argues is possible through civilian oversight. Hryniewicz (2011) argues for a central role to be played by the public in issues of accountability and oversight given that "the security and political freedom of each person is more likely to be nurtured and protected through their participation with others". This notion seems to hold value if one notes that as early as 1992, the former ANC intelligence chief, Joe Nhlanhla argued that "the security of the state depends on the security of the people and the security of the people depends on the security of the state" (Nhlanhla J. , 1992, p. 08)

Flowing from the above, the research paper authored by Liebenberg (1999) builds on the notion of raising the profile of civilians in exercising oversight. However, in order for this to happen, the authors argue that "civilian oversight has to be institutionalized in line with a new mind-set on security which needs to be promoted" (Liebenberg, 1999, p. 78). Such a mind-set, they argued, should be in line with the "changing social relations and civilian demands". Indeed, this is the point one raised earlier on, when one outlined the problem statement and the changes that have occurred since the South African oversight model was developed.

All of the literature reviewed in the foregoing section has one central theme woven in the text - the multifaceted nature of the oversight model and its various pillars. This is

also the case in the research paper by Hutton (2007, p. 16) focusing on the governance of intelligence issues which found “a need to ensure vigilance necessary to avoid a theoretic bastion of democratic civil security relations becoming empty tokenism paying nothing more than lip service to democracy”.

2.3 Summary

The literature reviewed has emphasized the critical question related to the governance of intelligence services. It has spoken to the primary research question with regards to the need to a review of the model for intelligence oversight. The literature reviewed under each pillar of the model indicated the extent to which more can be done to improve existing institutional arrangements associated with the entire model.

It is my argument that to the extent that there are gaps in the existing knowledge, more research is required in reviewing the oversight model such that it makes for effective oversight in the intelligence services. Indeed, the work by South African scholars also show glimpses of the changing social relations and the increased demands by civil society on the principles of openness and transparency as provided for in the constitution (National Development Plan, 2012).

What remains to be seen, however, is how ready the South African public is to engage on intelligence matters. This will become apparent as the year progresses, when the State Security Agency reviews the white paper on intelligence, as announced by the Minister of State Security in his budget vote speech delivered in May 2012. The South African Intelligence White Paper was developed in 1994, largely as part of the transition process into the democratic dispensation. Eighteen years later, a number of changes have since taken place in the environment in which these institutional arrangements operate and it is for this reason that the Minister announced a review thereof.

2.4 Theoretical framework of the study

2.4.1 Introduction

Given that in the main, the control, accountability and oversight mechanisms are institutionalised in various structures and models of the executive, parliament and to some very limited extent, civil society, the study will be grounded in the institutional theory.

An attempt will be made to provide an understanding of institutionalization as a theoretical concept. Without delving much into the debate as regards the many versions of this theory, one will look briefly at the three main schools of thought namely, historical, rational and sociological institutionalism. One will further attempt to show how these can be used in relation to the research question that one is trying to answer before concluding with a short critique of the theory.

2.4.2 Understanding institutionalism as a theoretical concept

Many scholars (Pierre, Peters & Stoker, 2008) offer various versions of what institutionalism is. While this difference in opinion exists, there seems to be general acceptance that structures, however defined, are central to the understanding of organizations, their behaviour and the behaviour of those within such organizations. The common thread amongst these various scholars on this concept is unity in the "belief that institutions matter, that institutions make a difference, that institutions persist over time and that the behaviour of individuals is influenced by the institutional configurations within which they locate themselves" (Pierre, Peters, & Stoker, 2008, p. 115).

Institutional theories concern themselves about the argument of institutions as a central component of political life. One has noted that the research question of this study has everything to do with the formal institutions of government: how they are designed, the political life thereof and the use of power in the complex relations that exist.

Institutional theory posits that the role of individuals within the complex set of government institutions cannot be ignored when one analyses the institutions and policy management. However, of particular importance and of relevance to this study is the design of political institutions as they have a bearing on the nature and outcome of the

political democracy, an important context in the conduct of the intelligence institutions (March & Olsen, 1984).

Let us look briefly at the different schools of thought within the broad umbrella of institutionalism.

2.4.2.1 Historical institutionalism

This school of thought emphasized the evolution of institutions as an important element in understanding how institutions behave. It also emphasized "the structuralism implicit in the institutions of polity" (Hall & Taylor, 1996, p. 937). They define institutions as the formal or informal "procedures, routines, norms and conventions embedded in the organizational structure of polity or political economy". If we consider the model of intelligence accountability and its various pillars, one can argue that such a model is embedded in a broad political context, where there are political power contestations driven by, amongst other things, the norms and procedures of government and the ruling party.

Furthermore, it is going to be important, for purposes of this study, to answer the question: how do institutions affect the behaviour of individuals? In other words, to what extent can one argue, for example, that members of the Joint Standing Committee on Intelligence (JSCI) tends to behave in a manner that emulates the deeply held views and ideology of the ruling party. If the ruling party holds strong views about the manner in which oversight is to be conducted on the country's intelligence services, can members of the JSCI behave in a manner contrary to the so called 'cultural, ideological' orders of their political masters?

Historical institutionalism considers the individual as "deeply embedded in a world of institutions, composed of symbols, scripts, routines, which provide the filters for interpretation of both the situation and oneself" (Hall & Taylor, 1996, p. 939). Applying this understanding to performance of some of the pillars of the intelligence model could yield very interesting outcomes that could change the way the model has been operating thus far.

2.4.2.2 Rational institutionalism

This school of thought emphasizes the role of actors within institutions as active members that interact with the institutions in order to assign meanings that remain largely unaltered by institutional arrangements (Peters, 2000). To this end, choices that members make are not modified by the institutions to which they belong - “Rational choice institutionalists seek to locate the utility-maximising decisions of individuals within an institutional context” (Pierre, Peters, & Stoker, 2008, p. 130).

If institutions and indeed society as a whole is made up of ‘interested purposive, and often rational actors’, the question that begs an answer in the context of our research question is: to what extent can members of parliament and civil society use their cognitive ability to develop a better model of oversight for the intelligence services? Are the members of JSCI, again as a major oversight player, in a position to break-rank with the norms, procedures and ideology of their party political home to advance a more proactive oversight dispensation?

An interesting case in point is the behaviour of ANC councillors in the Tlokwe Municipality, North West Province, who on two occasions (in 2012 and in 2013) broke rank with the ruling ANC and deposed their very own mayor based on allegations of mismanagement and corruption. The ANC was quick to remind them that “they can’t act as they deem fit since they are individuals in their own right who are not bound to a collective entity that has a set of rules and procedures that govern it, to which they individually subscribe” (Mantashe, 2013, p. 01).

In the context of this argument, individual actors - whether they be organizations or members of civil society - cannot be taken as “passive recipients of elements and pressures from their institutional environments” (Suddaby, 2010, p. 15). On the contrary, actors respond to and process information and pressures from their environments within the context of their preferences and tastes. Hall and Taylor (1996) argue that in the attainment of such preferences, individuals will go at great lengths to make ‘extensive calculations’ In the case of Tlokwe Municipality, expelled ANC Councillors will carefully consider their options and make the right calculations before deciding whether to

contest the by elections as ‘independents’ or go back to the ANC and ask for forgiveness.

Rational institutionalism as a theoretical tool assists us in understanding and perhaps explaining why people behave the way they do within organizations. This is important in understanding the limitations of some of the pillars of the oversight model that is the subject of our research. This might also explain whether these deficiencies lie at the design level or at the level of the incumbents that work and interact with other actors in the environment.

2.4.2.3 Sociological institutionalism

Influenced by sociology, as a theory, this approach believes that the manner in which individuals interpret the world around them is highly influenced by ‘socially constituted’ mechanisms. Sociological institutionalism posits, unlike rational choice theorists, a “world of individuals or organizations seeking to define and express their identity in sociologically appropriate ways” (Hall & Taylor, 1996, p. 949). Enhancing the ‘social legitimacy’ of organizations is used in this approach to explain adopting new institutional practices.

In the face of some of the scandals that ‘rocked’ the intelligence services in 2005-2007, an argument could be made that there was a ‘lost opportunity’ to amend some of the oversight mechanism in the wake of those developments. In terms of this institutional approach doing so could have appeared not only an efficient way of addressing those problems identified but could have been a socially appropriate thing to do in the eyes of those who are watching.

Peters (2000) argues that in order for institutions to survive and be in a position to influence their members and the societal environment in which they exist, they have to possess four dimensions. These are:

> *Autonomy, described as representing a concern with the capacity of institutions to make and implement their own decisions*

Adaptability, which looks at the extent to which institution is capable of adapting to changes in the environment or more importantly capable of moulding that environment

Complexity, which demonstrates the capacity of the institution to construct internal structures to fulfil its goals and to cope with the environment and

Coherence, which represents the capacity of the institution to manage its own workload and to develop procedures to process tasks in a timely and reasonable manner

Source: Peters (2000, p. 08)

In relation to the problem statement and the research question, these four dimensions become significant as they can reveal the extent to which the various pillars of the oversight model for intelligence are institutionalised such that can be regarded as efficient and relevant. Understood against the framework of these dimensions, the issues raised earlier in the problem statement begin to indicate gaps that could be addressed further by this study.

2.4.2.4 Critique of institutionalism

Having regard to the body of knowledge of this conceptual theory, it is important to briefly touch on the limitations thereof. While this approach offers a good understanding and analysis of individual behaviour and of the effects institutions can have on behaviour, critics have bemoaned the theory's static posture and its failure to match the dynamic world of politics, which in many respects it seeks to explain (Peters, 2000, p. 14).

Peters & Stoker (2008) argue that the 'conceptual divergence' found within the broad institutionalism provides room for conceptual conflict. Such a situation does not make for easy and good understanding of the complex phenomenon of human and societal behaviour. Suddaby (2010, p 16) seems to share this view when he argues that "institutional theory has largely failed to retain methodologies that are consistent with

their need to attend to meanings, systems symbols, myths and processes by which organization interpret their institutional environments".

Despite these two main criticisms of this theory sighted above, one takes comfort in the fact that an interchange of the various disciplines of the theory does provide a genuine account of the complexities involved in the interaction of structures and human actors.

2.5 Conclusion

The preceding section sought to provide the theoretical basis of this study. Having chosen institutional theory as the most relevant in successfully grounding this research project, an attempt was made to define the conceptual theory and its various dimensions or schools of thought. Each of these can be used as a combination or individually to provide meaning to the research question and its findings.

Having outlined the theoretical and conceptual framework in this Chapter, one will use this basis to ensure that the study is well anchored on a framework that facilitates data collection, analysis and interpretation in the latter section. This intention would be to use the broad parameters of the theory to provide a basis for answering the research question.

CHAPTER 3

RESEARCH METHODOLOGY

3.1 Introduction

This chapter outlines the approach the researcher took in seeking to answer a number of questions that deal with accountability and oversight of the intelligence services, with specific reference to South Africa in its 18 years of the democratic dispensation. It is critical to once again, revisit the key primary and secondary research questions that this study seeks to answer.

The primary research question is:

> *Is the South African model on accountability and oversight of intelligence services still effective and relevant 18 years later*?

The secondary research questions are:

> *What are the challenges in the pillars of the oversight model in respect to design and implementation and what are the implications of these in promoting constitutional accountability? and*
> *How can the role of civil society be institutionalised in improving the quality of accountability and oversight of the intelligence services?*

The chapter also deals with the data collection process, outlining in detail the techniques used and briefly describing data analysis as a technique. The analytical framework to be used in data analysis is also discussed, this in order to set the tone for the analysis that is done in Chapter 5 of this study. The actual presentation of the data that has been collected using these methods and techniques will be presented in the following chapter.

3.2 Research design

3.2.1 Approach

Essentially, this study contains elements of an explanatory as well as descriptive study. As such, it will utilise qualitative research methods of document analysis and interviews.

The nature of qualitative research is such that it allows one to explore the real world rather than the experimental or manipulated settings (Neuman, 2011). One is able to focus on the micro-social processes and their manifestation at the individual, group or organizational level. As such, when one looks at the extent to which the South African oversight model of intelligence has been effective in its 18 years of existence, one needs to pose different questions at various levels of the executive, the parliamentary system as well as the civil society movement. The flexible research strategy that the qualitative approach offers is what makes one opt for it, given the nature of the research topic one has chosen. Furthermore, as Creswell (undated, p.181) indicates, “several aspects emerge during a qualitative study” and a qualitative approach empowers one to probe these aspects or changes that might have occurred.

It is one’s considered view that given the nature of the primary and secondary research questions, the best suited method of probing will be that of interviews, which will have open ended questions, allowing the researcher to draw maximum input from the interviewee (Neuman, 2011). This will ensure that one has as detailed an answer as possible, enriching the analysis and interpretation process.

A further consideration of this approach lies in its ability to “address the complexity of social intervention and its ability to draw out multiple layers of understanding” (Mason, 2002, p. 43). The study of accountability and oversight is not a straight forward policy area and a qualitative approach will help to understand the ‘why, how and under what conditions’ it works or fails (Neuman, 2011). It is for this reason, therefore, that one has chosen this approach.

The nature of the primary and secondary research questions is such that it will require a lot of interaction with the subjects of the research. In the author’s view, interviews will

provide the best form of interaction as it will allow one to pose questions and follow up with clarity seeking questions if need be. One firmly believes, therefore, that these methods will best allow one to probe the issues deeper and derive a better analysis and critique of the focus of this study.

With respect to conceptualisation one has already noted, in the literature review, that the study uses, to a larger extent, two main concepts whose meaning is critical in the understanding of the issues pertinent to the research question itself. The concepts are 'control' and 'accountability'. The former refers mainly to those activities that are administered at the executive level, by the Minister responsible for intelligence, and include such things as laws, regulations, policies and directives (DCAF, 2003). The latter deals with the "process by which the intelligence services are obligated, by law, to appear before a parliamentary committee that has been given the responsibility, in law, to monitor and to apply scrutiny over the agency's performance" (Hannah, O'Brien, & Rathmell, Intelligence and Security Legilsation for Security Sector Reform, 2005, p. 12).

3.2.2 Data collection

As outlined in the foregoing section, data collection has been mainly done through document analysis as well as a selection of targeted interviews. Document analysis refers to the analysis of existing documents which contain information on the subject of research (Mogalakwe, 2006, p. 02). For purposes of this study, the focus has been on public documents and legislation that deal with the country's accountability and oversight model and its composition

In respect of document analysed, the following Acts of Parliament were analysed, using the analytical framework referred in this section 3.3 hereunder.

- The Intelligence Services Act 65 of 2002: which provides for the establishment of the intelligence services of the country and sets out various structures
- National Strategic Intelligence Act 39 of 1994, which sets out powers and functions of the Minister, amongst others, in relation to the role of discharging accountability and

- The Intelligence Services Oversight Act 40 of 1994, which provides for, amongst other things, for the parliamentary and civilian oversight mechanisms

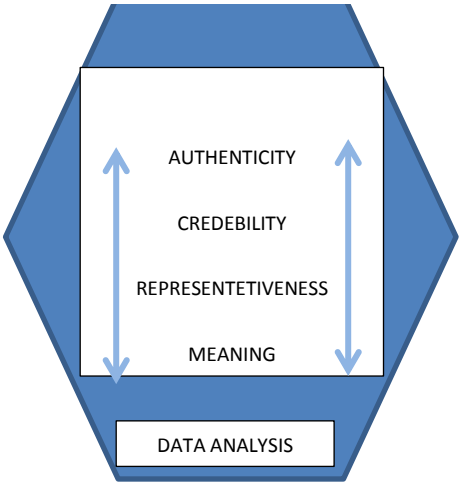
The other document is the Oversight and Accountability Model of the Parliament of the Republic of South Africa, a document which sets out the constitutional framework of oversight for Parliament. The last document is the National Development Plan, a document that maps out South Africa's development trajectory for the year 2030.

3.2.3 Documentary analysis as a data collection technique

Mogalakwe (2006) argues that documentary analysis, as a research technique, has not received much acclaim and has been marginalised, despite its good attributes of being cost effective and generally good. Its use in this study is premised on the observation that South Africa's model for intelligence oversight is grounded on a number of key legislative provisions which interface with institutions that are expected to implement same. Therefore, in order for one to establish whether such a model is effective and still relevant after 18 years of democracy and freedom, one needs to critically analyse certain key documents.

To ensure a scientific approach in the handling of data emanating from these documents, the following framework of analysis has been adopted.

FIG 3.2.1 Framework for data analysis



Source: Own conceptualisation

Throughout the analysis, the key questions that the researcher has sought to probe are:

i) What is the motivation for such a document?
ii) What is the intent and purpose for its existence?
iii) What orientations, values and ideologies does the document represent?

At this stage it is essential to provide a brief conceptualisation of the framework referred to above under 3.2.1.

Authenticity is used in this discussion to refer to the extent to which evidence is reliable and genuine and free of adaptations or manipulation (Mogalakwe, 2006, p 225). Credibility is sued to denote the extent to which the evidence is devoid of any distortion or errors. In a sense it also involves an element of trustworthiness of the document. Representativeness deals with whether the documents consulted can be considered as a representative sample of documents that existed originally. Lastly, the aspect of meaning has to do with the extent to which evidence is clear and comprehensible - what understanding and significance can be derived from it (Mogolakwe 2006, p 227).

3.2.4 Operationalising the study

As part of operationalising the study, the following five (5) questions were framed and formed part of the interviews.

Table: 3.2.4.1: Interview questions showing linkages with research questions

Research Objective	Question	Method
The extent to which the accountability and oversight model is effective in dealing with intelligence challenges of the 21 century	*What are the challenges in the pillars of the oversight model in respect to design and implementation and what are the implications of these in promoting constitutional accountability?*	Document Analysis & Interviews
	What is the nature of the relationship between executive and parliamentary	Document Analysis

Research Objective	Question	Method
	oversight mechanism?	& Interviews
	What have been the key challenges of accountability, control and oversight of the services in the last 18 years of our democratic dispensation?	Interviews
The extent to which the accountability and oversight model is reflective of the changing nature of intelligence sector and the emerging trends in global security threats	How have changes in the intelligence community- with respect to mandates, functions and technological advances- impacted on the mechanisms of oversight?	Interviews
The extent to which civil society and independent institutions are able to exercise scrutiny and oversight on the intelligence services	What are some of the key lessons learnt, internationally, on institutionalising the role of civil society in strengthening accountability and overnight of the services?	Interviews

For the interview sessions, the following stakeholders were identified as key informants and people that are knowledgeable about the subject of this study. These interviews helped the author to subject documents analysed to more rigorous interrogation.

Table: 3.2.4.2: List of individuals that were interviewed

Name	Designation	Organisation
Adv Cecil Burgess	Chairperson: Joint Standing Committee on Intelligence	Parliament of the Republic of South Africa
Gareth Newham	Senior Researcher	Institute of Security Studies
Alison Tilley	Executive Director	Open Democracy Advice Centre of South Africa
Adv Jay Govender	Legal Advisor	Office of the Inspector General for Intelligence

3.2.5. Data analysis

Data analysis involves the process of organising data collected such that it makes sense. To this end, data was categorized into various themes that are aligned to the research question and analysed in order to determine any patterns or trends that are meaningful with the context of the research question (Neuman, 2011, p. 510)

The analysis was grounded or informed by the theoretical framework of the study, this in an effort to make sure that one is not carried away during this process. Furthermore, this ensures that the researcher is able to "allow analytical ideas and concepts to emerge from the data" (Booysen S. , PADM5132-3 Background Document, 2012).

To ensure that one produces a quality analysis of the data, one focused attention to the following three issues:

- *Checking and rethinking the accuracy of the data collected*
- *Making the analysis as thorough and complete as possible rather than cutting corners and*
- *Continuously acknowledging the unwanted biases which are inherent in one's values and proximity with regards to the research question as an employee of an intelligence service*

Source: (Yin, 2011)

3.2.5.1 Analytical framework

In an effort to conduct a comprehensive data analysis, one draws from the literature review and presents an analytical tool that was used to conduct the analysis. Broadly speaking, the following elements should form part of what is meant by 'effective and relevant' oversight:

- Adequate constitutional provisions
- Institutional safeguards against ministerial abuse
- Adequate parliamentary oversight and
- Active civilian oversight

I now briefly discuss each of these elements.

3.2.5.1.1 Adequate constitutional provisions:

In any constitutional democracy, the constitution is the supreme law that outlines how the democracy is to be operationalised. In this regard, the constitution must provide expressly for the establishment, composition and leadership of the services. In the case of the latter, clarity must be provided as to the appointment of both the political and administrative leadership. As Nathan (2010, p.196) opines, "the constitution lies at the heart of the transformation agenda and has been pivotal in shaping and constraining intelligence services".

3.2.5.1.2 Institutional safeguards against ministerial abuse

As an essential feature of the oversight model, it is crucial that proper safeguards are in place to insulate the intelligence services from becoming amenable to political abuse by the executive. Other risks associated with abuse by the executive include excessive secrecy, temptation to use intelligence services for 'purposes of domestic politics' and unconstitutional instructions (Born & Leigh, 2005, p. 68). An ideal scenario in respect of such safeguards will include clear legislation on the powers and functions of the minister, written instructions provided by the minister, briefings to the leader of the opposition by the director general and an open door policy that facilitates direct liaison with the president (DCAF, 2003, p. 75).

3.2.5.1.3 Adequate parliamentary oversight

As a major player in the operationalising of democratic principles, it is an engine room for democracy (Ebo, 2008, p. 24).

> ”Parliamentary involvement gives legitimacy and democratic accountability , helping to ensure that security and intelligence organisations are serving the state as a whole and protecting the constitution rather that narrower political or sectional interest” (Born & Leigh, 2005, p. 77).

A clear and specific mandate of parliamentary oversight is a starting point in terms of determining effectiveness of same. In reviewing functionality and effectiveness of parliamentary oversight, the concept of ‘AAA - authority, ability and attitude - analysis’ proves to be of great value (Aning & Larey, 1995, p. 06). Authority is derived from the legislative provisions that give effect to parliamentary oversight. Ability of parliament speaks to issues of ‘capacity of parliament to hold the executive accountable over security sector and is the function of resources (human, financial and technical) available to parliament’. Attitude has to do with the political will of members towards the notion of intelligence oversight and its related functions. As Ebo (2008, p.27) notes “if parliamentarians lack the will to exercise their oversight functions, then they will bring neither authority nor their ability to bear”.

3.2.5.1.4 Active civilian oversight

Any oversight model will be incomplete if it does not provide institutionalised avenues for the public to exercise civilian oversight. Such civilian oversight is characterised by opportunities provided, in the main by parliament, for citizens to make inputs on policy and legislative developments or amendments. Through publishing reports pertaining to matters of investigations and/or enquiries into the conduct and performance of intelligence services, citizens can be empowered to actively participate in matters of intelligence oversight

In sum, an effective and relevant oversight mechanism will consists of adequate constitutional provisions that provide for proper safeguards against ministerial abuse as well as adequate parliamentary oversight which facilitates civilian participation.

3.3 Reliability and validity

Issues of reliability and validity are important components of any research design. As Silverman (2010, p. 157) opines “unless you can show your audience the procedures you used to ensure that your methods were reliable and your conclusions valid, there is little point in aiming to conclude a research dissertation”. Without reliable and valid conclusions, the study will degenerate into a work of fiction.

In the case of documentary analysis, an effort was made to handle data scientifically and this involved considerations of the following four criteria: authenticity, credibility, representativeness and meaning. Authenticity refers to the extent to which data is from trustworthy sources and whether or not is genuine while credibility looks at the extent to which evidence is typical of its kind. Representativeness considers whether documents consulted are representative of the totality of the relevant documents while meaning looks at the extent to which evidence is comprehensible and clear (Mogalakwe, 2006, p. 224).

In respect of the interviews, an effort was made to conduct these in a professional, organised manner. The decision to use a purposive sample for the in-depth interviews was based on pragmatic grounds such that one can expedite the data collection period (Silverman, 2010, p. 270).

By constantly focusing on transparency, a clear methodology and adherence to evidence, one has attempted to ensure the trustworthiness and credibility of this qualitative study.

3.4 Ethical considerations

Considering that qualitative research inevitably involves working with humans, it follows that ethical considerations must be taken cognisance of, right from planning through execution and final completion of the study (Silverman, 2010, p. 152).

In respect of the interview component of data collection, all participants gave consent for their names to be used given that they are people in the public domain, working with communities in an open and transparent manner. Save for the one employee in the

Inspector General's office, who works as a legal advisor, the balance of the respondents expressed no reservations whatsoever.

Consideration has also been given to the fact that in the intelligence sector, a perception exists that all information is meant to be kept secret and in this study, we argued for an institutional framework to be adopted such that there is more visible civil oversight. All ethical considerations taken were informed by and large by this assertion.

3.5 Conclusion

This chapter focused on the research methodology and the design that has been adopted in this study. By choosing to adopt the qualitative research approach, one sought to develop a deeper understanding of the factors that impact on the efficiency or lack thereof of the oversight model for the intelligence services. An outline of the analytical framework used for the analysis of data was also presented, as was the issues of reliability, validity and ethics.

CHAPTER 4

DATA PRESENTATION

4.1 Introduction

This chapter focuses on the presentation of data collected through documentary analysis as well as in-depth interviews. The data will be presented in an integrated manner that combines all the sources of the data collected. This will include data from a purposive sample made up of four respondents chosen from institutions active in the various pillars of the oversight model. Each of the respondents were asked five similar questions. The responses were coded as Respondent A, B, C and D. The presentation will also include the five documents analysed (as mentioned in the previous chapter).

As a prelude to this Chapter, a description of the oversight model will be provided. Using the pillars of the analytical framework described in the previous chapter, data from the document analysed as well as from in-depth interviews will be presented in a manner that lays the basis for the analysis that occurs in Chapter 5.

4.2 A description of the oversight model

In Chapter 1, it was noted that South Africa has an accountability and oversight model that was developed in the first year of the democratic dispensation in 1994. Such a model has three pillars namely executive, parliamentary and civilian oversight. These pillars are anchored on a fourth pillar of judicial oversight, which provides the legislative framework for the entire model. The first element is built around the Minister who is a member of Cabinet assigned by the President to exercise executive authority over the services (Constitution of RSA, 1996).The second aspect is based on a parliamentary committee, the Joint Standing Committee on Intelligence (JSCI). The last pillar of civilian oversight, finds expression in the work done by the Office of the Inspector General of Intelligence. The legal framework on which this model is based is meant to provide safeguards in line with the constitutional order.

There are a number of democracy supporting institutions that also play a role in the conduct of intelligence oversight. These include the Office of the Auditor General which conducts an audit on the finances and issues an opinion on the status of the books. Concerns have been expressed, however, on the manner in which these reports are managed and the extent to which members of the public have the ability to be assured that public finances are managed accordingly. The Mathews Commission (2008) expressed concern pertaining to the non-publication of such reports.

> "Despite the provision in the constitution, section 188 (3), the audit reports on the intelligence services are presented only to the JSCI and are classified as 'confidential' or 'secret'. As a result, the reports are not in the public domain. This is clearly unconstitutional"
>
> (Mathews Commission, 2008, p. 229)

The other democracy supporting institutions playing a role in oversight are the office of the Public Protector and the Human Rights Commission. These institutions play a role insofar as investigations are concerned in a similar fashion as does the office of the Inspector General of Intelligence (Fazel, 2009).

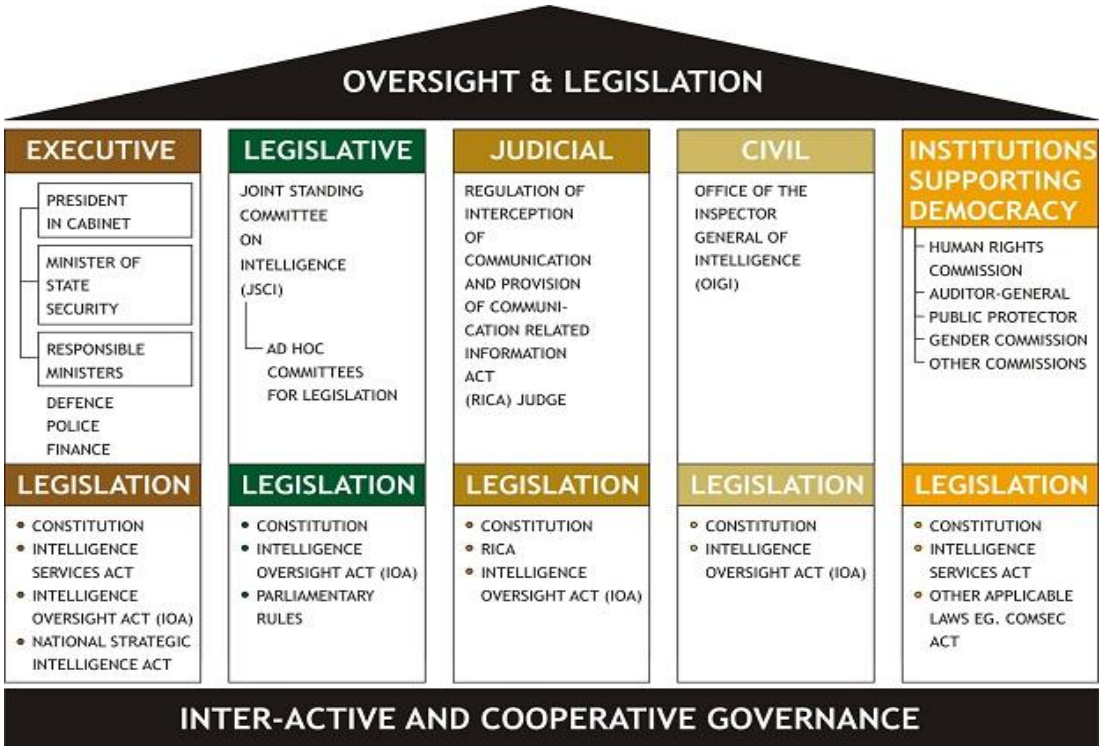
The Office of the Public Protector can, in the conduct of its work, refer cases to the Inspector General (IG) insofar as it relates to the intelligence community.

The Human Rights Commission can also be called upon to probe human rights abuses insofar as the use of intrusive collection methods is concerned or when allegations of infringement of basic human rights are raised.

The functioning of the entire oversight model can thus be graphically depicted as shown in 4.2.1, found on the next page:

The graphic illustration is best read from the bottom up, where one finds the legal and constitutional framework provision anchored on the interactive and cooperative governance. The various pillars of the model are built on this foundation, with the ultimate deliverable being accountability and oversight.

Figure 4.2.1 Accountability and oversight model



Source: www.ssa.gov.za

4.3 Presenting data using the elements of the analytical framework

In the previous chapter, mention was made of four broad areas that form a reference point in assessing the effectiveness and efficiency of the oversight model. In order to lay the foundation for the analysis of the data collected, it is imperative that one uses these broad areas in the presentation of data collected.

4.3.1 Adequate constitutional provisions

Section 209 of the RSA Constitution provides for the establishment of the intelligence service of the country. It goes further to provide broad principles on how such a service is to be managed, in terms of leadership.

> ‘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.

> 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'.
>
> RSA Constitution, Sec 209, p125

According to Respondent B (Interview in Cape Town, March 2013), one of the major problems in terms of the design of the model lies in the manner the constitution is worded in terms of the appointment of the heads of the intelligence services and the Minister responsible for intelligence services.

> "This manifests itself in the Minister and the heads fighting for territory because the other believes he or she is doing his or her job while the interpretation of same differs completely amongst the two of them. There appears to be various interpretations on the concept of 'political responsibility' as introduced in Chapter 11, Section 209 (2) of the constitution. What is meant by this?"
>
> "The fight between the former DG's with the current Minister, as widely reported in the media in 2012, could have, inter alia, been informed by such issues pertaining to what they perceived as interference with operations, while the Minister on the other hand could have interpreted it in terms of him fulfilling his 'political responsibility"

'B' further noted that maybe those who wrote the constitution did not follow the rest of the world where the Director General, who gets appointed by the President, reports directly to the President.

It can be argued that it was precisely for such reasons, amongst other reasons, that the Intelligence Services Act 65 of 2002 was introduced. This Act provides for the establishment and regulation of intelligence institutions by conferring certain powers to the directors general as well as the Minister responsible for intelligence.

The contextual background under which it was written is one where the country had just experienced various atrocities and human rights abuses at the hands of intelligence officers driven by the desire to protect the state. After the development of the White Paper on Intelligence, as part of the transitional arrangements, this legislation was drafted to give effect to the new intelligence philosophy espoused by the White Paper on Intelligence.

With respect to the powers of the Minister, the Act confers certain powers such that the Minister "may do or cause to be done all things which are necessary for the sufficient superintendence, control and functioning of the intelligence services" (Intelligence Services Act, 1994). The Act further provides in Section 20 that the Minister may delegate any power conferred upon him or duty assigned to him or her but the number of exclusions in various sections is rather long.

While recognising the role of the executive in the intelligence oversight model and further recognising the need to ground executive control on sound legislation, it is essential to insulate intelligence from being misused or abused by those in power. It could be argued that this Act confers too much power to the executive authority and to the extent that the director general is appointed by the President, this could provide grounds for contestation between the DG and the Minister. Such contestations were also raised by one of the respondents (Respondent B) who argued that the constitution is not very specific when it comes to the roles and responsibilities of the DG and the Minister.

A similar argument on the provisions of the constitution was made by Respondent C (Interview in Pretoria, 18 March 2013) who argued that the oversight model looks good on paper, citing, however, the problem of senior appointments that are spelt out clearly in law. "The practice is that you don't end up with the best possible candidate being appointed because the constitution didn't expressly outline a process to be followed in this regard and merely leaves it to interpretation".

Respondent D (Interview in Pretoria, April 2013) also argues that the constitutional and legislative factors affect the outcome of the oversight process.

> "Our oversight model is still in its infancy phase. This I say because while the oversight was passed in 1994, we had a 10 year period of non-implementation which meant that the actual implementation only started in 2004. During this 10 year period, there was a lot of confusion about how the IG's office is to look. While it was conceptualized as a Chapter 9 institution (in terms of the constitution) it was in effect a Chapter 11 institution"

'D' contends that this period of non-implementation also saw a few amendments to the legislation "to provide for a better system that can achieve its desired outcomes".

The final aspect under this section of constitutional provisions and one which completes the question of the challenges in respect to design and implementation deals with the inherent secrecy. Respondent A (Interview in Cape Town, April 2013) decries the lack of transparency which appears to have been institutionalised from the days of the transition into the democratic dispensation. A suggests that the design of the oversight model is characterised by 'insufficient transparency' and a culture of secrecy that was part of the transitional period. A notes also that the introduction of the Truth and Reconciliation Commission (TRC), did not achieve much in terms of disclosures that were expected, particularly from the security services of government and of the liberation movements.

> "Indeed, a lot of people who were involved in some activities that I imagine would not have been above board didn't come forward. We also know that certain records were destroyed and this was a huge disappointment"

For Respondent A, the issue is not so much with the institutions but more with the culture of secrecy that was harvested from the old order into the new dispensation.

4.3.2 Institutional safeguards against ministerial abuse

The National Intelligence Strategic Act 39 of 1994 sought to define the roles and functions by setting out clear mandates in this regard. It also provides for a legal framework for the coordination of intelligence amongst the various structures and this is done by the establishment of the National Intelligence Coordinating Committee

(NICOC). The functions of NICOC as well as those of the various structures and government departments associated with it are well defined.

In Chapter 2, it was noted that it is critical to ground executive control of intelligence on sound legislation, for a number of reasons. One critical reason is the need to "institutionalize key functions in order to insulate intelligence from being abused by those in power" (DCAF, 2003, p. 06). Thus the Strategic Act sought to clarify the issue of mandates by providing legal certainty on issues that are subject of debates in many quarters. This is because many see this as the source of challenges that have beset the intelligence services over the past 18 years.

On the question of mandate, some have argued, for instance Nathan (2010), that the mandate of the domestic intelligence structure is too wide and prone to abuse by rogue elements within the system or to be abused by those in political office for narrow party political gains. An analysis of these functions reveals that while an effort has been made to succinctly de-alienate the specific function of this structure, the wide ranging definition of intelligence makes it difficult to narrow the scope as this might have unintended consequences of insufficient collection of information that might prove significant. It can thus be argued that the ambiguity of the intelligence agency's mandate directly impacts on the directional efficacy thereof pertaining to accountability and oversight. This inherent dichotomous nature disallows an adequate positioning regarding the terms of reference.

Further, an unambiguous mandate will positively impact on the efficacy and focussed nature of oversight and review as the mandate of the Agency needs to be adequately clear to serve as criteria for, and to dictate, the scope of oversight/review.

Respondent A (Interview in Cape Town, April 2013) argues that there are three challenges that can be identified and which can be linked to the issue of ministerial control as well as the broad mandate of the services. These challenges point to the need to further strengthen the model.

First, ‘A’ notes that the so called Chikane Files - a series of accounts published by the former Director General in the Mbeki administration in which he claimed that the intelligence agents posed a great threat to the stability and constitutional order of the republic - provided ‘evidence’ of what was going wrong in the intelligence sector insofar as the question of mandates is concerned. Second, A argues that the issues pertaining to the removal in office of the former Director General of the National Intelligence Agency by former President Mbeki also revealed systematic governance challenges for the sector. In the third instance, A notes that the so called “Zuma spy tapes” saga is another challenge that has been facing the intelligence community as it is still not clear how these were produced and whether they were leaked and by whom.

Respondent C (Interview in Pretoria, March 2013) similarly cites Project Avani - that infamous political intelligence project conducted by the National Intelligence Agency in the mid 2000’s - as an example that displayed the issue of political dynamics at the very highest level. “We saw how internal party politics found their way to the operational tasking of the intelligence services, in a manner that undermined public confidence and fuelling the charge that political interference is rife within the state intelligence services”.

In order to manage the inherent contradictions brought about by the demands of secrecy and openness in the mandate of the intelligence services, recent amendments of the intelligence legislation, particularly in the much talked about Protection of State Information Bill and the General Intelligence Laws Amendment Bill now have a specific clause that provides for the exclusion of “lawful political activity, advocacy or dissent” (Protection of State Information Bill, 2012). This exclusion was a consequence of intense debate both in the National Assembly and in the National Council of Provinces and it was meant to provide certainty to the recurring concern regarding the mandate of the domestic intelligence agency. It was also part of the concerns of Project Avani, discussed in detail in Chapter 2.

4.3.3 Adequate parliamentary oversight

Parliamentary oversight is an important pillar of the oversight model, given the important role of parliament as an institution of democracy. To provide legal certainty for the concept of parliamentary oversight, the Oversight Services Act 40 of 1994 was enacted.

The Act establishes the parliamentary committee that exercises oversight over the intelligence services and defines the functions of this committee.

Section 2 (1) (a) and (b) provides as such:

> There is hereby established a Parliamentary Committee to be known as the Joint Standing Committee on Intelligence, which shall, subject to the Constitution, perform the oversight functions set out in this Act-
>
> *(a)* in relation to the intelligence and counter-intelligence functions of the Services, which include the administration, financial management and expenditure of the Services; and
>
> *(b)* in respect of the administration, financial management and expenditure of the Intelligence Services Entities, and thereon report to Parliament

Analysing the powers and functions of this committee, it is clear that these appear to provide for a more reactive than proactive approach to oversight. Given the changes in the manner in which intelligence agencies function and considering the advancements in technology, a reactive design is bound to have significant limitations. Some of these limitations are highlighted in Chapter 2, under the section dealing with the case for oversight.

Perhaps it can be argued that it is these and other limitations that prompted the Fourth National Parliament to develop a more comprehensive document outlining the accountability and oversight model for parliament. The main purpose for its existence is to outline how this vision is to be realised through a model of oversight.

> The objective was to develop an oversight model for Parliament in line with the Constitution and Parliament's new strategic vision, together with the realignment of resources to fulfil its mandate with greater efficiency. The model's primary objective is to provide the framework that describes how Parliament conducts oversight. It seeks to improve existing tools of Parliamentary oversight, streamlining components of the new oversight model with existing components,

> and enhance Parliament's capacity to fulfil its oversight function, in line with Parliament's new strategic direction.
>
> (RSA Parliament, 2009, p. 05)

Such a model sets out the key constitutional provisions that empowers parliament to conduct its business. The model also outlines key institutional characteristics of oversight which must be used as part of conducting business. These mechanisms include various tools and procedures including issues of capacity that is to be provided to members.

The development of such a document came against the backdrop of a realisation by the ruling party, in the main, of the need to strengthen the institutional capacity of parliament such that it becomes a powerful institution that is able to hold the executive to account. In its resolutions of the Polokwane Elective Congress, the ANC coined the term of an "activist people's parliament" (ANC, 2007), this in order to improve the quality of oversight and engagement by parliament. It could be argued that it was in response partly to the on-going concerns about parliament increasingly being an extension of the executive.

The oversight model that this document presents is one in which parliament - through both its houses i.e. National Assembly and National Council of Provinces - uses a range of mechanisms to ensure accountability of the executive and the various departments and agencies it oversees. Key amongst these mechanisms are various committees (portfolio, joint, standing, specialised and ad hoc committees), member statements, questions, budget votes, oversight visits and petitions.

Whilst the oversight document appears to be authentic, credible and representative of documents on the subject of oversight produced by parliament, a number of gaps can be identified which speak to the weaknesses of the current oversight model. These gaps are relevant for purposes of this study given that a significant role of the oversight of the intelligence services is conducted by the parliamentary Joint Standing Committee on Intelligence. These gaps, it can be argued, are located within the broader understanding and significance of this document.

Briefly, the first gap is that the work of the houses of parliament lacks coordination and this can be achieved, the document argues, by establishing a Joint Parliamentary Oversight Assurance Committee (RSA Parliament, 2009). Such a committee will better ensure that all commitments and undertakings made by the executive are fulfilled, a serious concern that results in empty promises. The second gap deals with the need to develop monitoring compliance with international treaties to which parliament as a people's institution is party. Parliament has a duty to ensure that the country adheres to international law and treaties that we have signed. Tracking of issues between the executive and parliament is another area of weakness which requires further attention. The last gap identified pertains to the central issue of this study, the need to ensure the institutionalisation of the role of civil society in issues of national interest such as this one. "The non-integration of public participation with the overall oversight mechanism" is a matter of great concern (RSA Parliament, 2009, p. 07).

It can further be argued that these gaps and limitations on the part of parliamentary oversight institutions remain an on-going concern given that they are also echoed in the National Development Plan (NDP).

The NDP as a broad plan seeks to eliminate poverty and reduce inequality by 2030 and proposes a range of policy interventions in order to achieve these. It is a product of the National Planning Commission appointed by President Zuma in May 2010. In June 2011, the Commission produced the national diagnostic report - a report that sought to identify key failures in policy implementation and resultant challenges (National Development Plan, 2012).

The NDP is scathing in its attack on the limitation of parliament as an active oversight institution. "Parliamentary accountability is weak, with parliament failing to fulfil its most basic oversight role. The rising numbers of service delivery protests indicate that the state also needs to make it easier for citizens to raise their concerns" (National Development Plan, 2012, p. 45).

Such a view seemed to have been shared by a number of respondents during the in-depth interviews. At issue, in the first instance, is the perceived poor relationship

between parliament and the executive, as pillars of the oversight model. This relationship, it can be argued, results in what the NDP referred to as 'weak accountability'.

Respondent A (Interview in Cape Town, April 2013) is scathing of the nature of the relationship between the executive and the parliamentary oversight mechanism. 'A' notes that parliament has over the years become less important in terms the calibre of members deployed to serve there. 'A' suggests that the period between 1995 and 1999, parliament saw the deployment of high calibre members who commanded respect and integrity. The consequence of this change in the quality of members is that it has become less assertive while the executive has grown more assertive. 'A' notes that parliament's ability to produce quality legislation has also suffered as a result of the deployments. As an important pillar of ensuring constitutional accountability and oversight, 'A' argues that parliament needs members with the relevant political acumen and who command power.

At the heart of this problem, 'A' identifies the proportional electoral system which 'A' argues results in parties sending members without proper assessment thereof. 'A' also blames structural problems on the operation of parliament citing the use of ad hoc committees as an example. Such a system, 'A' argues, is not effective as it does not facilitate a process of experienced members dealing with legislation and related matters. Linked to these institutional challenges, Respondent B (Interview in Cape Town, March 2013) adds the issue of the formula used for members to serve in the parliamentary oversight committee. In this regard, 'B' notes that while the constitution provides for multiparty oversight mechanism, smaller parties in parliament tend not to second members to the JSCI owing to its strict security measures such as vetting and taking of the oath of secrecy. "Because this doesn't benefit them, as they cannot speak openly about their work, they rather not participate and this weakens the democratic principle of accountability".

Respondent D (Interview in Pretoria, March 2013) did not mince words, arguing that the executive has no respect for parliament oversight structures. According to 'D', this stems from the partisan manner in which members of parliament operate by forgetting

why they are in the oversight committee in the first place. “They seem to be more concerned about not appearing to be questioning their own party members. ‘D’ argues that given the fact that the meetings of the JSCI are held behind closed doors, with members who have taken an oath of secrecy, a vast opportunity is being missed where members could really be probing and exercising real oversight by asking relevant questions without the fear of same making it out on the public. “There is also an element of protecting members of the executive and the executive knows”.

In echoing the sentiments of Respondent A, Respondent C (Interview in Pretoria, March 2013) notes that the challenges regarding the relationship between the executive and parliamentary oversight mechanisms are centred on the current electoral system of proportional representation. ‘C’ is of the view that such a system results in members of the ruling party not being keen enough to hold their fellow members of the executive to account.

> “One has to depend on the chair of the portfolio committee to effect proper oversight so that if the chair is weak, then there will also be weak oversight. In the case where the chair of the committee is very strong and really calls on the executive to account, you often see the chair being redeployed. An example here will be that defence portfolio committee chair that clashed with the Minister of Defence, resulting in him losing his job. This leads to a scenario where those who are in parliament adopt an attitude of not wanting to rock the boat as it were”

Respondent C argues that the capacity to hold the executive to account is thus a result of the systematic issues of design more than of implementation.

The second aspect which came out on the nature of the relationship as having an impact on the effectiveness of parliamentary oversight had to do with capacity of the committee to carry out its work. In particular, the issues of skills in critical areas such as ICT were raised.

Respondent C (Interview in Pretoria, March 2013) argues that members of the parliamentary oversight committee do not have sufficient knowledge of the technological systems they are meant to oversee. C cites recent discussions in parliament over the

proposed General Intelligence Laws Amendment Bill where the committee elected not to discuss the issues pertaining to bulk scanning of international communications signals currently conducted by the National Communications Centre. “This shows their lack of confidence in technical issues of national importance”.

For Respondent B (Interview in Cape Town, March 2013), funding is the main challenge in the list of two critical issues that have characterised the intelligence oversight in the past 18 years. The cost of conducting research, attending conferences and courses etc. has been a hindrance to conducting oversight as members have been restricted in this regard. “This affects your ability to stay in contact with your counterparts as one requires knowledge sharing in order to stay abreast of latest developments”.

The second issue is that of expertise. “Given the technological advancements, it follows that those who conduct oversight must also brush up on their skills through training”. ‘B’ notes however that no provision is made to accommodate same for members of parliament. “Membership of the committee is not backed by a legislative provision that require members to have specific skills”. ‘B’ argues that as the intelligence sector evolves, parliament must provide certain support in order for members to remain relevant.

The issue of technological skills within the committee was raised within the context of the impact it has on oversight mechanisms. In this regard, Respondent A (Interview in Cape Town, April 2013) notes that technological advances of the past decade have made conducting intelligence much more difficult. “Cell phones and laptops, for example have revolutionized the manner in which people can access information. You can’t ignore such developments in the way you conduct oversight”.

It is clear from the foregoing that the nature of the relationship between executive and the parliamentary oversight mechanism as well as the changes in the intelligence community - with respect to mandates, functions and technological advances - all impact on the mechanisms of oversight. The extent to which this impact can be assessed will form part of the discussion on Chapter 5, dealing with the analysis of all the data collected.

4.3.4 Active civilian oversight

In the literature review in Chapter 2, it is argued that civilian oversight, in terms of the model, is performed by the Office of the Inspector General, duly mandated by the Section Intelligence Services Oversight Act, act 40 of 1994.

Section 7 provides as follows:

(1) The President shall appoint an Inspector-General of Intelligence-

(a) nominated by the Committee; and

(b) approved by the National Assembly by a resolution supported by at least two thirds of its members:

The functions of the Inspector-General are, in relation to the Services-

(a) to monitor compliance by any Service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence;

(b) to review the intelligence and counter-intelligence activities of any Service;

(c) to perform all functions designated to him or her by the President or any Minister responsible for a Service

Such an office did not exist prior to 1994 and it was established as part of the intelligence reform aimed at ensuring that the intelligence atrocities of the apartheid era were a thing of the past.

However, for Respondent D (Interview in Pretoria, April 2013), the concept of civilian oversight only existed in paper until 2004 when the government began to implement it by appointing incumbents to the office of the Inspector General for Intelligence. (IG) “Even here, the government couldn’t get the right person for the job, with the first incumbents lasting in office for a period not exceeding six months. In fact the first incumbent only lasted for a mere six weeks”.

According to ‘D’, the oversight legislation was also amended a couple of times in order to ensure that candidates have knowledge of intelligence as a prerequisite for appointment. Respondent C (Interview in Pretoria, March 2013) however, argues that

despite this amendment, the Act remains outdated. “The initial plan was to provide for Inspectors General for all the intelligence services as is the case in international dispensations, for example Canada and New Zealand”.

Of concern to Respondent D (Interview in Pretoria, March 2013) is the fact that the Inspector General as a pillar of the civilian oversight is a toothless institution that does not go far enough to promote constitutional accountability. “For example, in terms of our law, the IG doesn’t have the powers of subpoena. I’m convinced that powers need to be reviewed as a first point of practice and implementation of the IG’s mandate”. According to ‘D’ inadequate powers hinder the efforts of the IG’s office to promote constitutional accountability through proper investigations.

For its part, the National Development Plan argues that citizens need to play a much more active role in ensuring that public institutions deliver on their oversight mandate.

One of the key approaches that the NDP proposes is a concept of ‘enhanced capabilities and active citizenry’ (National Development Plan, 2012, p17). This concept argues that in order for the government to become a capable state that is able to deliver on its mandate and service the people accordingly, citizens must themselves recognise their responsibility and hold leaders accountable for their actions.

The NDP argues that active citizenry is necessary for democracy and development to flourish. It calls for the public to become active beyond the elections. But this concept seems to be difficult to successfully implement given that, as Respondent C (Interview in Pretoria, March 2013) notes, there is a lack of public appetite on matters of intelligence. ‘C’ cites an example where for the public input process on the processing of the General Intelligence Laws Amendment Act, only 4 submissions were received. ‘C’ notes that public interests in intelligence matters is usually driven by scandals that break out from time to time, arguing that the public furore around the Protection of State Information Bill was what gave the rallying call that saw the successful mobilisation of civil society under the banner of the Right2Know Campaign.

‘C’ also argues that one of the best ways of ensuring quality accountability and oversight is the formulation of clear legislation, a clear design framework for the institutions which clarifies roles in simple terms.

For its part, the NDP raises two critical issues significant to this study. First, the need to provide for better civil society involvement in matters of governance and oversight, in particular, is amplified. In fact, the document calls for a renewed participation on the side of civil society in order to move the country forward.

> Active citizenry requires showing inspirational leadership at all levels of the society. Leadership here doesn’t refer to one person or even a tight collective of people. Parents, leaders of the community and the public figures should demonstrate leadership qualities that include the ability to lead by example and to follow rules that apply to everyone
>
> (National Development Plan, 2012, p. 429)

The second and perhaps most important contribution of the NDP is the assessment that accountability is essential to democracy and that with several weakness in the accountability chain, the prospect of success is doubtful. In order to reverse this state of affairs, the document calls for citizens to “dissuade leaders from taking narrow, short sighted and populist positions” (National Development Plan, 2012, p. 27). In essence, the active citizenry must lead to decisive action on the part of civil society in enforcing accountability.

These two factors lay the foundation for the concept of ‘civilian oversight’ referred to earlier in Chapter 2 and echoed by Respondent A (Interview in Cape Town, April 2013) who says “ the current form of civilian oversight is not perceived as such by many in the civil society sector due to its insufficient level of independence”.

The other concern expressed, which is the linked role of the Inspector General, is that the legislation (i.e. the Intelligence Services Oversight Act) requires the reporting, by heads of the intelligence services, of significant intelligence failures. However, because the Act does not define expressly what these are, there is a lacuna when it comes to

such and there hasn't been any reporting of this nature in the past 18 years (Mathews Commission, p 113).

For Respondent D (Interview in Pretoria, March 2013), a number of things could be done to remedy this situation and improve the civilian oversight function of the IG's Office.

> "There are a couple things which can be done to ensure better involvement of members of the public in the oversight of intelligence. The vision of the office of the IG speaks of providing assurance to the people that the intelligence services are indeed functioning according to the spirit of the law. This will be difficult to do if the IG continues to hold its briefings in camera. The office must publish all certificates of assurance that it conducts in the various service categories, for example, with certain sections 'blacked out' just to protect sensitive information"

'D' also notes that the complaints system needs to be strengthened as it provides the linkages with civil society and the IG's office.

Another matter raised by Respondent D (Interview in Pretoria, March 2013) is one which involves the perception which says the office of the IG is not independent enough, that it exists to 'protect' and 'cover up' intelligence services. If these perceptions were to be dealt with, there is a need to publish more documents, e.g. annual reports, have an official and a public version of the compliance certificates that can even go so far as exposing wrong doing, if any, on the part of the services. "There is also a need to start holding joint briefings and joint education campaigns with the services and engage more in order to provide the space for civil involvement"

It thus can be argued that there is a need for legislative review to provide for express functions of the Inspector General, given the significance of this office as an extension of the civilian oversight function. Gaps in the legislation of such an institution that has to provide public assurance are a cause for concern. I will deal with this point later in the recommendations section.

4.4 Conclusion

The focus of this chapter was on the presentation of data collected through documentary analysis as well as in-depth interviews.

Presenting data in an integrated manner through the use of the elements of the analytical framework, an effort was made to start laying the foundation for the following chapter on the analysis.

From the data collected, it became clear that the subject of intelligence oversight is viewed from common yet different perspectives. From those inside the system, great strides have been made yet they recognise the glaring discrepancies. From those outside the system, more needs to be done to restore the credibility of the intelligence services through, amongst other things, more openness and transparency.

CHAPTER 5

ANALYSIS AND INTERPRETATION

5.1 Introduction

This Chapter outlines the analysis and interpretation of data collected using various methods as discussed in the previous chapter. Neuman (2011, p.506) argues that this process enriches the research activity by allowing us to "improve understanding, expand theory and advance knowledge".

In seeking to analyse what was read and heard during the process of collecting data, one will reflect briefly on the institutional theory, on the basis of which this study is grounded. Furthermore, the analytical framework discussed in Chapter 3 will be used to determine the extent to which the intelligence model of the intelligence services is relevant and effective in the 18 years of democratic South Africa. Four themes that form part of this analytical tool - namely adequate constitutional provision, institutional safeguards, adequate parliamentary oversight and active citizen oversight - will be used in order to note patterns and/or relationships as one edges closer to the conclusion and recommendations of the study.

5.2 Institutional theory: providing a sound theoretical grounding.

It was noted in Chapter 2 that institutional theory posits that the role of individuals within the complex set of government institutions cannot be ignored when one analyses the institutions and policy management. While analysing the data on the institutions that are responsible for the accountability and oversight of the intelligence services, it is critical not to lose sight of the importance and relevance of the design of political institutions. This is because they have a bearing on the nature and outcome of the political democracy, an important context in the conduct of the intelligence institutions (March & Olsen, 1984).

Since the adoption of the model of accountability and oversight of intelligence, 18 years ago, a number of changes have since taken place in the manner in which intelligence is collected. More specifically, there are three critical developments in this regard, as indicated in Chapter 1. These include 1) the changing nature of global threats, 2) modifications in the mandates and functions of the services and 3) an increased civilian awareness and demands for openness, transparency and accountability.

The focus of this chapter will be to look deeper into the data collected and to determine the extent to which it provides an understanding of the behaviour of institutions and the people within these institutions in their exercise of their various duties. The extent to which power relations and issues of leadership impact on these processes will form part of the analysis.

In the final analysis, the extent to which these institutions that drive accountability and oversight have been institutionalised such that they can be regarded as efficient and relevant will be the key determinant as we seek to provide answers to the research problem.

5.3 Analytical tool for understand research data

As indicated in Chapter 3, in order to understand the relevance and efficiency of the accountability and oversight model, it is critical to understand the concepts that underpin this tool. What follows is the discussion of the four conceptual themes under which the data has been categorized as part of the analysis of the data collected.

5.3.1 Adequate constitutional provisions

It has been argued before that in order for any oversight mechanism of the intelligence services to be worth the paper it is written on, there has to be a very clear constitutional and legal basis for this. The constitution has to make provision for how the intelligence services are to be established and subsequent legislation has to spell out the basis for an accountability and oversight mechanism.

If one considers that the current model of oversight was a result of the negotiated settlement of 1994, one cannot ignore the development of the White Paper as a

precursor to the constitution which would later, in 1996, be adopted as a supreme law of the country.

The context of the development of the White Paper on Intelligence is an interesting question that should not be ignored. At the height of the struggle for freedom and democracy, intelligence services on both sides of the conflict were active in trying to support the different causes of their political masters. The apartheid government had used the state intelligence apparatus to wage a war on 'terrorists' that had adopted an armed struggle in order to destabilise the country. When the time had come to sit around the table and negotiate a settlement, the context was one in which both sides committed to very noble and high standards of developing a new 'intelligence philosophy, mission and role of intelligence in a democratic South Africa" (Republic of South Africa, White Paper on Intelligence, 1994, p. 01).

The White Paper is replete with references to the 'constitution' and this points to the thinking on the role the constitution was to play in shaping the spirit and the letter of the intelligence services and respective oversight mechanisms. Unlike the pre-1994 era, the intelligence services were to exist to protect the constitution.

This view is further amplified in all the intelligence legislation reviewed as part of the document analysis in Chapter 3, where mandates and functions of the intelligence services speak of 'threats to the constitutional order of the republic' (National Strategic Act, 1994). The same Act also provides for a counterintelligence mandate of the domestic intelligence branch to include the use of measures and activities aimed at countering 'subversion, treason, sabotage and terrorism'. "Subversion is defined as any activity intended to destroy or undermine the constitutionally established system of government in South Africa" (National Intelligence Strategic Act, 1994, p.01)

Against this backdrop, it is noteworthy that two respondents (A and C) located the problems of the design of the intelligence model on the constitution, arguing that it does not expressly provide clarity on two critical issues, namely, the concept of 'political responsibility' as exercised by the Minister responsible for intelligence services and the appointment of the heads of the intelligence services. They argued that in the case of

the former, the loaded term of ‘political responsibility’, while attempting to provide for executive control is, in itself, problematic as it is all encompassing and often leads to turf wars with the administrative heads. In the case of the latter, they argued that the constitution is silent on an important matter of the appointment of the heads of the intelligence services and this leads to a process of poor leadership as the president and the minister appoints those considered to be loyal to them and not necessarily the best candidates.

While it can be argued that the constitution cannot spell out every single detail in respect of the establishment and management of the intelligence services, their control and oversight, there are legitimate limitations that cannot be blamed on it. These, it can be argued in terms of the theory of institutionalism, are the function of the government and the departments, including the legislature. To this end, the behaviour of the individuals in the institutions of government determines, to a greater extent the success of the implementation of the noble provisions of the constitution and the law. Depending on the interpretation and meanings they want to attach to the existence of these legal processes, we can have various outcomes that can either be favourable or unfavourable.

In essence, to blame the inaccuracy of the constitutional provisions for the behaviour of individuals within certain institutions of government that are rooted in deep power contestation is, it can be argued, finding the easy road to the realities of governance and the challenges it presents.

Nathan (2010) qualifies the existence of various interpretations by actors in the institutional arrangements insofar as constitutional provisions relating to intelligence oversight are concerned. He argues that in essence there are two schools of thought that exist with regards to what is meant by the concept “protecting the constitutional order” as found in various sections referred to earlier. Nathan (2010) opines that within the intelligence services, there are those who subscribe to the concept of ‘intelligence exceptionalism’ loosely understood to mean intelligence is a special function of government that cannot be subjected to the same constitutional scrutiny and compliance.

Clearly, this notion is at odds with the argument presented in Chapter 2 where the case for oversight is made as well as data obtained from the Intelligence Services Oversight Act which calls for oversight and scrutiny of the intelligence. Furthermore, all respondents recognised the need for strengthened oversight as a necessary condition for the effective functioning of the model. On the contrary, it is precisely for the reasons that intelligence uses, inter alia, wide powers and methods which can infringe on constitutionally mandated rights, that it must be subjected to a multi-dimensional model of oversight. The concept that Nathan (2010) speaks of is perceived 'bending of the rules' in order to protect the very same constitution.

While the constitution sets out a number of provisions on how intelligence and other security services are to be established, managed and overseen, the role of the individual actors within the complex power relations of the institutions continue to have an effect on the effectiveness of the control and oversight of intelligence. Indeed, the behaviour of individuals gets influenced by the configurations of the institutions within which they locate themselves (Pierre, Peters & Stoker, 2008).

If we consider institutions as a central component of political life, as the theory of institutionalism posits, it does not come as a surprise that the conceptualization of Project Avani, that infamous political project (described in Chapter 2) implemented by the former NIA in 2005 which saw the initiation of various reviews of the controls and mandate of NIA, was a manifestation of the political interpretation by the leadership of the intelligence service at that time.

It can be further argued that while the constitution calls for certain behaviour from the officials within the institutions, such as the principle of non-partisanship of the officials, problems have arisen in the past 18 years and these have a lot to do with the individual behaviour than with the system. Nathan (2010) recognizes the efforts of the former Minister of Intelligence Services, Ronnie Kasrils, when he introduced an educational campaign located around the '5 Principles of Intelligence Service Professionalism'. This development was in the wake of Project Avani and it was aimed at preventing further acts that border on illegality and to promote the constitution as the primary good of behaviour and 'reform in the intelligence services'.

International experience - as in the case of the US oversight of its various institutions - indicated that oversight is by its nature not an easy, static concept but that it is a dynamic phenomenon requiring the constant review of oversight structures to ensure relevance and efficiency. Despite the hundreds of years of experience as an established democracy, problems arising out of the developments of 9/11 and other terror related developments have forced the US government to take a serious look at its oversight mechanisms (Halchini & Kaiser, 2012).

In summary, while the constitution provides ample guidance in terms of principles and specific requirements, the various actors in the intelligence sector will continue to assign their meanings to the very provisions of the constitution such that it continues to be the subject of fierce discussion, particularly on matters of control and oversight.

After all, individuals active in the various institutions that are working with these matters "cannot be taken as passive recipients of elements and pressures from their institutional environments" (Suddabay, 2010, p. 15)

5.3.1.2 Institutional safeguards against abuse

In Chapter 2, the need for ensuring proper safeguards against abuse at the executive level was discussed. In particular, the role of the Minister as a member of the executive was reflected upon. In Chapter 4, the legislative framework of the intelligence services was also analysed. It became clear that the Intelligence Services Act 65 of 2002 and the National Strategic Intelligence Act 39 of 1994 confer certain powers to the Minister responsible for intelligence services such that he or she is able to exercise control over the services.

In the aftermath of the infamous Project Avani, the Inspector General was scathing in his report, accusing the NIA of gross irregularities in the manner in which they conceptualized, planned and executed what he referred to as a ''sensitive project without the requisite approval and supervision by the Minister" (Jansen van Rensburg, 2006,p.117).

So while there is legislative framework in place for the Minister to exercise control and supervision of the intelligence service within the framework of the oversight model,

concerns have been raised about how the services can be insulated from undue political interference and abuse at the highest level. Such concerns could include political manipulation or abuse of the intelligence system for political or personal gain.

On probing the challenges that have beset the intelligence services in the past 18 years, Respondents A and C raised the question of insulation from political interference and the existence of a perception, in the minds of the public, of continued political interference in the handling of such high profile cases as the matter of General Mdluli. General Mdluli is the suspended head of Crime Intelligence, a division of the South African Police Services (Respondent A, interview in Cape Town, April 2013).

It is critical to look deeply at the relationship of ministerial control and oversight on the one hand, and insulating, through safeguards, the intelligence services from undue pressure, on the other hand.

This relationship is paradoxical in nature and similar to that of secrecy and openness in the functioning of the intelligence services. While it is a desired effect for Ministers to play a particular role of oversight against those that they are responsible for, it is also not unimaginable that abuses can pop up during the course of exercising control and oversight. This is not limited to undemocratic or transition states, for evidence exists where in democratic states, various cases of ministerial abuse have been reported. Whether these have been proven to be true or otherwise is not significant but the fact that perceptions exist is a cause for concern in its own right (Nathan, 2010).

There are two particular issues related to this debate that are of significance. In the first instance, it is possible for a culture of excessive secrecy to form part of how a member of the executive charged with the responsibility to oversee intelligence operates. In some instance, government can go as far as treating information given by public servants, in the conduct of their duty as its own property. An example in this regard could be information dealing with procedures on accountability or matters that could form part of a legitimate public debate that could otherwise be canned in the name of ministerial control.

The other problem could be a situation where ministerial abuse takes the form of irregular instructions or the temptation to use the services to gather information on other politicians or members of the opposition. In the South African context, with its highly charged campaigning within the ruling party at elective conference periods, allegations of the use of the intelligence services have emerged, although without any substantive evidence being put forward. The latest to make such claims is the leader of what appears to be another breakaway party, this time formed by ex-members of the Mkhonto Wesizwe Military Veterans, Mr Alex Mashini. In response to the criticism that followed his announcement of forming a political party, South Africa First, Mr Mashini was quoted by the newspaper as accusing the ruling party government of using its intelligence apparatus to illegally put surveillance and taps on their phones (*The Citizen*, 29 April 2013).

A major question is how best can democratic governments deal with this question of providing safeguards that can deal with preventing abuses and even the perceptions of such abuses from developing.

Looking at international best practice, it seems that the key issue is to strike a delicate balance between "ensuring proper democratic control of the intelligence services and preventing democratic political manipulation" (Born & Leigh, 2005, p. 68). In Canada, Australia and Hungary there is a specific requirement that in order to promote sound governance, all ministerial instructions to the services must be put in writing. In Australia, the Director General, who is appointed by the President has a legislative requirement of briefing the leader of the opposition (Born & Leigh, 2005, p. 69). The net effect of such an arrangement is that opposition parties do not feel necessarily 'vulnerable' if they are kept within the intelligence realm, as opposed to a situation, as in most African states, where they appear to be wholly excluded thus giving them the space to produce all kinds of theories as to what is going on. Other states would also conduct briefings on the 'need to know' basis and again this has been credited for promoting a nonpartisan approach to security and intelligence (Born & Leigh, 2005).

Other states, notably United Kingdom and Bosnia, have an arrangement of ensuring clear legislative provisions that bar intelligence services from being amenable to

attempts that undermine their impartiality (Wills, 2010). It should be noted that South Africa also has similar provisions that prohibits members of the security services from obeying a manifestly illegal instruction. Section 199 of the RSA constitution also provides that in the conduct of their duties, members of security agencies (which include defence, police and intelligence) “may not prejudice a political party interest that is legitimate in terms of the constitution or further, in a partisan manner, any interest of a political party”.

A recent welcome development in the South African context, which obtains internationally as well, is the inclusion, in the General Intelligence Laws Amendment Bill of a clause that excludes in the mandate of SSA “acts of protest, advocacy or dissent which are part of a democratic process”. This development was hailed as major step forward in the quest to balance the democratic rights of the citizens on the one hand and the requirements of upholding national security on the other.

It can be argued that the examples cited by Respondents A and C on some of the challenges that have beset the intelligence sector have to do with the weaknesses in the system, despite the existence of these constitutional and legislative provisions. Respondent A (Interview in Cape Town, April 2013) went as far as saying part of the problem is that the poor controls internally make it difficult for those in power to convincingly defend the integrity of the service. She argued that the problem is not a design issue but that of implementation where weaknesses are allowed to occur and no decisive action is taken to counter these.

In sum, political direction and control for intelligence services is vital for the effective functioning of the oversight model but equally so, political independence of the services is crucial in order to ensure the highest integrity of the service and to provide public assurance that the service exists to secure the constitutional democracy of the nation with no narrow party political interests driving the agenda of the government.

In the South African context, it can be argued that, despite the problems that have been reported in the past 18 years in terms of accountability and oversight of the intelligence services, the existence of a sound constitutional order and clear legislative provisions

have provided the necessary protection which has seen the intelligence services avoid a total collapse in terms of operations. The constitutional provisions have sought to provide guidance even during the height of such problems, as was the case in Project Avani. The Minister identified a problem (having received a complaint from a member of the public and prominent ANC member and business man), reported the matter to the Inspector General who investigated and provided a report on the basis of which the Director General complained to the constitutional court, with the court making a firm ruling against him and affirming the constitutional right of the president to remove him from his post, owing to the irreparable breakdown in their relationship of trust as a result of the Director General's conduct (Constitutional Court, 2008). In the height of what many regarded as an intelligence crisis or failure, the constitution was there to provide institutional guidance in a manner that sought to preserve the integrity of the intelligence services (Nathan, 2010)

5.3.3 Adequate parliamentary oversight

In seeking to analyse the data presented on this aspect of the study, it may be useful to employ the Triple A model espoused by Aning and Larey (1995). As discussed in the previous chapter, this model looks at the authority, ability and attitude of parliamentary oversight mechanisms as they relate, in this case to the oversight of the intelligence service.

In terms of authority, the documents analysed provided enough evidence to point towards a sound constitutional and legal framework for the concept of oversight to exist in the South African Parliament. That the JSCI is established by the constitution (Section 199, subsection 8) and further that the Intelligence Services Oversight Act provides a further basis for its functions and mandate, provides the 'authority' to the model of oversight. It is also in line with international best practices in most democratic states where the oversight concept is based on a sound constitutional and legal basis.

However, despite this unquestionable authority, it is noteworthy that all but one respondent raised the diminishing and unfortunate status of parliament as a 'failing institution' when it comes to asserting its authority on matters of oversight. Parliament as an institution no longer sees the deployment of senior members amongst the various

parties, who command respect amongst their peers. To this end, the institution has over the last 18 years become less assertive while the executive has become more assertive. One respondent (Respondent D) even went as far as saying the 'executive has no respect for parliament'.

The question that needs to be posed is how this has come about in the last 18 years of freedom and democracy. It has been argued, by some respondents that the current system of proportional representation, while good for our democracy, has had unintended consequences that have impacted negatively on the calibre of the parliamentarians that serve on various committees, including the JSCI. Does this lead to a more partisan approach in the conduct of oversight? It can be argued that to an extent, the role of chairpersons of various committees in terms of liaising and interacting with the Minister responsible for a particular portfolio will determine, in the end, the effectiveness of the oversight the committee exercises. With respect to the JSCI, it is noteworthy that the current Minister of State Security served as the chair of the very same JSCI before being appointed in the executive in 2008 and in 2009 after the elections. Whether or not this has made his relations with the JSCI more effective remains to be seen, when his full term as Minister expires at the end of the current term of the Zuma administration in 2014.

Documentary evidence suggested, however, that in all the ministers responsible for intelligence in the 18 years of democracy, there was not one who seemed to be clashing with his or her chair in the oversight committee, at least not in the overt way the then Minister of Defence and Military Veterans, Minister Lindiwe Sisulu, fought with her former Chairperson of the Defence Portfolio Committee (Daily Maverick, 20 May 2013). The fight between Sisulu and Nyami Booi resulted in the latter losing his job as chair, based on alleged assertions of him being too critical of the member of the executive. Whether this was a question of political dynamics playing out within the institution of parliament is another matter which may require detailed analysis.

In terms of the JSCI's ability to conduct oversight, there are several issues worth noting arising from the interviews. In the first instance, it was noted in Chapter 2 that the intelligence sector has seen a number of developments insofar as the use of technology

is concerned. The advent of newer technological instruments in the field of communications has revolutionised how people communicate and how they share information. Clearly, this has an impact on the manner in which those who collect intelligence do their work but equally so, there are implications for those who are conducting oversight.

This leads to the question of skills and expertise as an important issue on the JSCI. What set of skills does the committee have and does it have the requisite expertise to fully grasp the work of the intelligence services it oversees? From the documentary evidence gathered, there is no indication of a clear, dedicated programme developed to assist members of the JSCI to acquire ICT expertise. Both the legislation and document outlining parliament's oversight model are silent on the issue of specific training in relation to members. The current legislation which provides for oversight does not make it mandatory for members serving on the JSCI to have a particular set of skills and this can be cited as a limitation in terms of empowering members to better understand and be ready for their work. With the advances "in personal computing, the growth of the Internet, the advent of smart phones and the shift in telecommunications to high-speed fibre-optic lines" it is clear that members of the JSCI cannot be left behind on matters that impact on the conduct of their work (Shorrock, 2013, p. 01)

Funding of the research function of the JSCI is another important factor insofar as the skills set of its members is concerned. Despite the unavailability of all documents pertaining to the functioning of the JSCI, it became clear from the interviews conducted that there is no legislative requirement that makes it mandatory for members of this committee to have a set of particular skills that will assist them in their ability to fully grasp the task at hand. It can therefore be argued that while the intelligence sector continues to see advances in the manner in which this work is conducted, particularly on the ICT matters, there is no visible and tangible evidence suggesting that members of the committee are adequately supported to match the skills set available in the sector they are overseeing. This poses a risk that those working on intelligence can hide certain matters from the JSCI and get away with it on the basis of a lack of similar expertise in the committee.

During the investigations, by the JSCI, on the Browse Mole Report, the committee, according to Respondent B (Interview in Cape Town, March 2013) did not fully grasp the technical issues pertaining to this work and had to rely on an outside expert to assist it in understanding the modalities of falsification and fabrication of emails, an expertise solely lacking from within. This demonstrates the need for adequate skills within the committee to fully understand all the modalities of the oversight work that the committee is conducting.

Funding of the JSCI is another matter that contributes to its ability to successfully empower its members in the conduct of its work. Although one could not find detailed financial documents showing how this function is funded, data collected from interviews provides a sneak preview on the ability of the JSCI to take members to international conferences and conduct research on issues central to their role. Respondent B (Interview in Cape Town, March 2013) indicated that one or two members of the committee can attend conferences in a financial year and this limits the ability to effectively facilitate peer learning and sharing of best practices.

The problem of expertise in parliamentary oversight is not limited to South Africa alone. A study conducted by the Democratic Control of Armed Forces (DCAF) in the West African Parliaments in 2011 found that parliaments in the ECOWAS region have weak information and expertise amongst their staff. The skills in the parliamentary staff rarely match those found in government and this is the crux of the problem. “Parliaments in West Africa rely on information emerging from the government, yet these are the institutions they are supposed to oversee. This creates a disadvantageous position for parliamentarians vis-à-vis their counterparts in the executive branch” (DCAF, 2011, p. 212). This study also found that due to lack of funding, proper training and capacity building of members of parliament and their staff is compromised.

Clearly, limitations of this nature do not auger well for a robust system of parliamentary oversight.

The final aspect of the ‘Triple A model’ has to do with the attitude adopted by the JSCI in terms of how it conducts its work. The key question in this regard is whether the

committee has demonstrated clear political will to exercise oversight over the executive and the intelligence services in a manner that provides assurance to the public.

In the first instance, if one looks at how representative the JSCI has been in terms of multi-party representation, one sees a worrying trend develop over the 18 years of democracy. Such a trend reveals that while the constitution has been very clear on the need to develop a non-partisan approach to the work of oversight, smaller parties have not participated fully on the committee and this impacts on the constitutional democracy that is the grain of our society.

Closer analysis of this trend reveals that because of the obligations that one has to satisfy in serving on this committee, smaller parties tend to prioritise other committees as they see no real value in deploying their resources on a committee dealing with intelligence oversight. Respondent B (Interview in Cape Town, March 2013) indicated that linked to this problem is the belief amongst many that serving on such a security committee has no value as one is sworn to secrecy and therefore cannot speak freely about the activities and work of this committee. Linked to this point is the general perception that security and intelligence matters in particular are not popular amongst the electorate and therefore not appealing enough to build one's campaign around in order to secure votes.

This notion seems to contrasts sharply with what obtains in the United States, where Senators who serve on oversight committees will seek to raise security matters that appeal to the electorate when elections approach. In this way, they are able to play into the emotions of the people and appear to be concerned about the security and wellbeing of their constituency and hence raise the prospect of securing enough votes to return to the Senate. Of course this is not hard to see given that as a country, the US has a very high national security consciousness as compared to South Africa and perhaps other countries in Africa and Europe for that matter.

The question of political will is a crucial element in the effectiveness of the oversight model, given that it holds the key to whether parliament will use the tools at its disposal to contribute to deepening the culture of accountability. Party discipline and loyalty has

been raised, by some respondents (A and C) as the cause for ineffective oversight by the JSCI and parliament in general. Again, this appears to be the 'side-effects' of the electoral system of proportional representations in that members of parliament are not seen to be wielding enough power over their fellow party members who sit in the executive.

However, it is noteworthy to indicate that the ANC as a ruling party has tried to instil the concept of an 'activist parliament', calling on their members to adopt a robust and fearless oversight function. Its latest document released in May 2013 titled *Protocol for Good Practice and Conduct* seeks to urge their MP's to adopt the right attitude when conducting oversight. "All ANC public representatives must begin to appreciate that good governance and oversight is not the sole responsibility of the opposition. This means that the bulk of critical, constructive and substantive questions to Members of the Executive should come from ANC MPs with the ultimate aim of assisting our deployees to perform better and achieve our electoral mandate" (African National Congress, 2013).

The extent to which this assertion is put into practice in the JSCI and other committees of parliament is not easy to detect. It seems the party is yet to convince many South Africans of showing strong political will in promoting effective oversight.

5.3.4 Active civilian oversight

In Chapter 2, the concept of 'civilian oversight' was introduced. This concept speaks of the public as playing a crucial role in holding those exercising power to account. However, questions have been raised about the extent to which such an appetite exists in the public domain for security and intelligence matters or are these seen as the exclusive purview of politicians and members of the executive?

The data collected, both from documentary analysis and interviews, suggests that in South Africa, the culture of civil activism in matters of intelligence oversight is still in its infancy. While a lot of public outcry was witnessed between 2011 and 2012 with regards to the issue of the Protection of State Information Bill, this was driven by a concern on issues of corruption more than being perceived as a concern on national security per

se. This confirms the view that while other older democracies have matured to the extent that national security matters are a constant feature of public debates, ours is still more driven from scandals that break out from time to time, with public interest waning immediately thereafter.

Respondent C (Interview in Pretoria, March 2013) raised a critical point which demonstrates this point even further. 'C' noted that during the public hearings on the General Intelligence Laws Amendment Bill, no fewer than four submissions were made, this to a bill which changes the current architecture of the civilian intelligence structures of the country. It can be argued that this 'scandal driven' approach to civilian involvement on oversight of the intelligence is neither desirable nor sustainable. The National Development Plan calls for renewed civil activism in order to sustain the gains of the democratic constitutionalism for a better future of this country. Scandals cannot sustain citizen activism and constitutional accountability suffers in the process.

While the institution of the Office of the Inspector General is meant to provide a window to civilian oversight in the intelligence services through public complaints and related matters, it has not successfully achieved its vision of being a voice that provides public assurance on the work of the civilian intelligence institutions. There could be two reasons why this is so.

In the first instance, the government struggled to find appropriate and skilled incumbents to occupy such an office. According to documentary evidence gathered, the Office only became operational ten years after it was first established. In essence, while we are looking at 18 years of the implementation of the entire oversight model, the concept of the Inspector General is only ten years in operation and this contributes to some of the weaknesses identified earlier on in Chapter 4.

The second issue in relation to lack of effectiveness of this office has to do with questions of independence of the office. The Mathews Commission raised the concern that the office is not independent enough of the executive and that, as a result, it fails to exercise its full constitutional mandate. The Commission argued that the Office of the Inspector General "should be given independent organizational status, allowing it to

receive and manage its budget independently of NIA and affording the Inspector General full control of the resources and activities of the Office. The Inspector General would remain functionally accountable to the JSCI but would be financially and administratively accountable to the Minister for the purposes of the Public Finance Management Act" (Mathews Commission, 2008, p. 124).

Other respondents also raised this matter of independence, with Respondent A (Interview in Cape Town, April 2013) arguing that as far as civil society is concerned, the Office of the Inspector General does not constitute part of civilian oversight.

I would argue that as opposed to independence, which the office requires in order for it to be able to convincingly assure the public that intelligence services are performing in accordance with the constitution, the office needs much more autonomy such that it is able to make and implement its own decisions, without fear or favour. Autonomy would go a long way in ensuring that while the office would be receiving its budget from the executive and would be accountable to parliament, it will be able to fully take charge of its mandate and discharge it knowing full well that it cannot be influenced in any manner or form.

5.4 Implications

5.4.1 Local implications

It has been noted in the foregoing sections that South Africa has a strong constitutional and legislative framework that lays a good basis for the accountability and oversight functions. The legislative framework, as indicated in this section above, is considered a pre-requisite for an effective and efficient system. Oversight and accountability mechanisms must have a legal basis that is in line with international law. In terms of the accountability and oversight of the intelligence services in the past 18 years, data collected suggests that the country has the appropriate institutions in place in terms of executive, judicial, parliamentary, and to an extent, civilian oversight.

In terms of the institutional theory which forms the basis of this study, it can be argued that despite the existence of such institutions, the extent to which their performance can be said to be effective depends on a number of factors emanating from the society

within which these institutions function. Their performance is the function of the historical considerations, which in the case of the transitional arrangements saw the creation of such institutions that drove both the conceptualization and implementation. Most importantly, the behaviour and the rational decisions of the individuals that have managed these institutions of the 18 year period, will ultimately determine the success or lack thereof of such institutions.

Having regard to this, the question then becomes, what are the implications of these observations for South Africa in the next decade and beyond?

It is noted that the current crop of leaders have made a significant contribution in laying the foundation for a culture of accountability and oversight of the intelligence services.

Despite the problems and challenges that have been identified, the prospect for success in the next decade and beyond is positive. However, it can be argued that the success thereof depends on the following three main issues; leadership, common vision and active citizenry.

5.4.1.1 Leadership

South Africa is imbued with capable leaders from across the political and cultural divide. The political ideologies of the various political parties represented in parliament do not differ significantly. The ‘open, equal opportunity society’ of the DA and the ‘non-racial, non-sexist and prosperous South Africa’ of the ANC have a lot in common as broad visions of the two parties, for example. The critical differences come in the policies that each party adopt as a mechanism to achieve its objectives.

Observing the work of the JSCI as a structure that is accountable for oversight of the executive and the intelligence services, one gets the view that all the parties want the same thing: an accountable intelligence service that serves the national interest of the country.

However, in order for South Africa to attain the best possible and highest standards in terms of ensuring the above objective, bold leadership will be required in the period ahead. Such leadership will be expected to raise the bar in terms of convincing and

winning public trust on the functioning and effectiveness of the intelligence services. Such mechanisms will have to go beyond the existing oversight mechanisms and include a broader, institutionalised role for civil society in order to provide better assurance on those exercising overt and covert powers to secure the country.

5.4.1.2 Common and shared vision on intelligence priorities

It has been noted in previous sections of this chapter that public involvement in matters of intelligence oversight has been largely ad hoc and driven by 'scandals' that have been reported. Part of the problem, it is argued, is based on the fact that South Africa has not yet successfully crafted what can be referred to as a shared vision on national interest issues. Put differently, as a country we have not yet defined in bold terms what our national interest is.

The absence of a national security strategy makes matters worse. Such a strategy will help the country understand its key priorities in terms of what needs to be protected and the best possible way of providing such protection in terms of security architecture. This strategy vacuum contributes, it can be argued, to a less effective accountability and oversight function as those who exercise oversight lack the required vision that is so crucial for the conduct of their work.

Given that the public sphere is a heavily contested terrain of competing interests and ideologies, (Peters, 2010), South Africans need to have a sober debate about the policy direction it wishes to take and it needs to ensure that the legislation being developed in the next decade has sufficient safeguards to prevent abuse by those who will exercise the powers.

Going forward, it means South Africa will need to develop a broad and shared vision of issues that constitute national interest so that the country can actively guard those who exercise overt and covert power in pursuit of securing the national interest and national security broadly.

5.4.1.3 Active citizenry

It follows from the foregoing that there can be no shared vision if the citizens of this country have no desire to get involved in matters that affect them beyond the elections.

As the National Development Plan argues, the fate of the local communities of this country depends on the leadership they elect, in the first instance, but goes much further than that. As Duncan (2011) argues, South Africans cannot just accept "unquestioningly that intelligence matters are inherently secret, and therefore lie outside the public domain. Unless these assumptions are challenged and citizens start to demand accountability from these most secretive areas of government, then activism may well revert back to being a dangerous, even life threatening activity" (Duncan, 2011, p. 04). Active citizenry will have a huge implication in how South Africa performs in this field in the next decade and beyond.

5.4.2 Global implications

In Africa, South Africa commands respect amongst the nations of the content. From its struggle days, the ruling party had formed relations with a number of African governments, which relations helped the ANC to set up bases and establish foreign offices during the height of the struggle against apartheid. Following successful democratic elections of 1994, South Africa adopted a foreign policy that recognized the role played by a number of African countries during the dark days of apartheid. Today, South Africa has a number of bilateral and multilateral trade and diplomatic relations with countries across the continent (DIRCO, 2013).

Given the role and the growing influence South Africa has on matters of peace and security on the continent and its participation in the various African Union security structures, it follows that the country's performance on matters of accountability and oversight of the security and intelligence sector in particular, will be of interest to the rest of the continent. This is because South Africa is considered one of the most influential countries in the SADC region and the entire continent in terms of peace and security related matters (African Union, 2013).

Apart from the influence that South Africa has, it also has obligations arising from a number of declarations, treaties and conventions it has signed. These make it obligatory on the part of South Africa to ensure that a legislative framework is in place for institutions supporting accountability and oversight. It follows therefore that any

measures taken by South Africa to review its oversight mechanisms with a view of aligning these with current international trends will reflect highly on the character and demeanour of South Africa amongst its peers on the continent.

The same can be argued for South Africa's standing in the international community. The country has assumed its rightful place amongst the nations of the world and is regarded as a worthy contributor to such structures as the United Nations Security Council. That South Africa has served two terms (2007 & 2011) on this critical security structure in world affairs is an indication of its perceived influence on the global stage.

It follows once again, that the conduct of South Africa's oversight and accountability mechanisms will have implications for its continued participation and influence on the world stage. Various instruments which serve to gauge the global perception of the country's performance will be positively affected by a trajectory that seeks to consolidate gains for an improved culture of accountability and governance.

5.5 Conclusion

Using the analytical framework discussed in Chapter 3, a determination was made as to the extent to which the intelligence model of the intelligence services is relevant and effective in the 18 years of democratic South Africa. A careful consideration and analysis of the data collected was done against the four themes that form part of this analytical tool, namely adequate constitutional provision, institutional safeguards, adequate parliamentary oversight and active citizen oversight.

The findings made in the next chapter are based on this analysis and will also inform the recommendations that this study will make as its contribution to enhancing the effectiveness of the existing oversight and accountability model of the intelligence services.

CHAPTER 6

FINDINGS, RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

The existence of a sound, effective and efficient model of intelligence oversight is an ideal that most democracies the world over strive for. It is an important requirement that goes a long way in providing public assurance that intelligence services, with their use of extra-ordinary measures in conducting their work, do so within the ambit of lawful considerations.

This study has sought to establish whether the current intelligence accountability and oversight model developed post 1994 is still relevant and effective in the 21st century. A number of supplementary questions were posed to help answer this question. These included the nature of challenges in the pillars of oversight with respect to the design and implementation. The role of civil society in an institutionalised framework within the context of promoting accountability and oversight of the intelligence services was also raised as a critical question.

Having adopted the rationale of an explanatory and descriptive approach, in the context of a qualitative study, a methodology consisting of documentary and in-depth interviews was employed to probe these questions further.

In the previous chapter, it was demonstrated, through the analysis of data that the country's accountability and oversight model has a number of strengths that auger well for the constitutional democracy. It was also apparent that there is room for improvement in some of the pillars of the model.

This chapter will present the key findings emanating from the analysis of the previous chapter, coupled with some recommendations that could be considered in ensuring that the limitations identified could be addressed. The recommendations could also speak to areas for further research given that this study was not without its limitations in terms of scope and depth.

6.2 Key findings

6.2.1 Sound legislative framework in place

It was argued, throughout this thesis, that international experience indicates that a prerequisite for effective accountability and oversight mechanisms is the presence of a sound and comprehensive legislative framework. It has been shown that South Africa made great strides in 1) developing a comprehensive White Paper for Intelligence, 2) producing a constitution that is the envy of some states in the world and 3) enacting up to three key intelligence specific pieces of legislation to guide the establishment, management and operation of intelligence services.

The White Paper on Intelligence was a necessary policy framework given that South Africa was making a transition from an apartheid state into a democratic state in which the role and significance of the intelligence service was to change. The White Paper therefore served an important mind-set change for a new intelligence service that was to consist of adversaries under a new government. It is for this reason that the White Paper was credited for introducing a new intelligence philosophy which was to serve as a reference point for the new dispensation.

The new philosophy of intelligence had an emphasis on defining a new vision that is rooted in a human rights approach (O'Brien, 1996). To this end, the White Paper provided clarity on the need for legislative control of the intelligence institutions, coupled with parliamentary oversight and civilian oversight by an inspector general;

> *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.*

Source: White Paper on Intelligence, 1994 (p 6)

It is the finding of this study that indeed a clear, sound and express legislative environment exists in South Africa and further that this framework lays a good foundation for an accountability and oversight model that has great potential to be effective and efficient. Although the South African government had announced a review of the White Paper, given the same reasons advanced for the review of the oversight model on accountability, it stands to reason that its existence created the bedrock for the legislation that was to follow, which legislation is credited for providing a sound framework for the oversight model. Given however, the effect of time and the changes in the manner intelligence is conducted 18 years later, there is a need to amend this legislation to provide for legal certainty on areas considered as providing a lacuna in terms of advancing a number of related issues of management and oversight.

6.2.2 Appropriate design of the model

One of the key issues raised as part of this study was the extent to which limitations on the effectiveness and efficiency of the oversight model are a function of either design or implementation or both. Having regard to the analysis of data as presented in the previous chapter, it can be argued that the design of the model has no discernable limitations and is in fact in line with international best practices.

It was shown in the previous chapter that limitations that exist in the model are a function of the implementation that occurs by various policy actors, within a context of power and ideological contestations.

In essence, the extent to which the model can improve on its effectiveness and efficiency depends much on the incumbents that operate in the institutions established by legislative provisions.

However, the model can benefit with amendments that introduce a more proactive positioning of the pillars so that a hybrid design that includes both proactive and reactive oversight is developed. Such an approach will help improve the extent to which problems can be identified before they blow up to what many refer to as intelligence failures.

6.2.3 Inadequate skills set on parliamentary oversight structures

As noted in Chapter 2, a number of mainly technological changes have occurred in the past 18 years. These advances impacted on the way in which those who conduct intelligence do their work.

It is the finding of this study that the parliamentary pillar of the oversight model lacks a dedicated programme of skilling of members of the JSCI so that they are able to keep abreast with these technological advances. Such a programme will result in members' better understanding the work they are doing in overseeing the work of the intelligence officers. Such a lack of training programme has the potential to undermine the mandate of the JSCI if no expertise exists within the committee to critically analyse and understand the impact of technological advancements. That the committee had to rely on outside experts in investigating that infamous 'hoax email' case in the mid 2000s is a clear indication of the challenge that beset it.

The down side of the shortage of expertise in the committee is that in the conduct of its work, it tends to rely on the very same agency for which it must exercise oversight on. Such an arrangement has the potential to undermine the oversight work of the committee.

6.2.4 Policy gaps

Despite the existence of numerous attempts by various Intelligence Ministers in the last 18 years, South Africa still does not have a comprehensive National Security Strategy. Such a strategy is important not only for providing an overall vision on how national security issues are to be defined, managed and mitigated but it is important in that it also provides those who exercise oversight with a broad roadmap in terms of the issues that require oversight. Without such a roadmap, oversight lacks its own vision on the

issues that must pre-occupy the committee resulting in disjointed and at times ineffective oversight.

It is important to note that the current Minister of State Security announced earlier this year in Parliament that the work to produce the first National Security Strategy for South Africa is at an advanced stage and will be tabled before Cabinet before making its way to Parliament for processing. It remains to be seen how the public will respond when public inputs are called upon and public hearings are scheduled on an important piece of policy for the security sector.

6.2.5 Civilian oversight not institutionalized

Perhaps one of the important findings of this study is the issue of the lack of an institutionalized civilian oversight mechanism in the current oversight model. The absence of such impacts on the ability of the public to 1) have an appetite for national security issues and 2) have the desire and will to make informed contributions driven by the passion to ensure that the country is safe and secure at all times not just when 'scandals' are reported.

The lack of an institutionalised framework for civilian oversight feeds into the perception that "intelligence matters are inherently secret and therefore lie outside the public domain" (Duncan, 2011, p. 02). Such an assumption is not in line with international best practice where the public appears to be demanding better accountability on matters that affect their security.

6.3 Recommendations

The following recommendations are made as part of the effort to enrich the debate around improving accountability and oversight of the intelligence dispensation. They are also made as a contribution to the body of knowledge pertaining to the security and intelligence sector and could also serve as a basis for further research.

6.3.1 Amend legislation to provide for an institutionalized framework for civilian oversight

As part of providing legal certainty to the institutionalized civilian oversight, amendments to the current intelligence legislation may be necessary. Legal certainty expressed through legislation, as opposed to regulations or policy, would go a long way to demonstrate government's commitment to the notion of balancing the intrinsic conflict between secrecy, a necessary precondition for intelligence functions, and accountability. This will augur well for the promotion of the concept of democratic constitutionalism.

6.3.2 Introduce mandatory training programs for members of the JSCI

In order to further empower the members of the JSCI to conduct their work with confidence, it is recommended that mandatory training be introduced to focus on developing expertise in such areas as ICT and technology. This will have the benefit of the committee having in-house specialized skills and reduce its dependability on the agencies it is meant to exercise oversight on. Such independence will further bolster its ability to conduct its work without fear, favour or prejudice.

Linked to this point is a further recommendation to increase the research capacity of the committee so that it is able to keep abreast with international developments and best practices. In this regard, Parliament could do more to look at the funding model and ensure that for specialized oversight structures that operate within a framework that is different from others, additional support is provided to ensure higher levels of success.

Given that the JSCI is somewhat dependent on the knowledge, experience and quality of work done by the Office of the Inspector-General, a further recommendation could be made in respect of the training of personnel appointed within the OIGI to conduct reviews and oversight of intelligence and counterintelligence activities.

6.3.3 Close policy prevailing policy gaps

The role played by policy in directing the conduct of both intelligence gathering and oversight cannot be over emphasized. Intelligence is by its nature a highly regulated sector and gaps in policy adversely affect the effectiveness and efficiency of the services.

In this regard, it is recommended that work to review the 1995 White Paper on Intelligence, as well as the development of the long outstanding National Security Strategy, be completed as a matter of urgency. These policy documents will further consolidate a common philosophy and vision for intelligence conduct so that the public and relevant stakeholders move from the same premise, united in the pursuit of ensuring the attainment of national security. Equally so, the oversight structures will have a common vision of what it is to oversee, guided by these policy documents.

The intelligence mandate should, as part of the above-mentioned process also be reviewed to ensure that it is sufficiently clear and not open for interpretation. The ambiguity of its mandate directly impacts on the directional efficacy thereof pertaining to accountability and oversight. This inherent dichotomous nature of its current mandate as provided for in act 39 of 1994 disallows an adequate positioning regarding the terms of reference. This, in addition to the absence of a clear definition of threats to national security results in incoherent interpretations of it and creates problems in the unpacking of priorities and targeting at a practical level.

A more unambiguous definition of security threats and a more narrow/traditional approach to the interpretation of the Agency's mandate should be adopted that is aligned with international practice such as the MI5 in Britain and the Canadian Security Intelligence Service CSIS.

6.3.4 Institutionalize civilian oversight

Having argued strongly for an institutionalized framework for civilian oversight and having made a recommendation for legislative amendments to provide for same, it is further recommended that the following practical steps be adopted, as part of policy and to amend regulations:

- Increase the engagement with the public through publishing more documents such as the annual report of the intelligence structures. Publishing a public version of the National Intelligence Estimates, which does not compromise national security, could facilitate a public participation culture in security and intelligence work so that the public can volunteer more information. In doing so, however, careful consideration should be given to guard against the inherent risk of a counter intelligence threat that could be posed by adversaries of the state.
- Publish reports on public complaints investigated by the Inspector General so that those against whom the complaint was made can have the opportunity to publicly redeem themselves if the reports have no substantial findings against them. Such an undertaking will further have the effect of promoting education and learning such that the public has a better grounding on intelligence issues. Furthermore, such an undertaking will deal decisively with a phenomenon where politicians will make wild accusations in the public domain without having the requisite facts to back their claims. When findings are made after an investigation, politicians will be shamed for making unsubstantiated and wild accusations on intelligence structures and this could serve as a deterrent in the politicization of intelligence agencies.

6.4 Conclusion

Accountability and oversight of the intelligence sector is a complex phenomenon that requires political will on the part of the government and a comprehensive constitutional and legal framework that serves as a bedrock for the attainment of effectiveness and efficiency.

Old democracies the world over still grapple with the inherent contradictions of ensuring an accountable intelligence sector which operates with justifiable secrecy in a democratic dispensation. The international trend of growing civil demands for openness and transparency further complicates this equation.

As has been mentioned here before, oversight serves as one of the critical measures in ensuring that intelligence services operate within the framework of the law and that they do not abuse their powers for personal or political gain

It has been the contention of this thesis that the lack of an institutionalized mechanism for civil oversight is the major limitation of this current oversight model. The findings of this study coupled with the recommendations made in the latter part of this chapter will go a long way in ensuring that the South Africa's accountability and oversight model remains relevant in the 21st century and does afford space for adequate civil society accountability.

Bibliography

African National Congress. (2013). *Protocol for Good Practice.* Cape Town.The Congress

African Union. (2013, May 25). *AU.ORG*. Retrieved May 25, 2013, from www.au.org: http:/www.au.int.en

Aldrich, R. (2009). Global Intelligence Coopration versus Accountability: New Facets to an Old Problem. *Intelligence and National Security, 24*(1), 26-56.

ANC. (2007). *52nd National Conference Resolutions.* Johannesburg: ANC.

Aning, K., & Larey, E. (1995). Parliamentary Oversight of the Security Sector: Lessons from Ghana. *Human Rights Quarterly*, 17(3), 556-573

Bang, H., & Esmark, A. (2009). Good governance in network society: reconfiguring the political from politics to policy. *Administrative Theory and Praxis, 31(1)*, 7-37.

Booysen, S. (2006). *Public policy-making. Government & Politics in South Africa.* (A. &. Venter, Ed.) Pretoria: Van Schaik.

Booysen, S. (2012). *PADM5132-3 Background Document.* Parktown: Wits Press.

Booysen, S. (2012). *Research process and research with special reference to the research in the MMPP.* Johannesburg: Wits University.

Born, H., & Caparini, M. (2007). *Democratic Control of Intelligence Services: Containing Rogue Elephants.* Farnham: Ashgate.

Born, H., & Leigh, I. (2005). Making Intelligence Accountable: Legal Standards & Best Practice for Oversight of Intelligence Agencies. *Project Report available at http://www.dcaf.ch/DCAF-Migration/kms*

Born, H., & Leigh, I. (2007). Democratic Accountability of Intelligence Services. *Geneva Centre for Democratic Control of Armed Forces . Project Report available at http://www.dcaf.ch/DCAF-Migration/kms*

Borzel, T. (1998). Organising Babylon-on the different conceptions of policy networks. *Public Administration, 76*(2), 253-273

Bruneau, T. (2001). Controlling Intelligence in New Democracies. *International Journal of INtelligence and CounterIntelligence, 14*(3), 323-341.

Constitution of RSA. (1996). *Constitution of the Republic Of South Africa.* Pretoria: RSA Government

Constitutional Court. (2008). *Masetlha v. President of the Republic of South Africa and another.* Johannesburg: Constititional Court of South Africa.

Creswell, J. (2009.). Research Design: Qulaitative, Quantitative and Mixed Methods Approahces, Los Angeles. Sage

Cwele, S. (2012). *Budget Vote.* Pretoria: Department of State Secuirty.

Daily Maverick. (2013, May 20). *Defence force's veil of secrecy: a threat to SA democracy*.

DCAF. (2003). *Intelligence Practice and Democractic Oversight-A Practitioner's view.* Geneva: Centre for the Democratic Control of Armed Forces.

DCAF. (2011). *Parliamentary Oversight of the Security Sector: ECOWAS Parliament Guid for West African Parliamentarians.* Geneva: DCAF.

De Vos, A. (1998). *Research at grass roots: A primer for the caring professions.* Pretoria: Van Schaik Academic.

Department of State Security. (2011). *Restructuring the Intelligence Dispensation.* Pretoria: Department of State Secuirty.

DIRCO. (2013, April 20). *Department of International Relations and Cooperation*. Retrieved April 20, 2013, from www.dirco.gov.za: http://www.dirco.gov.za

Dlomo, D. (2004). *Analysis of Parlimanentary Intelligence Oversight with specific reference to the Joint Standing Committee on Intelligence.* Pretoria: University of Pretoria.

Duncan, J. (2011, October 23). *South African Civil Society Information Service.* Retrieved Janaury 13, 2013, from www.sacsis.org.za: http://sacsis.org.za/site/article/771.1

Ebo, A. (2008). The challenges and opportunities of security sector reform in post conflic Liberia. *DCAF Occasional Paper No9*, 1-88. Geneva. DCAF

European Commission for Democracy Through Law. (2007). *Report on the Democratic Oversight of the Secuirty Services.* Strasbourg: Council of Europe.

Fazel, I. (2009). Who shall guard the guards? (L. Hutton, Ed.) *To spy or not to spy? Intelligence and democracy in South Africa*(157), pp. 31-42.

Government of South Africa. (1994). *White Paper on Intelligence.* Pretoria: Government Printers.

Halchin, L., & Kaiser, F. (2012). *Congressional Oversight of Intelligence: Current Structure and Alternatives.* Washington: Congressional Research Service.

Hall, P., & Taylor, R. (1996). Political Science and the Three New Institutionalisms. *Political Studies*, 44(5), 936-957

Hannah, H., O"Brien, K., & Rathmell, A. (2005). *Intelligence and Security Legislation for Security Sector Reform.* Cambridge: Rand Europe.

Hryniewicz, D. (2011). Civilian oversight as a public good:democratic policing, civilian oversight and the social. *Contemporary Justice Review, 14*(1), 77-83.

Hutton, L. (2007). *Looking beneath the cloak: An analysis of governance in South* Africa. Institute of Security Studies, 1-22.

Inspector General . (2006). *Executive Summary of the Final Report on the Findings of an Investigation into the Legality of Surveillance Operations Carried by NIA on Mr S Macozoma.* Pretoria: Office of the Inspector General of Intelligence.

Institute of Security Studies. (2010). *Security Sector in Southern Africa.* (T. Musavengana, & C. Hendricks, Eds.) Pretoria: Institute of Security Studies.

Jansen Van Rensburg, P. (2006). *Covert action and its contemporary status in the US and RSA.* Pretoria: University of Pretoria.

Liebenberg, I. (1999). *Civil control over the security institutions in South Africa: Suggestions for the future and notes on replicating the experience in Africa*. Moscow: Russian Academy of Sciences.

Mail and Guardian. (2009, 01 17). Retrieved February 18, 2013, from www.mg.co.za/masetlha.

Mantashe, G. (2013). *Parties, not people, earn a mandate.* Business Day.

March, J., & Olsen, J. (1984). The New Institutionalism: Organizational Factors in Political Life. *American Political Science Review, 78*(3), 734-749.

Mason, J. (2002). *Qualitative Researching.* London: Sage.

Mathews Commission. (2008). *Intelligence in a Constitutional Democracy.* Pretoria: Mathews Commission.

Mogalakwe, M. (2006). The use of documentary research methds in social research. *African Sociological Review, 10*(1), 221-230.

Musavengana, T. (2010). *Security Sector in Southern Africa.* ISS Monograph.Pretoria: Institute for Security Studies

Nathan, L. (2010). Intelligence bound: the South African constitution and intelligence services. *International Affairs*, 86(1), 195-210

Nathan, L. (2010). Lighting up the intelligence community: An agenda for intelligence reform in South Africa. *African Security Review*, 18(1),91-104.

National Development Plan. (2012). *National Development Plan.* Pretoria: Government Printers

Neuman, W. (2011). *Social Research Methods. Qualitative and Quantitative Approaches.* Boston: Pearson.

Nhlanhla, J. (1992). *The Modalities of Combining the SATBVC and Liberation Movements Intelligence Services in a Changing South Africa. Strategic Review for Southern Africa: Security and Intelligence in a Post Apartheid South Africa*, XIC(2), 66-77. Pretoria; University of Pretoria

O'Brien, K. (1996). South Africa's Evolving Intelligence and Security Structures. *The International Journal of Intelligence and Counterintelligence*, 9(2),187-232

Office of the Inspector General of Intelligence. (2011, 02). *www.oigi.gov.za*. Retrieved 10 20, 2013, from www.oigi.gov.za: http://www.oigi.gov.za

Peters, G. (2000). Institutional Theory: Problems and Prospects. *Political Science Series*, 5-15.Available at: hhtp://ssoar.inp/ssoar/handle/document/24657 accessed on 03 March 2012

Pierre, J., Peters, B., & Stoker, G. (2008). *Debating Institutionalism.* Manchester: University Press.

RSA Parliament. (2009). *Oversight and Accountability Model: Asserting Parliament's Oversight Role in Enhancing Democracy.* Cape Town: Government Printers.

savingrhinos.org. (2012, December 12). Retrieved from www.savingrhinos.org: http://savingrhinos.org/rhino-extinction-crisis

Schreier, F., & Stocker, J. (2006). *Contemporary Challenges for the Intelligence Community.* Geneva: Geneva Centre for Democratic Control of Armed Forces.

Security Cluster, Government of South Africa. (2009). *Review of the Intelligence Community.* Pretoria: Government Printers

Shorrock, T. (2013, June 17). *Put the Spies Back Under One Roof*. New York, USA.

Silverman, D. (2010). *Doing Qualitative Research: A practical handbook* (3rd ed.). London: SAGE.

Suddaby, R. (2010). Challenges for Institutional Theory. *Journal of Management Inquiry*, 19(1), 14-20

The Citizen. (2013, April). *Disgruntled MK veterans forms breakaway party*. Johannesburg: The Citizen

Wills, A. (2010). *Understanding Intelligence Oversight.* Geneva: DCAF.

Yin, R. (2011). *Qualitative Research from Start to Finish.* New York: The Guilford Press.

Zagart, A., & Quinn, J. (2010). Congressional Intelligence Oversight: The Electoral Disconnection. *Intelligence and National Security, 25*(6), 744-766.

APPENDICES

Appendix 1: List of government acts, policies and reports

Cwele, S. (2012). *Budget Vote.* Pretoria: Department of State Secuirty

Department of State Security (2011). *Restructuring the Intelligence Dispensation.* Pretoria: Department of State Secuirty

General Intelligence Laws Amendment Bill (2011)

Government of South Africa. (1994). *White Paper on Intelligence.* Pretoria: Governmnet Printers

Intelligence Services Act, 65 of 2002, Act 65 of 2002

Intelligence Services Oversight Act, Act 40 of 1994

Mathews Commission. (2008). *Intelligence in a Constitutional Democracy.* Pretoria: Mathews Commission.

National Development Plan. (2012). *National Development Plan.* Pretoria: Government of RSA.

National Strategic Intelligence Act, Act 39 of 1994

Protection of State Information Bill (2010)

RSA Parliament. (2009). *Oversight and Accountability Model: Asserting Parliament's Oversight Role in Enhancing Democracy.* Cape Town: RSA Parliament

Security Cluster, Government of South Africa. (2009). *Review of the Intelligence Community.* Pretoria.

Appendix 2: List of interview questions

RESEARCH QUESTION:

> *Is the South African model on accountability and oversight of intelligence services still effective and relevant 18 years later?*

Question 1

What are the challenges in the pillars of the oversight model in respect to design and implementation and what are the implications of these in promoting constitutional accountability?

Question 2

What is the nature of the relationship between executive and parliamentary oversight mechanism?

Question 3

What have been the key challenges of accountability, control and oversight of the services in the last 18 years of our democratic dispensation?

Question 4

How have changes in intelligence community- with respect to mandates, functions and technological advances- impacted on the mechanisms of oversight?

Question 5

What are some of the key lessons learnt, internationally, on institutionalizing the role of civil society in strengthening accountability and oversight of the services?