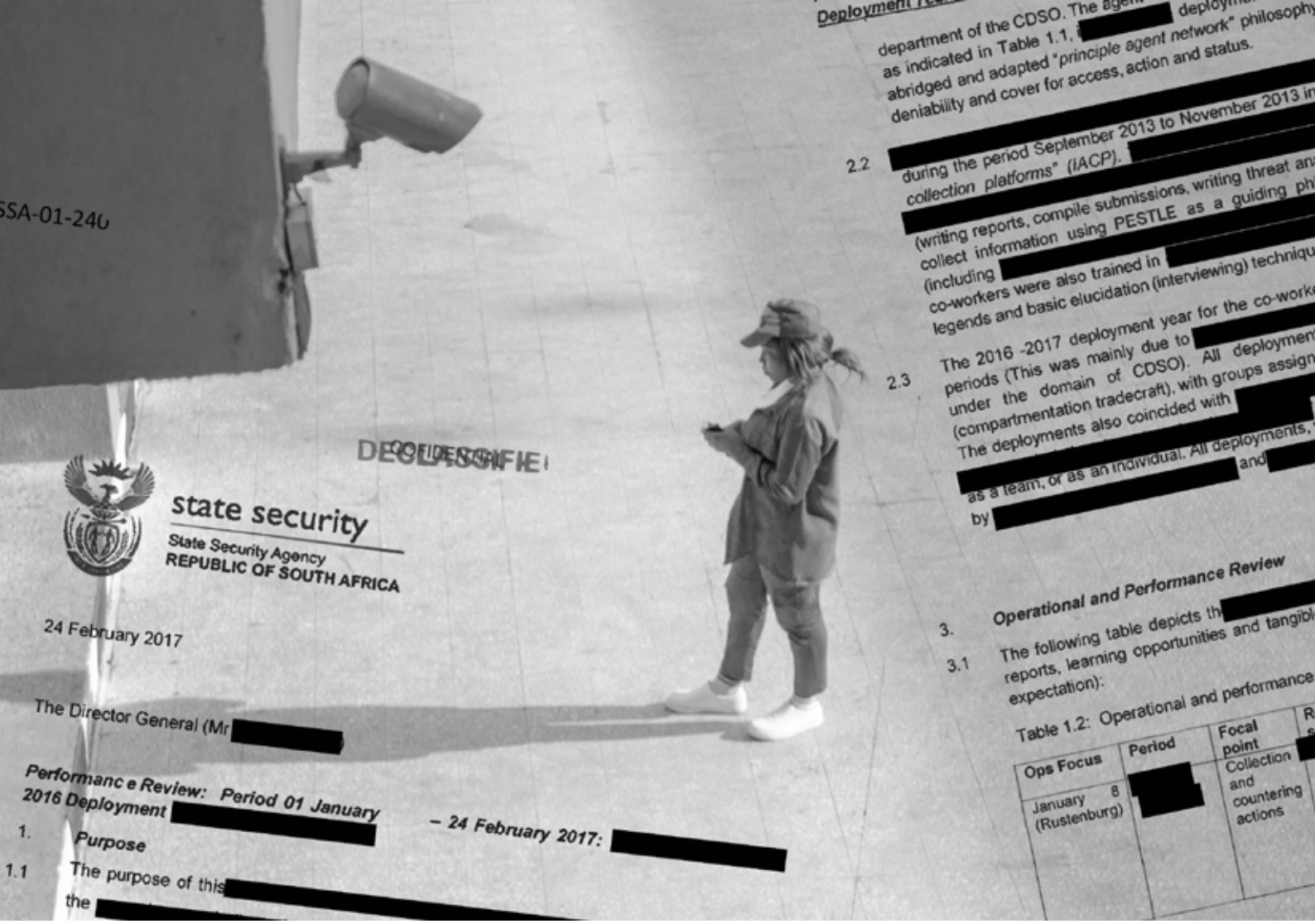

SECRET FUNDING AND THE STATE SECURITY AGENCY: HOLDING INTELLIGENCE SERVICES ACCOUNTABLE

Recommended changes to funding and accountability mechanisms for South Africa's state intelligence services based on international trends

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Intelwatch and the Media Policy and Democracy Project

SECRET FUNDING AND THE STATE SECURITY AGENCY: HOLDING INTELLIGENCE SERVICES ACCOUNTABLE

This report examines the shortcomings in the legislation that regulates how South Africa's State Security Agency funds its secret operations and functions, and puts forward recommendations for changes to funding and accountability mechanisms based on international trends.

Intelwatch & The Media Policy and Democracy Project

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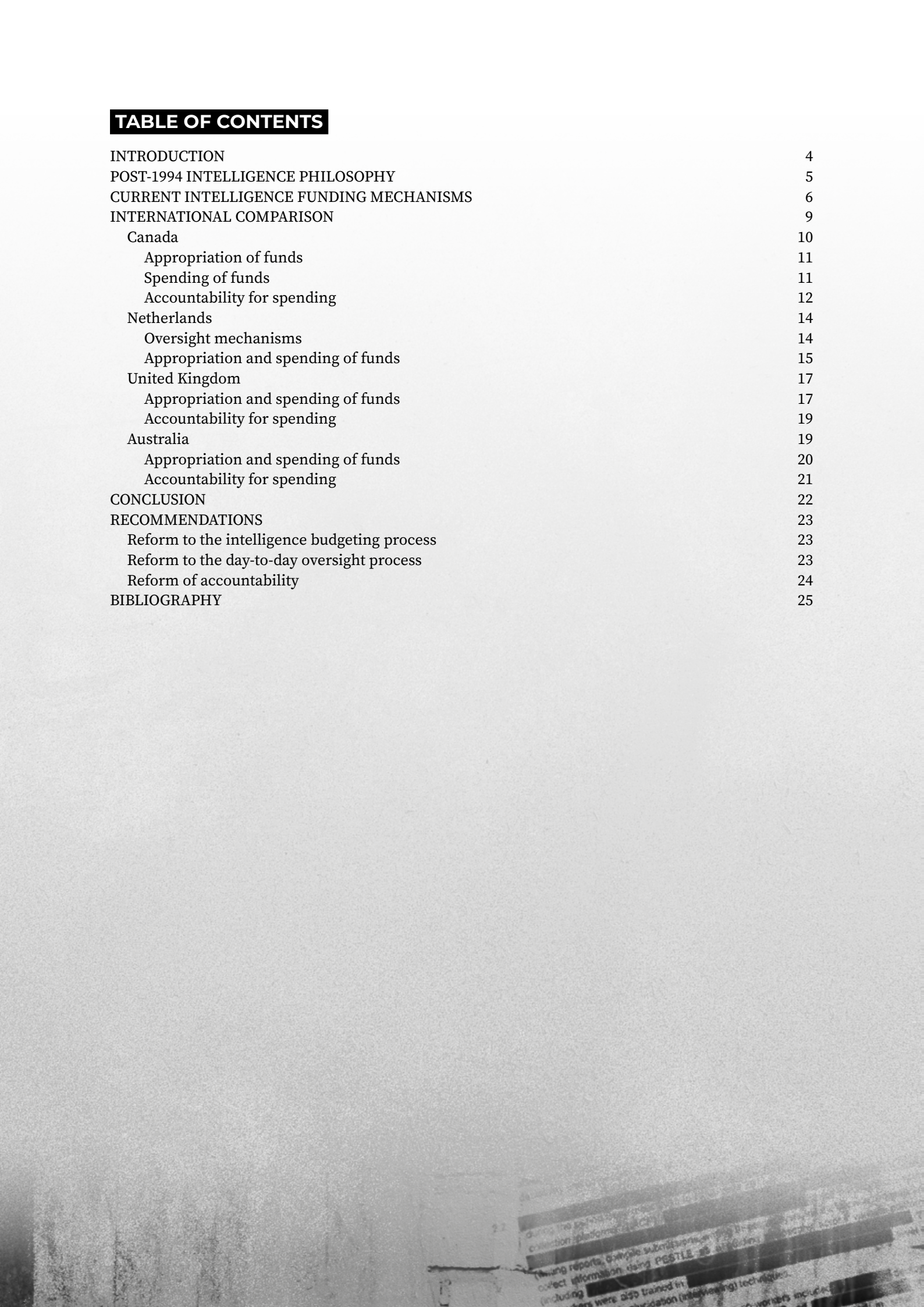

INTRODUCTION

1. The State Security Agency ("SSA") and the South African Police Service ("SAPS") may draw on a Secret Services Account governed in terms of Apartheid-era legislation. The Secret Services Account was established by the Secret Services Act 56 of 1978. The Act remains in force. It was last amended in 1994, although significant amendments were made through the Secret Services Account Amendment Act 142 of 1992.

2. Similarly, and perhaps more alarming, the Security Services Special Account Act 81 of 1969 also remains in force. The Act established the Security Services Special Account on which the SSA[1] may draw for its work. This Act was last amended in 2013. These amendments appear to have expanded the ease with which funds from the account may be spent by the SSA at the whim of the Director-General ("DG") in that:

   2.1. Section 2, amended in 2013, allows funds in the account to be used for just about any function of the SSA;

   2.2. Section 3 places the account under the exclusive control of the DG of the SSA; and

   2.3. Section 6 allows for unexpended balances in the account to be invested.

3. The Secret Services Act similarly, and alarmingly, allows for unexpended balances from the account to be transferred as a credit to the following year,[2] meaning the unexpended balances may be kept by the SSA without the need to ask for the funds to be rolled over in the Finance Minister's adjustments budget in terms of s30(2)(g) of the Public Finance Management Act ("PFMA").[3]

4. Section 2(2)(a) of the Secret Services Act allows for an amount to be transferred from the Secret Services Account into the Security Services Special Account at the request of the President or Minister. Such amounts are deemed to have been appropriated by parliament, as provided for in s2(2)(b) of the Act. This allows for funds in the Secret Services Account (which is under the control of the Minister of Finance in terms of s2(1) of the Act), to be transferred into the Security Services Special Account (which is under the exclusive control of the DG of the SSA) at the whim of the executive.

5. The net result of this legislation, is reduced oversight and accountability of the SSA's expenditures. While the PFMA has been praised for promoting accountability and transparency in public spending, the existence of the Secret Services Account Act and Security Services Special Account Act as they currently stand, allows the SSA to bypass parliament and the controls contained in the PFMA.

6. The purpose of this paper is to investigate alternatives to the Secret Services Account and Security Services Special Account such that there may be greater transparency and accountability in the funding for the SSA, in accordance with the intelligence philosophy of post-Apartheid South Africa. Ultimately, it will be argued that the Secret Services Act and the Security Services Special Account Act should be repealed. In their place, the SSA should be subject to the financial controls in the PFMA as well as further oversight appropriate to the SSA's work.

1 As well as the Office for Interception Centres (established in terms of the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002).
2 Section 2A of the Secret Services Act.
3 Act 1 of 1999.

POST-1994 INTELLIGENCE PHILOSOPHY

7. The Intelligence White Paper published in 1994 ("the White Paper"), expounded on the new approach to intelligence in post-1994 South Africa.[4] According to the White Paper, the emphasis of security going forward should be on security for all people of South Africa, protection of their quality of life, the promotion of democracy, and "an internal and external climate of peace and stability".

8. "National security" is defined in the White Paper as the maintenance and promotion of peace, stability, development and progress.[5] This reflects the principles espoused in s198 of the Constitution, namely that "national security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want to seek a better life".

9. In the context of the current discussion, the mission of the South African intelligence community espoused in the White Paper bears mentioning in its entirety:

   "In the South African context the mission of the intelligence community is to provide evaluated information with the following responsibilities in mind:

   - the safeguarding of the Constitution;
   - the upholding of the individual rights enunciated in the chapter on Fundamental Rights (the Bill of Rights) contained in the Constitution;
   - the promotion of the interrelated elements of security, stability, cooperation and development, both within South Africa and in relation to Southern Africa;
   - the achievement of national prosperity whilst making an active contribution to global peace and other globally defined priorities for the well-being of humankind; and
   - the promotion of South Africa's ability to face foreign threats and to enhance its competitiveness in a dynamic world."[6]

10. These principles were acknowledged in Chief Justice Raymond Zondo's Report from the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State ("State Capture Commission"). The Chief Justice further found that during the state capture years, those in control of the SSA "drifted away from the guidelines and principles of the Intelligence White Paper that were reflected in the Constitution".[7]

11. The Honourable Chief Justice further found that the capture of the SSA contributed toward the overall project of state capture. In doing so, he acknowledged evidence of the Inspector-General of Intelligence ("IGI") that funds had been "looted" from the Secret Service Account by "officials".[8] Furthermore, the Chief Justice found that such looting was allowed to continue because the Auditor-General ("AG") could not execute its duties as it should have. He also found that there seems to have been an arrangement between the AG and the SSA such that the AG would provide a qualified audit report in respect of the Secret Services Account. Ultimately, this enabled large amounts of money to be siphoned through the Secret Services Account for corrupt purposes.[9]

12. These findings in the State Capture Report were, however, not unique. The issue of secret funding for intelligence was flagged by the Truth and Reconciliation Commission ("TRC") in its report, having received copies of the reports of the Advisory Committee on Special Secret Projects, chaired

4 Available at https://www.gov.za/documents/intelligence-white-paper#philosopy .
5 Intelligence White Paper para 3.3.
6 Intelligence White Paper para 3.2.4.
7 Judicial Commission of Inquiry into State Capture Report Part 5 Vol 1 para 942 at p 354.
8 Judicial Commission of Inquiry into State Capture Report Part 5 Vol 1 para 585 at p. 22.
9 Judicial Commission of Inquiry into State Capture Report Part 5 Vol 1 para 939 at p. 535.

by Professor Ellison Kahn, as well the Secret Services Evaluation Committee, chaired by Mr Amie Venter at the time. These reports were prepared for the President's office and shared with the TRC on 16 October 1996.[10] The TRC found that secret funding was used during the Apartheid era "to promote a political climate that led directly and indirectly to gross human rights violations".[11] Furthermore, the TRC had raised concern around the inadequate auditing and administration of secret services funding.[12]

13. The Matthews Commission, established in 2008, similarly found that the Secret Services Act and the Security Services Special Account Act were relics of the Apartheid era and should be repealed.[13] In particular, the Commission stated that "[t]he Security Services Special Account Act of 1969 and the Secret Services Act of 1978, on the other hand, are anachronistic relics of the murky business of covert security funding in the Apartheid era".[14]

14. In the more recent High Level Review Panel ("HLRP") Report of 2018, similar findings were made. While the HLRP acknowledged that its mandate did not include a detailed review of the policies and prescripts governing the SSA, the HLRP found that the Secret Services Act was an Apartheid-era piece of legislation and that it should be repealed and replaced.[15]

15. It should be noted that the HLRP also found that the problem was not so much with the prescripts governing the SSA, but rather with the blatant disregard for them.[16]This can be seen by the lack of proper auditing of the SSA accounts by the Auditor-General (provided for in both the Secret Services Act and the Security Services Special Account Act), as well the non-functioning of the Secret Services Evaluation Committee, ostensibly established by s3A of the Secret Services Act, as amended in 1992 and 1993. The HLRP and the Matthews Commission both found that the Evaluation Committee did not appear to exist.[17]Despite the decade that separated the Matthews Commission and HLRP, nothing had been done to remedy the situation.

16. Therefore, while the South African secret services stem from "murky" beginnings in the Apartheid era, the philosophy espoused in the Intelligence White Paper and the Constitution is consistent with human rights discourse and a democratic society. That said, the continued existence of the Secret Services Act and Security Services Special Account Act have enabled the murkiness of past intelligence practices to continue to the present day, and have contributed toward state capture itself. It is, therefore, high time that these laws are repealed and replaced with a funding system for the intelligence services that is more appropriate for a constitutional democracy, and in line with the values espoused in the Constitution and the White Paper.

CURRENT INTELLIGENCE FUNDING MECHANISMS

17. While the Secret Services Act and the Security Services Special Account Act provide for specific accounts on which the intelligence services may draw, this is not the whole picture of intelligence funding in South Africa. In order to answer the question of what mechanisms should replace the secret accounts, we need to consider the accountability mechanisms currently in place regarding funding for intelligence and evaluate their sufficiency as well.

10 Truth and Reconciliation Commission ("TRC") Report Volume 2, Chapter 6, p. 524.
11 TRC Report Volume 2, Chapter 6, p. 541.
12 TRC Report Volume 2, Chapter 6, pp. 541-542.
13 Intelligence in a Constitutional Democracy: Final Report to the Minister of Intelligence Services, the Honourable Mr Ronnie Kasrils, MP, 10 September 2008 ("Matthews Commission") para 10.8 at p. 231.
14 Matthews Commission Report para 10.2.2 at p. 221.
15 High Level Review Panel ("HLRP") Report para 4.3.4 p. 21.; para 8.5 (k) at p. 59.
16 HLRP Report para 1 at p. 68.
17 Matthews Commission Report para 10.2.1 at p. 219; HLRP Report para 4.3.4 at p. 21.

18. Broadly speaking, funding and accountability mechanisms can be divided into three categories:

18.1. *Appropriation of funds for intelligence*

This question covers how funds are allocated to the intelligence services, who decides on that funding and what information they have access to in making that decision.

18.2. *Spending of funds*

This question covers how intelligence funds are spent on a day-to-day basis: who authorises the activities of the SSA and what oversight mechanisms exist to monitor which projects are funded, and how.

18.3. *Accountability for spending*

This question covers accountability for the spending of funds by the SSA after they have been spent. This includes audit mechanisms as well as reporting mechanisms, including how much detail is contained in these reports and how much information oversight bodies have access to.

19. At present, South Africa has some existing mechanisms that can be utilised to ensure accountability

20. In the first stage of accountability, South Africa already has a system of departmental budgets being debated and approved by parliament. The problem with the current system is that parliament is provided with insufficient information to be able to debate the SSA's budget effectively. As was pointed out by the Matthews Commission: "To put the matter graphically: whereas the estimate of national expenditure for the Department of Correctional Services runs to 20 pages of figures and explanations, the budget vote for [security services] is limited to a single line."[18]

21. The Joint Standing Committee on Intelligence ("JSCI") currently provides some oversight at the first stage in that the budgets and financial reports for the SSA are reviewed by them. However, as pointed out by the Matthews Commission, the documents themselves are confidential and are not presented to parliament. Therefore, "according to the National Treasury, the intelligence services are not directly accountable to Parliament for their budgets and spending".[19]

22. The JSCI's role is therefore more effective in the third stage of accountability: namely, that they are able to review the expenditure of the SSA after the fact. However, as was found by the HLRP as well as the State Capture Commission, the JSCI has been ineffective in the state capture years, for various reasons.[20] The JSCI was found to have failed in its role at the third stage of accountability during these years by not acting on the Inspector-General's reports nor on the briefing given to them by Mzuvukile Jeff Maqetuka. In doing so, the Chief Justice found that parliament contributed to state capture.[21]

23. The JSCI is governed by the Intelligence Services Oversight Act 40 of 1994, which provides that the Committee shall have access to the AG's report on the SSA and the report of the Evaluation Committee, among others.[22] The JSCI is also to consider and report on the appropriation of revenue or monies for the functions of the SSA.[23] However, one can immediately see that the JSCI may be hampered by restrictions on access to SSA documents contained in s4(2) of the Act. Section 4(1) of the Act also limits the Committee's access to documents to only those that are "necessary" for the performance of its functions. In the context, the party who determines which documents are "necessary" could only be the SSA itself. Therefore, the existing legislation provides that crucial information may be withheld from the JSCI simply because the DG of the SSA deems it to be unnecessary.

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18 Matthews Commission Report para 10.3 at p. 222.
19 Matthews Commission Report para 10.3 at p. 222.
20 HLRP Report para 13.4.3 at p. 97; Judicial Commission of Inquiry into State Capture Report Part 5 Vol 1 para 913-915 at pp. 345-346.
21 Judicial Commission of Inquiry into State Capture Report Part 5 Vol 1 para 916 at p. 346.
22 Section 3(a).
23 Section 3(l).

24. The Intelligence Services Oversight Act also provides for the Office of the Inspector-General of Intelligence ("IGI"). The functions of the IGI are, among others, to monitor compliance of the SSA with the Constitution and applicable laws and policies, review intelligence and counter-intelligence activities of the SSA, and investigate any complaints about the SSA from the public.[24] However, as pointed out in the State Capture Report, the IGI's office has been inhibited by various obstacles. These include a limited budget and the fact that it has no budget independent of the SSA (the very body over which it exercises oversight).[25] Also of importance, the IGI's recommendations do not appear to be binding and were ignored by the JSCI during the state capture years.[26]

25. As mentioned above, the AG can also provide oversight by auditing the SSA's accounts. However, a practice has developed where the AG has issued only qualified audits of the SSA's accounts. The primary reason for this, is the AG's lack of access to classified documents.[27]

26. As a result, the State Capture Commission Report made the following recommendation:

    "The role of the IGI, the AG, and Parliament through its Joint Standing Committee on Intelligence, must be sharpened. Secrecy should not be used to hide criminal activity."[28]

27. The mechanisms through which these institutions can be "sharpened" will be discussed in the recommendations section below, following the consideration of intelligence funding mechanisms in other jurisdictions.

28. From the above discussion, flaws in South Africa's intelligence accountability mechanisms are already visible in all stages of accountability, particularly in the second stage: day-to-day.

29. It seems that at present South Africa has no functioning mechanism to oversee the day-to-day activities and intelligence priorities of the SSA. This role would have been served by the now-defunct Evaluation Committee (provided for in section four of the Secret Services Account Amendment Act 142 of 1992), which served to "evaluate all intended secret services in order to determine whether the object thereof and the *modus operandi* to achieve it are in the *national interest*; and review all secret services annually with the said object in order to determine whether they may be continued…" (own emphasis).

30. As it stands, without a functioning Evaluation Committee to adjudicate on the question of 'national interest', this nebulous term is left open to the sole interpretation of the SSA's Director-General, with no oversight mechanisms in place.

31. What is abundantly clear, is that current the oversight mechanisms for funding, spending and accountability for intelligence services in South Africa are woefully inadequate. The country has already paid the price — in the form of state capture — for its failure to update its intelligence legislation in keeping with international trends in intelligence oversight.

24 Section 7.
25 Judicial Commission of Inquiry into State Capture Report Part 5 Vol 1 para 931 at p. 350.
26 Judicial Commission of Inquiry into State Capture Report Part 5 Vol 1 para 930 at p. 350.
27 Judicial Commission of Inquiry into State Capture Report Part 5 Vol 1 para 130 at p. 44.
28 Judicial Commission of Inquiry into State Capture Report Part 5 Vol 1 para 885 at p. 334.

INTERNATIONAL COMPARISON

32. In the following sections, the intelligence funding and accountability mechanisms of four developed constitutional democracies will be considered, namely Canada, the Netherlands, the United Kingdom and Australia.

33. Although the histories of their state intelligence apparatuses are by no means free of controversies surrounding illegal operations and human rights abuses, these four jurisdictions were selected because they are all constitutional democracies with mechanisms in their intelligence services similar to those of South Africa. Moreover, each of these jurisdictions, at least with regard to their policies, espouse the values of transparency and accountability in their intelligence services, and have had relatively recent updates to their intelligence legislation.

34. Some consideration was given to the inclusion of other developing countries in the analysis, particularly other African countries. After an overview of some of these jurisdictions, it was decided that they should be excluded from a thorough analysis due to the fact that certain aspects of their intelligence services are incompatible with the South African intelligence philosophy. In particular, the manner in which intelligence services are conducted in these countries would represent a step backward for South Africa rather than a step forward toward realising our own post-Apartheid intelligence philosophy. For example:

    34.1. Sections 10 to 13 of the Namibia Central Intelligence Service Act 10 of 1997 provides for the Intelligence Account established by their National Intelligence Act 19 of 1987 to continue to exist on much the same terms as the South African Secret Services Account.

    34.2. The Botswanan Directorate of Intelligence and Security was established by the Intelligence and Security Service Act 16 of 2007. This Act has been criticised by Botswanan academics as being inconsistent with Botswana's own Vision 2016. In particular, the Act establishes a parliamentary oversight committee, but fails to give it proper powers.[29] Rather, an executive committee consisting of the permanent secretary to the president, attorney-general, director-general and deputy director-general of the directorate of intelligence are empowered to "review the intelligence policies and activities; and examine the expenditure, administration, complaints by, and oversee the legal framework of, the intelligence".[30] Also contrary to the South African intelligence philosophy, the Act allows intelligence officers to arrest without a warrant, even where the alleged offence is not related to the primary investigation.[31]

    34.3. In Ghana, the Security and Intelligence Agencies Act 1030 of 2020 replaced the Security and Intelligence Agencies Act 526 of 1996 in its entirety.[32] While this Act specifies that the monies required by the intelligence agencies are to be approved by parliament,[33] it does not provide for a parliamentary oversight committee or any other form of independent oversight. The only information provided to parliament regarding the intelligence services includes an annual report from the Minister of National Security.[34] The Act specifies that this report shall include a report on the activities and operations of the agencies, the report of the Auditor-General and "any other report that the Minister may consider necessary".[35] What this indicates, is that there is more executive control and less oversight of the intelligence services in Ghana than in South Africa.

35. It is on this basis that this analysis will rely on the jurisdictions of Canada, the Netherlands, the United Kingdom and Australia for guidelines to increase transparency and accountability of South African intelligence services' funding and expenditures.

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29 As Zibani Maundeni has described it: "the secrecy is enormous, and the exclusion of parliament is total." Z Maudeni "Vision 2016 and Reforming the Intelligence in Botswana" (2008) 40 *Botswana Notes and Records* 135 at p. 145.
30 Section 30, as cited in Z Maudeni "Vision 2016 and Reforming the Intelligence in Botswana" at p. 144.
31 Sections 21(1) and 21(2).
32 Section 50(1).
33 Section 38.
34 Section 40(1).
35 Section 40(2)(a)-(c).

Canada

36. The Canadian intelligence structure appears to be largely influenced by its intelligence philosophy as a nation. In particular, Canada does not appear to perceive any existential threats to the survival of the state.[36] Rather, its national interests have been identified as fourfold:

    36.1. The protection of Canadian territory and security of its people;

    36.2. Economic growth, prosperity and welfare of Canadians;

    36.3. A stable world order in the interests of security and prosperity of Canada; and

    36.4. International protection and the enhancement of democracy and freedom.[37]

37. As a result, Canada does not have a foreign intelligence service such as the United States' CIA.[38] Its international security strategy is to contribute to a global rules-based system as part of the international community,[39] and it prefers to use diplomacy and international organisations to respond to threats.[40]

38. However, Canadian Signals Intelligence ("SIGINT") appears to have evolved out of multilateralism and Canada's participation in the "Five Eyes" intelligence partnership with the United States, the United Kingdom, New Zealand and Australia.[41] Co-operative international intelligence sharing, therefore, forms part of the Canadian intelligence philosophy.

39. Canada's primary intelligence service is the Canadian Security Intelligence Service ("CSIS"). The CSIS was created by the Canadian Security Intelligence Service Act 1985, c. C-23 (the "CSIS Act"), following the recommendation of the McDonald Commission of Inquiry of 1977 and the MacKenzie Commission of 1969. The primary concern of these commissions was the infringement of civilian liberties by the intelligence services, particularly the right to privacy.[42] This is also a valid concern in the South African context, albeit that the blatant abuse of resources and state capture have been more obvious concerns of late.

40. The McDonald Commission concluded that even though Canada was not under serious threat, threats to liberal democracy nonetheless existed, thus justifying the existence of a security service to protect and maintain that liberal democracy.[43] Quite significantly, the Commission stated that "[t]here are serious threats to the security of Canada but they are not so serious as to prevent a reasonable amount of informed discussion about the nature of these threats and the measures necessary to protect Canada against them".[44] In light of this, and in order to guard against the use of intelligence services for partisan purposes, the Commission proposed various forms of oversight of the intelligence services, some of which were also brought into being with the CSIS Act.

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36 M Munier "The Canadian national intelligence culture: A minimalist and defensive national intelligence apparatus" (2021) 76 3 *International Journal* 427 at p. 437.
37 Don Macnamara, "Canada's national and international security interests," in David S. McDonough, ed., *Canada's National Security in the Post-9/11 World: Strategy, Interests, and Threats* (Toronto: University of Toronto Press, 2012), 49–50.
38 M Munier "The Canadian national intelligence culture" at p. 442.
39 M Munier "The Canadian national intelligence culture" at p. 437.
40 M Munier "The Canadian national intelligence culture" at p. 440.
41 M Munier "The Canadian national intelligence culture" at p. 439 and Wesley Wark, "The road to CANUSA: How Canadian signals intelligence won its independence and helped create the Five Eyes," (2020) 35 1 *Intelligence and National Security* pp. 20–34.
42 CES Franks "The Canadian Parliament and Intelligence and Security Issues" (1985) 46 1 *Indian Journal of Political Science* 49 at 52.
43 CES Franks "The Canadian Parliament and Intelligence and Security Issues" at p. 49.
44 Quoted in CES Franks "The Canadian Parliament and Intelligence and Security Issues" at p. 55.

Appropriation of funds

41. The funding to the Canadian intelligence community is appropriated by parliament. However, in a 1996 report of the Auditor-General of Canada, it was recognised that parliament was constrained in its voting since much of the information on the activities, expenditures and performance of the agencies and units carrying out intelligence functions was, of necessity, classified, and could not be included in public documents.[45] Nonetheless, it appears that funding for the CSIS and the Security Intelligence Review Committee (SIRC, as it then was – see below) was provided by parliament through different votes.[46]

42. As at 2021, it appears that the Canadian parliament was still not privy to detailed breakdowns of CSIS expenditures due to the fact that they are classified. However, parliament was provided with general information about CSIS financial resources through documents such as the Interim Estimates, the Main Estimates, the Supplementary Estimates and the CSIS Public Report.[47] The extent of information provided to parliament is difficult to determine, as only the summary of the Estimates is available online.

Spending of funds

43. The Canadian concern about the right to privacy is reflected strongly in the CSIS Act in that section 11 lays out how data is to be used and managed.

44. Section 21 further requires the service to apply for a warrant from the courts should it wish to intercept any communication for the purposes of investigation. In making such an application, the CSIS is first to obtain the Minister's approval, and thereafter to show the judge that it has reasonable grounds to believe that a warrant is necessary for it to investigate a threat to the security of Canada.[48] Such a warrant may authorise the CSIS to intercept any communication or obtain any information, record, document or thing for the following purposes:

    44.1. to enter any place or open or obtain access to any thing;

    44.2. to search for, remove or return, or examine, take extracts from or make copies of or record in any other manner the information, record document or thing; or

    44.3. to install, maintain or remove any thing.

45. Section 21.1 also requires that such a warrant should be issued where the CSIS wishes to take measures which include:

    "(a) altering, removing, replacing, destroying, disrupting or degrading a communication or means of communication;

    (b) altering, removing, replacing, destroying, degrading or providing — or interfering with the use or delivery of — any thing or part of a thing, including records, documents, goods, components and equipment;

    (c) fabricating or disseminating any information, record or document;

    (d) making or attempting to make, directly or indirectly, any financial transaction that involves or purports to involve currency or a monetary instrument;

    (e) interrupting or redirecting, directly or indirectly, any financial transaction that involves currency or a monetary instrument;

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45 Report of the Auditor-General of Canada (1996) available at https://irp.fas.org/world/canada/docs/oag96/ch9627e.html#0.2.2Z141Z1.9M79CM.RMMA1E.KU at para 27.51.

46 Report of the Auditor-General of Canada (1996) at 27.51.

47 2021-2022 Main Estimates Canadian Security Intelligence Service (18 March 2021) available at https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20210722/008/index-en.aspx

48 Section 21(1).

(f) interfering with the movement of any person, excluding the detention of an individual; and

(g) personating a person, other than a police officer, in order to take a measure referred to in any of paragraphs (a) to (f)."

46. What is clear from the above is that a high degree of judicial oversight is exercised with regard to how the CSIS executes its mandate. Many of the activities listed in the CSIS Act above would be considered covert operations in South Africa, requiring only the DG of the SSA to approve them. However, in Canada, such activities require the approval of both the executive (Minister) and the judiciary in the form of a warrant.

Accountability for spending

47. In terms of s20.2(1) of the CSIS Act:

"The Service shall, within three months after the end of each calendar year, submit to the Minister a report of the activities of the Service during the preceding calendar year, and the Minister shall cause the report to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the Minister receives it."

48. Furthermore, provision was made in the CSIS Act for the SIRC, an independent review agency which guarded against any infringement on human rights and freedoms by the CSIS. It was composed of between three and five Privy Councillors who were not members of the House of Commons or the Senate.

49. The National Security and Intelligence Review Agency Act of 2017 (S.C. 2019, c. 13 - "NSA") which came into effect in June 2019 has, however, replaced SIRC with the National Security and Intelligence Review Agency ("NSIRA").

50. Like the SIRC, part of the NSIRA's mandate is to review any activity carried out by the CSIS and any intelligence activity carried out by any department, and to investigate any complaint referred to it.[49] In so doing, the NSIRA must, each calendar year, review at least one aspect of the Service's performance in taking measures to reduce threats to the security of Canada.[50] Furthermore, the NSIRA may, in the course of its review, make any findings or recommendations it considers appropriate, including those relating to "the reasonableness and necessity of a department's exercise of its powers".[51]

51. In exercising these review powers, the NSIRA is entitled to have access, in a timely manner, to any information that is in the possession or under the control of any department.[52]

52. In its annual report to the Minister, the NSIRA must report on:

"(a) the compliance of the Canadian Security Intelligence Service with the law and any applicable ministerial directions; and

(b) the reasonableness and necessity of the Canadian Security Intelligence Service's exercise of its powers."[53]

53. The NSIRA must also report to the Prime Minister annually regarding its activities during the previous calendar year and the findings and recommendations it made during the calendar year in question.[54] This report must also be tabled in parliament.[55]

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49 Section 8(1).
50 Section 8(2).
51 Section 8(3)(b).
52 Section 9(1).
53 Section 32(2).
54 Section 38(1).
55 Section 38(2).

54. The Act provides for a secretariat to assist the NSIRA with its mandate.[56] Each member of the NSIRA must take an oath of confidentiality, must have appropriate security clearance, and must comply with the Treasury Board's requirements for the secure handling of documents and information.[57]

55. It should be noted that NSIRA exists in addition to Canada's National Security Intelligence Committee of Parliamentarians, a body similar to South Africa's JSCI. The two bodies are required by statute to co-operate with one another, and may exchange classified information. What this means is that the work of the parliamentary committee is supported by an independent agency comprised of experts in intelligence.[58]

56. The NSA has also created the Office of the Intelligence Commissioner ("IC") through the Intelligence Commissioner Act (S.C. 2019, c. 13, s. 50). The IC is a retired judge, appointed by the Governor in Council on the recommendation of the Prime Minister for a period of five years.[59]

57. The IC is primarily responsible for:

    "(a) reviewing the conclusions on the basis of which certain authorizations are issued or amended, and certain determinations are made, under the Communications Security Establishment Act and the Canadian Security Intelligence Service Act; and

    (b) if those conclusions are reasonable, approving those authorizations, amendments and determinations."[60]

58. It would appear that in certain circumstances, when the urgency of a matter makes the application for a warrant impracticable, the IC can give authorisation to the CSIS for such activities.[61]

59. Therefore, it would appear that the IC performs a quasi-judicial review function in the Canadian intelligence service. It also appears that the IC in Canada plays a more hands-on role in the day-to-day decisions made in the CSIS than the IGI does in South Africa in that the IC is required to authorise certain espionage activities before they are undertaken. On a practical level, a person in such a position could oversee and authorise how intelligence funding is used on a day-to-day basis, rather than relying on oversight occurring after the fact.

60. CSIS, like other government departments and agencies, is subject to the scrutiny of the Auditor-General in Canada.[62]

61. There therefore appears to be no provision for a separate secret services account in Canada. While some provision is made for secrecy, the budget and spending of the CSIS is otherwise managed in the same manner as other government departments, while their day-to-day operations are overseen by an independent agency as well as an independent commissioner.

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56 Section 41.
57 Sections 49 and 50.
58 Security Intelligence Review Committee "All Government of Canada national security and intelligence activities now subject to independent expert review" (17 July 2019) NewsWire, available at https://www.newswire.ca/news-releases/all-government-of-canada-national-security-and-intelligence-activities-now-subject-to-independent-expert-review-858523391.html
59 Section 4(1).
60 Section 12.
61 Section 18 read with Section 11.22(1) of the CSIS Act.
62 2021-2022 Main Estimates Canadian Security Intelligence Service.

Netherlands

62. In the Netherlands, the agency responsible for civilian intelligence is the General Intelligence and Security Service, or Algemene Inlichtingen- en Veiligheidsdienst ("AIVD"). The AIVD's work is governed by the Intelligence and Security Services Act of 2017 ("Wiv 2017"), which entered into force on 1 May 2018. The AIVD falls under the Department of Interior and Kingdom Relations. The military branch of the security services is the MIVD, falling under the Department of Defence. Like Canada, the Netherlands does not have a separate foreign civilian intelligence branch.

63. Part of the mission of the AIVD is to be "as transparent as possible", and its rules are based on the European Convention on Human Rights which requires the intelligence and security services to be "clear, foreseeable and accessible" to the public.[63] As such, the AIVD issues publicly available reports on its work and what it perceives to be threats to national security on an annual basis. This is in addition to reports issued by the Dutch Review Committee on the Intelligence and Security Services ("CTIVD"), the body tasked with its oversight.

64. The Dutch philosophy around national security seems to be consistent with most developed economies in that a broad definition of security is used. National security thus includes security of the state, of society and of individuals, as well as economic security, energy security, maritime security and cyber security, among others.[64] Such a broad definition could allow for abuse. However, in 2018, AIVD found that almost all of the threats posed to the Netherlands had a digital component, and involved attempts to acquire information to influence decision-making or to intimidate or influence foreign nationals who live in the Netherlands.[65]

65. What is striking about the AIVD annual report, is how candidly the agency identifies what it perceives to be the threats to Dutch national security in so public a forum. For example, it lists specific incidents of possible jihadist terror attacks which the AIVD intercepted. As such, the AIVD characterises itself less as a secret service and more as a "service with secrets" where such secrets are necessary to recognise and address threats timeously.[66]

66. Wiv 2017 appears to have also addressed concerns among the public regarding civilian privacy and the use of personal data. AIVD may now only collect and store data if such data is important for its work – otherwise it must be destroyed. In 2018, 98% of data collected was destroyed.[67]

Oversight mechanisms

67. The Dutch Review Committee on the Intelligence and Security Services ("CTIVD") was established per the Intelligence and Security Services Act of 2002 ("Wiv 2002"). By 2018, the CTIVD had conducted around 50 diverse investigations into the AIVD and had published its findings in largely public reports.[68]

68. According to their website, the CTIVD's Oversight Department chooses the topics for its investigations independently. At times it may also be requested by the Minister of Internal Affairs and Kingdom Relations or the Minister of Defence to conduct an investigation. The results of its investigations are then published publicly on its website. However, any confidential information contained in these reports is reserved for an appendix which is not made public. Rather, this section of the report is sent to the Committee for Intelligence and Security Services ("CIVD") of the House of Representatives.[69]

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63 AIVD Website available at https://english.aivd.nl/about-aivd/the-intelligence-and-security-services-act-2017.
64 E Hirsch Ballin, H Dijstelbloem, P de Goede "The Netherlands and the Extended Concept of Security: The Rise of Security Strategies" in: E Hirsch Ballin, H Dijstelbloem, P de Goede (eds) *Security in an Interconnected World. Research for Policy*. (2020) Springer, Cham, available at https://doi.org/10.1007/978-3-030-37606-2_4.
65 AIVD Director-General, AIVD Annual Report 2018 available at https://english.aivd.nl/publications/annual-report/2019/05/14/aivd-annual-report-2018.
66 Per Dick Schoof, AIVD Director-General, AIVD Annual Report 2018 available at https://english.aivd.nl/publications/annual-report/2019/05/14/aivd-annual-report-2018 at p. 3.
67 WITH AIVD Director-General, AIVD Annual Report 2018 available at https://english.aivd.nl/publications/annual-report/2019/05/14/ aivd-annual-report-2018.
68 AIVD Annual Report 2018 available at https://english.aivd.nl/publications/annual-report/2019/05/14/aivd-annual-report-2018
69 CTIVD website available at https://english.ctivd.nl/oversight

69. The CIVD is a parliamentary committee similar to South Africa's JSCI. In 2020 it was composed of six members of parliament, each from a different political party.[70] The CIVD is responsible for oversight of the intelligence services, and it also plays an important role in the appropriation of funds for the service – as discussed further below. It is supported by a clerk, an advisor and two part-time assistants to assist with the administration of the committee's work. The Committee is also supported by the Analysis and Research Department of the House of Representatives.[71]

70. Wiv 2017 then introduced an additional oversight to the AIVD's work. Where the AIVD wishes to exercise a special power, it needs to seek ministerial approval. After the Minister has approved a request from AIVD to do so, the Independent Review Board for the Use of Powers (Toetsingscommissie Inzet Bevoegdheen - "TIB") will also review the legality of the Minister's decision.[72] This is done before the special power is exercised – except in urgent cases where the TIB reviews the request after the fact. In either case, the TIB reviews the request underlying the authorisation rather than the authorisation itself.[73]

71. The TIB consists of three members of whom at least two have been members of the judiciary for six or more years.[74] The TIB's rulings are binding – in order words, if the TIB rules that the authorisation from the Minister is unlawful, then the special investigatory power requested cannot be used.[75]

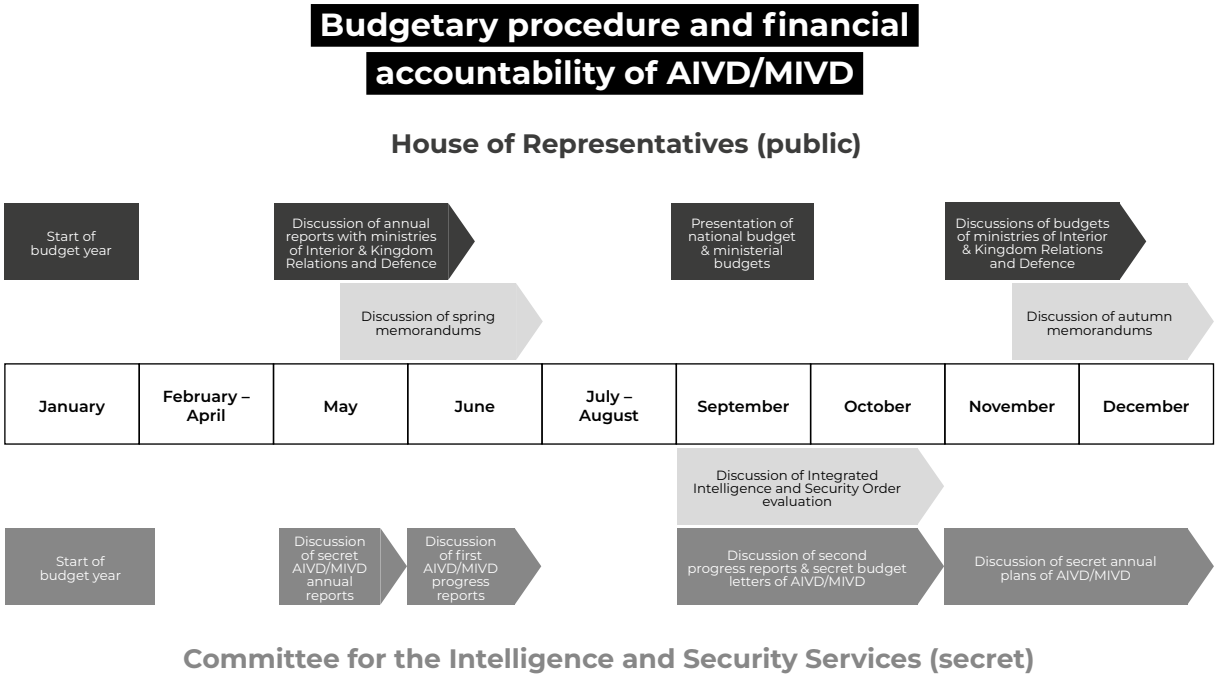
72. The types of special investigatory powers requiring the Minister's approval (and therefore TIB approval) include methods that would be invasive and infringe on the rights of individuals, such as surveillance within a home (Article 40, paragraph 3), DNA testing (Article 43, paragraphs 2 and 4), hacking (Article 45, paragraphs 3, 5 and 10) and interception of communications (Article 47, paragraph 2).[76]

73. As part of its review, the TIB will assess the necessity of the investigatory power as a means of pursuing one of the goals of the AIVD, as well as the proportionality of the measure as against the goal.[77] The TIB is empowered to ask questions of the AIVD when assessing the lawfulness of an authorisation, and where insufficient information is provided it can rule that the authorisation was unlawful.[78] Like the other agencies, the TIB also publishes annual reports.

Appropriation and spending of funds

74. The Netherlands' secret services, both the AIVD and MIVD, appear to be funded by monies appropriated by parliament through two parallel processes: one which is public, where the details of the budget are stated in broad terms, and one where the confidential details of the proposed budget are shared with certain specified parties. This process was represented in the 2020 CIVD report on its activities to the Dutch parliament as follows:

70 CIVD Report 2020 available at https://www.houseofrepresentatives.nl/sites/default/files/atoms/files/annual_report_civd_2020.pdf at p. 12.
71 CIVD Report 2020 at p. 12.
72 AIVD Annual Report 2018 available at https://english.aivd.nl/publications/annual-report/2019/05/14/aivd-annual-report-2018
73 TIB Annual Report 2018-2019 available at https://www.tib-ivd.nl/documenten/jaarverslagen/2019/04/25/annual-report-2018-2019 at p. 2.
74 TIB Annual Report 2018-2019 at p. 6.
75 TIB Annual Report 2018-2019 at p. 6.
76 TIB Annual Report 2018 at p. 7.
77 TIB Annual Report 2018 at pp. 9-10.
78 TIB Annual Report 2018 at p. 16.



75. Broadly, the process represented by this graphic is as follows:

    75.1. The AIVD and MIVD provide two annual reports to parliament before May of each year. One report is public and is provided to the Senate and House of Representatives. This public report must contain an overview of the areas on which the secret services have focused its activities in the past year and the areas in which it intends to focus its activities in the present year. This report does not give any detail of the following:

        75.1.1. the means deployed by the AIVD in specific cases;

        75.1.2. secret sources used by the AIVD;

        75.1.3. the AIVD's current knowledge level.[79]

    75.2. Such details are left for the classified report which is submitted to the CIVD.

    75.3. The CIVD also receives two progress reports from the security services: discussions of these reports take place in June and September.

    75.4. In September the CIVD also receives the secret budget letters from the AIVD and MIVD for discussion. These are the classified sections of the budget letters submitted to parliament. Around this time, the national and ministerial budgets will be presented to the House of Representatives for approval.

    75.5. The budgets for the Ministries of Interior and Kingdom Relations and Defence (under which the AIVD and MIVD fall respectively) appear to be presented to the House of Representatives in November. It is around this time that the CIVD discusses the classified report on the annual plans for the AIVD and MIVD.

76. In the result, the budget for the Netherlands' security services appears to be appropriated by parliament based on limited information presented to it in the public annual report. However, the CIVD conducts a parallel process based on full information of the AIVD and MIVD's activities and proposed activities for the coming year. This parallel process not only allows the CIVD access

79 CIVD Report 2020 available at p. 9.

to reports of past activities, but they are also privy to the future plans of the security service around the same time that the budget for the services is approved.

77. What this means is that a non-partisan parliamentary committee has access to classified information relating to the past activities of the security services as well as its future plans at the time that the budget is approved. Certain members of the legislature therefore have the power to block the approval of funds to the security services were they to be of the opinion that the funds may be used for nefarious purposes.

78. The Dutch parliament plays an active oversight role in the budget and intelligence priorities of the AIVD. Like in Canada, they are supported by the work of an independent intelligence agency, namely the CTIVD. On a day-to-day basis, the AIVD's activities are also overseen by the TIB.

United Kingdom

79. Secrecy, it would seem, is far more important in the United Kingdom than in the previous two countries reviewed.

80. An additional fund, known as the Joint Security Fund, was made available to intelligence services in 2015, ostensibly to provide for better coordination of the different security agencies in light of the terrorist bombings that took place on July 7 in 2005 in London.[80] This fund provides for an additional £1.5 billion annually for military and intelligence agency spending across government, particularly for counter-terrorism.[81]

81. According to its website, MI5's resources were allocated as follows in 2018/2019:

    81.1. 67% international counter-terrorism

    81.2. 20% Northern-Ireland-related terrorism

    81.3. 13% counter-espionage, counter-proliferation and protective security

Appropriation and spending of funds

82. The United Kingdom's security and intelligence agencies receive their funding from parliament through a single vote. This vote funds the Single Intelligence Account and this account in turn is the funding vehicle for the Secret Intelligence Service ("SIS"), Government Communications Headquarters ("GCHQ") and the Security Service ("MI5").[82]

83. Each of these agencies produces its own full set of annual reports and accounts in terms of the Government Financial Reporting Manual and Treasury directions, but these are not made public due to security reasons. They are, however, each audited by the Comptroller and Auditor-General and shown to the Chair of the Public Accounts Committee. This procedure was set down by the Secretary of State under the Intelligence Services Act of 1994. Parliament is then shown only a consolidated statement of net expenditure together with appropriate notes and a governance statement.[83]

84. MI5 has a Management Board which meets regularly to consider policy and strategic issues. Among these issues, the Board decides on how the "priorities and organization of MI5 should adapt to reflect changes to the threats", but these decisions are subject to external validation processes.[84] Included in this external validation process is the Regulation of Investigatory Powers

80 F Gardner "Budget 2015: What is the new Joint Security Fund?" (9 July 2015) *BBC News*, available at https://www.bbc.com/news/uk-33469450

81 F Gardner "Budget 2015: What is the new Joint Security Fund?" (9 July 2015).

82 Security and Intelligence Agencies Financial Statement 2020-2021, presented to the House of Commons, printed on 16 December 2021, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1042372/Final_APS_Security_and_Intelligence_Agencies_Financial_Statement_2020-21_Print.pdf at p. 6.

83 Security and Intelligence Agencies Financial Statement 2020-2021 at p. 2.

84 MI5 website at https://www.mi5.gov.uk/people-and-organisation

Act of 2000. This Act provided for circumstances in which MI5 required a warrant to be issued for the purposes of intercepting communications.

85. The Investigatory Powers Act of 2016 ("IPA") has updated the requirements and regulations relating to interception of communications.

86. Section 3 of this Act creates an offence where a person intentionally intercepts communications where they are not authorised to do so.

87. Warrants may be issued by the Secretary of State on application by the security services where:

87.1. the Secretary of State considers the warrant to be necessary;

87.2. where the conduct authorised by the warrant is considered proportionate to what is sought to be achieved by the warrant;

87.3. where sufficient safeguards are in place; and

87.4. where the decision to issue the warrant has been approved by a Judicial Commissioner.[85]

88. The Secretary of State may issue a warrant without a Judicial Commissioner's approval in urgent circumstances, but in those circumstances such decision must be ratified by the Judicial Officer within a certain time period. Where the Judicial Commissioner refuses to approve the decision to issue a warrant, that warrant will cease to have effect and may not be renewed.[86]

89. The IPA has also merged the Office of Surveillance Commissioners, the Interception of Communications Commissioner's Office and the Intelligence Services Commissioner's Office to form the Investigatory Powers Commissioner's Office ("IPCO") as of September 2017.

90. IPCO is an independent oversight body for MI5's use of investigatory powers. It is funded by the office of the Home Secretary, but it carries out its functions independently and is not part of government.[87] Their own description of their purpose is to "oversee the use of investigatory powers, ensuring they are used in accordance with the law and in the public interest".[88]

91. IPA itself lists the powers of the Investigatory Powers Commissioner as keeping under review "(including by way of audit, inspection and investigation) the exercise by public authorities of statutory functions relating to—

(a)the interception of communications,

(b)the acquisition or retention of communications data,

(c)the acquisition of secondary data or related systems data …, or

(d)equipment interference."[89]

92. IPCO is tasked with ensuring that MI5's use of these powers are lawful, necessary and proportionate to the goal sought to be achieved. They achieve this through a "comprehensive inspective process" where they "thoroughly examine" MI5's use of these powers throughout the year.[90] Oversight on a day-to-day basis is provided by the Judicial Commissioners through their oversight over the issuing of warrants.

85 Section 19(1).
86 Section 24(4).
87 IPCO website at https://www.ipco.org.uk/who-we-are/
88 IPCO website at https://www.ipco.org.uk
89 Section 229(1).
90 MI5 website at https://www.mi5.gov.uk/law-and-governance

Accountability for spending

93. On its website, MI5 states that, despite its needs to operate in secret, it must account for the money it spends in the same manner as any other public sector organisation. National Audit Office staff therefore have access to relevant MI5 records for auditing purposes.[91] In addition to being audited, the MI5 expenditure and resource allocation is also subject to the scrutiny of the Intelligence and Security Committee ("ISC").

94. Similar to South Africa's JSCI, the ISC was established under the Intelligence Services Act of 1994. Its powers were extended under the Justice and Security Act of 2013, in terms of which the ISC now has access to primary material held by the security services.[92]

95. Consisting of nine members drawn from both Houses of Parliament, the ISC oversees intelligence and security services in the UK. These members are all subject to the Official Secrets Act of 1989, since they are frequently given access to highly classified information in the course of their work. The ISC is supported in its work by an independent Secretariat and Investigator, as well as access to technical and financial expertise where necessary.[93]

96. The ISC sets its own agenda and work programme, producing an Annual Report as well as other reports on specific investigations should it choose to do so. Prior to publication of the reports, information which may harm national security may be redacted at the request of the security agencies. The Prime Minister, however, receives the unredacted version.[94] The Prime Minister may also order that sections of the report be redacted if they decide that the inclusion of such sections would be prejudicial to the wider intelligence and security community.[95]

97. The United Kingdom therefore retains more executive control of the security services than both Canada and the Netherlands. However, even in the more secretive environment, the UK's National Audit staff and the ISC parliamentary committee have full access to primary material held by the security services.

Australia

98. The Australian Security Intelligence Organisation ("ASIO") is governed by the Australian Security Intelligence Organisation Act of 1979, as amended. In terms of this Act, its functions are to obtain, correlate and evaluate intelligence relevant to security, communicate intelligence to relevant persons for purposes of security, and advise Ministers and authorities in respect of matters relating to security.[96]

99. ASIO is also charged with the responsibility of doing security assessments of individuals, as well as obtaining security information in accordance with sections 27A or 27B of the ASIO Act, or sections 11A, 11B or 11C of the Telecommunications (Interception and Access) Act 1979, and to communicate any such intelligence in accordance with these two Acts.[97] What is clear from this legislation is that Australia has a highly regulated regime pertaining to the interception of communications and protections for the right to privacy.

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91 MI5 website at https://www.mi5.gov.uk/people-and-organisation
92 ISC Annual Report 2013-2014 available at https://isc.independent.gov.uk/wp-content/uploads/2021/01/2013-2014_ISC_AR.pdf at p. 4.
93 ISC Annual Report 2013-2014 at p. 3.
94 ISC Annual Report 2013-2014 at p. 3.
95 ISC Annual Report 2013-2014 at p. 17.
96 Section 17(a)-(c).
97 Section 17(ca)-(e).

100. Like the UK, Australia has a particular concern about possible terrorist activities. According to ASIO's website, there were two domestic terrorist attacks and two major disruptions of violent extremist attacks in 2021. There is also a concern in Australia that children as young as 13 are embracing violent extremism motivated by religious radicalism.[98] ASIO'S priorities are classified according to five broad categories:

    100.1. Counter-terrorism;

    100.2. Counter-espionage and foreign interference;

    100.3. Border security;

    100.4. ASIO's reform programme; and

    100.5. Governance and accountability.[99]

Appropriation and spending of funds

101. ASIO receives funds appropriated by parliament for its work as part of the Department of Home Affairs. As such, it is subject to the governance and reporting requirements laid out in the Public Governance, Performance and Accountability Act of 2013. In terms of this Act, ASIO must produce an annual report (section 46), although certain statements are removed from the report so as not to prejudice national security (as required by s94 of the ASIO Act).

102. While section 78 of the Public Governance, Performance and Accountability Act makes provision for the Minister of Finance to establish special accounts, it does not appear that those special accounts resemble the South African Secret Services Accounts in any way. Firstly, such special accounts seem to be available to all government departments where necessary and not just to security services.[100] Secondly, even though these accounts are deemed "special" and are outside of the ordinary appropriation process, entities are nonetheless fully accountable for the monies appropriated to these accounts.

103. Reference is made to special accounts and special appropriations in ASIO's Portfolio Budget Statement for 2022-2023 as appearing in "Budget Paper No 4 – Agency Resourcing".[101]

104. Budget Paper 4 states in its preface that its purpose is to "set out the departmental funding for agencies, administered funding managed by agencies, the nature of those funding sources and the purposes of that funding as defined by Outcome Statements for each agency".[102]

105. A "special account" is described in this Budget Paper as being "an appropriation mechanism that sets aside an amount within the Consolidated Revenue Fund for specific expenditure purposes".[103] Some of those specific purposes described in the Budget Paper include provision being made for additional funds to the Finance Minister for relief in response to COVID-19, support for the aviation sector and domestic tourism,[104] and response to floods in New South Wales.[105] A number of different departments received appropriations via special accounts, including the Departments of Agriculture, Water and the Environment, Education, Skills and Employment and Social Services – among others.[106]

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98 ASIO Corporate Plan, available at https://www.asio.gov.au/resources/corporate-plan
99 ASIO Annual Report 2020 - 2021 available at https://www.asio.gov.au/sites/default/files/Annual%20Report%202020-21%20WEB.pdf at p. 11.
100 Section 78(1)(d)
101 ASIO Portfolio Budget Statements, Budget 2022-23 available at https://www.homeaffairs.gov.au/reports-and-pubs/budgets/2022-23-asio-pbs.pdf at p 163.
102 Agency Resourcing, Budget Paper No 4 2021-22, Budget 2021-22, available at https://archive.budget.gov.au/2021-22/bp4/download/bp4_2021-22.pdf at p. 1.
103 Agency Resourcing, Budget Paper No 4 2021-22, Budget 2021-22 at p. 127.
104 Agency Resourcing, Budget Paper No 4 2021-22, Budget 2021-22 at p. 4.
105 Agency Resourcing, Budget Paper No 4 2021-22, Budget 2021-2 at p. 4.
106 Agency Resourcing, Budget Paper No 4 2021-22, Budget 2021-22 at p. 128.

106. Within the budget for ASIO, there does not appear to be any account similar to the Secret Services Account in South Africa. Their budget estimates do contain some provision for income from external revenue (such as sale of services), and there does appear to be some roll-over of funds from previous years' appropriations, but these are all accounted for.[107]

Accountability for spending

107. On a day-to-day basis, the ASIO Act regulates the conduct of ASIO through the requirement that warrants be sought for certain activities. Warrants are approved by the Attorney-General, and must be sought for a variety of different activities including searching a premises,[108] gaining access to a computer,[109] the use of surveillance and tracking devices,[110] and questioning identified persons.[111] In most cases, the Director-General will make an application to the Attorney-General for the issue of the warrant. The Attorney-General will only issue such a warrant where they are satisfied that there are reasonable grounds for believing that the warrant is necessary to substantially assist the collection of intelligence that is important with regard to national security.[112]

108. Section 28 of the Intelligence Services Act of 2001 ("IS Act") establishes the Parliamentary Joint Committee on Intelligence and Security ("PJCIS"). Its functions are provided for in s29 of the IS Act as follows:

    108.1. reviewing the administration and expenditures of ASIO, as well as other Australian intelligence-related organisations;

    108.2. reviewing any matter in relation to Australian intelligence agencies referred to the Committee by the responsible Minister or by a resolution of either House of the Parliament;

    108.3. monitoring and reviewing the performance by the Australian Federal Police of its functions under Part 5.3 of the Criminal Code (terrorism);

    108.4. conducting reviews of a range of specific provisions in various Acts relating to national security, including terrorism, telecommunications, citizenship and migration laws;

    108.5. reviewing privacy rules applicable to intelligence agencies.

109. Curiously, the PJCIS's inquiry powers are limited by the IS Act such that it is not empowered to review the intelligence gathering and assessment priorities of ASIO, or to review particular operations.[113]

110. Section 31 of the IS Act requires the PJCIS to table an Annual Report as soon as practicable after the end of the year.

111. The Inspector-General of Intelligence and Security ("IGIS"), on the other hand, has full access to ASIO files and material related to ASIO activities and its use of powers.[114] The powers of the IGIS are governed by sections 8 to 9B of the Inspector-General of Intelligence and Security Act of 1986, namely to inquire into any matter relating to the conduct of ASIO and investigate any complaint. At times, the Attorney-General or the Prime Minister may request the IGIS to investigate certain matters.

112. While the IGIS has greater access to information than the PJCIS, the IGIS's role in conducting oversight of the intelligence services is also limited to investigations and the compilation of reports after the fact.

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107 Agency Resourcing, Budget Paper No 4 2021-22, Budget 2021-22 at p. 163.
108 Section 25.
109 Section 25A.
110 Section 26.
111 Section 34B.
112 See for example s25(2).
113 PJCIS website at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Role_of_the_Committee
114 ASIO website at https://www.asio.gov.au/accountability

113. ASIO itself compiles a comprehensive annual report on its activities, including financial information as well as certain details required of it by s94 of the ASIO Act, including:

    113.1. its use of questioning warrants;

    113.2. special intelligence operation authorities;

    113.3. authorisations for access to telecommunications data;

    113.4. technical assistance requests, technical assistance notices and technical capability notices;

    113.5. use of special powers under warrant and other powers; and

    113.6. international production orders.

114. The Australian model is similar to that of South Africa in that the parliamentary committee and Inspector-General's oversight powers are limited to the third stage of accountability. However, these entities do have greater access to information held by the intelligence services than the South African entities do. Furthermore, no secret services account exists in Australia, and the budgeting process for the ASIO is akin to that of Canada and the UK.

CONCLUSION

115. Some familiar institutions exist in the surveyed jurisdictions, such as parliamentary sub-committees similar to South Africa's JSCI, and intelligence inspectors similar to the South African Inspector-General. These institutions have existed in the surveyed jurisdictions since the 1980s and 1990s.

116. However, in most cases, further accountability mechanisms have been established more recently to guard against human rights abuses by the intelligence services and to promote greater accountability and transparency. These include the requirement for warrants to be issued for certain operations, for oversight bodies to have full access to information held by intelligence agencies, and for the intelligence budget to be scrutinised by parliament. None of the jurisdictions surveyed have an intelligence account containing funds that have not been appropriated by parliament.

117. Overall, the South African intelligence landscape seems to be more akin to Canada and the Netherlands than to the United Kingdom and Australia; South Africa is not at war and does not generally face threats of terrorism. Therefore, it would be appropriate for South Africa to implement the type of measures for enhanced transparency and accountability in the security service that we see in the Netherlands and Canada. However, providing oversight bodies with unfettered access to primary material held by the security services, as seen in the UK and Australia, should also be incorporated into the South African system.

118. It is also not necessary for South Africa to reinvent the wheel. The country already has some mechanisms and institutions in place that can be utilised or have their powers enhanced in order to meet the goal of improved transparency and accountability in the security services. Broad recommendations to this effect are set out below.

RECOMMENDATIONS

119. It is recommended that the Secret Services Act and the Security Services Special Account Act should be repealed in their entirety. In their place, the SSA's finances should be governed by the PFMA, subject to the following additional measures:

Reform to the intelligence budgeting process

120. In line with the recommendations of the Matthews Commission, the SSA should have its own vote in respect of monies approved annually by parliament and should present its annual budgets and financial reports to parliament.[115] This should be the case whether the SSA remains in the Office of the Presidency or if a separate Ministry is created in the future.

121. In line with the White Paper, it is important that parliament has access to the information it needs to determine whether budgetary allocations are warranted.[116] At the same time, it is acknowledged that the full business of the SSA cannot be made public if it is to be effective in its work. That said, covert operations should be avoided if possible.

122. Therefore, in order to achieve the appropriate level of transparency without compromising security, it is recommended that the Dutch model of intelligence budgeting is adopted. This would require that the JSCI has full access to classified information, including the projects and plans of the SSA for the year.

123. A broad, public report on the SSA may be received by parliament for debate, but parliament must be able to rely on the JSCI to have an informed debate on the SSA's budgetary vote. The JSCI must therefore have the final say on which projects and operations undertaken by the SSA receive funding for each financial year based on whether, in the JSCI's view, such projects are in the national interest.

Reform to the day-to-day oversight process

124. In addition to the JSCI, an independent body such as the Evaluation Committee provided for in the Secret Services Act should be established. This body should oversee the object of all secret service operations as well as the means by which the object is to be achieved and evaluate whether they are in the national interest or not. "National interest" should be defined in the legislation establishing the Committee such that the definition is in line with that given in the Constitution and the White Paper.

125. Like the TIB of the Netherlands and NSIRA in Canada, this Committee must also evaluate the proportionality of the means employed against the intelligence goal. This body would have the authority to recommend to the JSCI that funding should or should not be granted for specific projects in the future. The Committee may also terminate a particular project immediately if it finds that the means employed by the SSA in executing the project are unlawful. The Evaluation Committee must pass the test of adequate independence laid down by the majority in the case of Hugh Glenister vs President of the Republic of South Africa And Others 2011(3) SA 347 (CC). As such, this could be an independent Chapter 9 institution or similar body consisting of three members appointed by the Chief Justice, at least two of which must have previously served as judges of the High Court.

126. While the Regulation of Interception of Communications and Provision of Communication-Related Information Act does appear to require the SSA to seek warrants where the right to privacy may be infringed, it is unclear to what extent the SSA has been forced to obtain warrants for its covert activities in the past. From the evidence before the State Capture Commission it seems unlikely that warrants were sought by the SSA during the Principal Agent Network years or where the SSA used "grabber" devices.

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115 Matthews Commission Report Chapter 10 at p. 20.
116 Intelligence White Paper para 7.5.

127. This legislation should be strengthened to require the SSA to seek judicial approval prior to any such covert operations where human rights may be infringed, not just for interception of communications.

128. The powers of the IGI may also be extended to be more akin to those of an Intelligence Commissioner in the Canadian system. The IGI would therefore also be responsible for reviewing the applications for warrants in these circumstances. The IGI may also be empowered to issue warrants in certain urgent situations.

129. It is also important that the powers of the IGI are extended such that their recommendations are binding on the SSA.

Reform of accountability

130. It has already been recommended by the State Capture Commission that the Auditor-General must have certain personnel with sufficient security clearance to conduct a proper audits of the SSA's financials. This will be an important step towards accountability.

131. It is further recommended that the JSCI must have access to the full audit report and any additional documents, whether classified or not, in order for it to fully evaluate the SSA's budget vote. The AG's audit report must be provided to the Evaluation Committee as well. The JSCI and members of the Evaluation Committee must also have sufficient security clearance to carry out their work.

132. It is also recommended that the IGI and Evaluation Committee be involved in overseeing the security clearance for all oversight bodies, including each other. It would be inappropriate for the SSA alone to conduct the security clearance for those individuals who exercise oversight over it.

133. Finally, what is clear from other jurisdictions is that each of the entities involved in intelligence and the oversight thereof are fully supported with the offices, funding and expertise they need to carry out their work. With such support and resources each entity can also be expected to produce annual reports which may be made public. Where information needs to remain classified, such information can be included in the classified annexure to the report which would only be read by the President, the IGI, the Evaluation Committee and the JSCI.

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