

United Kingdom's Intelligence and Security Committee

Briefing note by Amnesty International UK, Demos, JUSTICE, Liberty, Open Rights Group, Privacy International, and Rights Watch (UK)

Statutory foundation

The Intelligence and Security Committee was first established by the Intelligence Services Act 1994 as a statutory committee appointed by and reporting to the Prime Minister. It is a joint committee of Parliamentarians comprising nine members from both Houses but is and always has been dominated by members of the House of Commons (one peer on each committee from 1994 – 2010, since 2010 the balance has been two peers and seven MPs). The Committee generally meets in secret, although it does conduct some public hearings for the purpose of taking evidence on issues within its remit. It sets its own agenda, subject to the Prime Minister having the ability to restrict operational matters that it can review,¹ and also carries out investigations at the request of the government.

In response to heavy criticisms of the ISC's ability to carry out effective and independent oversight of the intelligence agencies and other bodies (made by civil society, Parliamentarians and the ISC itself), the Government introduced reforms to the ISC in the Justice and Security Act 2013 (Part 1 and Schedule 1). The Justice and Security Act reconstituted the ISC as a parliamentary committee – the ISC is now a statutory committee of Parliament, although not a select committee, appointed by and reporting to Parliament.² However, the Committee remains heavily controlled by the executive with the Prime Minister nominating members, the Prime Minister having the ability to restrict the operational matters that the ISC can review, the Secretary of State retaining the ability to veto information from being passed to the ISC from Government bodies and agencies, and the Prime Minister retaining the ability to control onward disclosure from the ISC to Parliament.³

Functions and duties of the ISC

The function of the ISC is to examine or otherwise oversee the expenditure,

¹ See below for a more detailed discussion of this.

² We understand that the Standing Orders of both Houses will be amended to refer to the function and role of the ISC. However, the ISC is a creature of statute and its membership, function and powers are governed by the JSA 2013.

³ All these limitations are discussed in more detail below.

administration, policy and operations of the UK's three main intelligence and security agencies (MI5, MI6 and GCHQ).⁴ Other than the three intelligence and security Agencies, the ISC examines the intelligence-related work of the Cabinet Office including: the Joint Intelligence Committee (JIC); the Assessments Staff; and the National Security Secretariat. The Committee also provides oversight of Defence Intelligence in the Ministry of Defence and the Office for Security and Counter-Terrorism in the Home Office.⁵ How the Committee itself sees its function is not altogether clear - its last Chairman Sir Malcolm Rifkind was reported in a Telegraph newspaper article in January 2015 as having said that "one of the ISC's most important roles is to try to reassure the public that the spies are not out of control, as Snowden claimed". This raises a significant question as to the way the Committee understands its remit, as well as its distance from the Agencies it is meant to scrutinise (a topic addressed further below).

The ISC is required to make an annual report to Parliament on the discharge of its functions and enables it to make any other reports as it considers appropriate concerning any aspects of its functions.⁶ This differs from the previous position whereby the ISC made its reports only to the Prime Minister. However, as discussed in more detail below, the Prime Minister has the ability to control onward disclosure from the ISC to Parliament.⁷

Membership

As set out above, members of the ISC are nominated by the Prime Minister (in consultation with the leader of the opposition) and Parliament then approves or rejects the nominations.⁸ The members of the Committee appoint the Chair from within the membership of the Committee. Members must not be Ministers (although many are former Ministers). The Members are subject to Section 1(1) (b) of the Official Secrets Act 1989 and have access to highly classified material in carrying out their duties. The Committee takes evidence from Cabinet Ministers and senior officials (almost exclusively in private) – all of which is used to formulate its reports.

The membership of the ISC was completed on 15 September 2015 with the following members

⁴ Section 2 (1) of the Justice and Security Act 2013.

⁵ Section 2 (2) of the Justice and Security Act 2013

⁶ Section 3 of the Justice and Security Act 2013

⁷ All these limitations are discussed in more detail below.

⁸ Section 1 of the Justice and Security Act 2013

- The Rt Hon. Dominic Grieve QC MP (Chair) (Conservative)
- The Rt Hon. Sir Alan Duncan MP (Conservative)
- The Rt Hon. George Howarth MP (Labour)
- The Rt Hon. the Lord Janvrin GCB GCVO (Crossbench Peer)
- The Most Hon. the Marquess of Lothian QC PC (Conservative Peer)
- The Rt Hon. Fiona Mactaggart MP (Labour)
- The Rt Hon. Angus Robertson MP (SNP)
- The Rt Hon. Keith Simpson MP (Conservative)
- The Rt Hon. Gisela Stuart MP (Labour)

Recent annual reports, the Government's responses, special reports and other information are available from the ISC website <http://isc.independent.gov.uk>

Limitations of the ISC

(1) Executive control over appointments to the ISC

Perhaps the main criticism of the ISC concerns the manner of appointment of its members. As noted above, members must be nominated by the Prime Minister and Parliament can only approve or reject these nominations. From the start the ISC was viewed by many as too close to the Executive – appointed by and reporting to the Prime Minister, staffed by and located within the Cabinet Office. MPs interviewed for the book 'Watching the Watchers: Parliament and the Intelligence Services'⁹ were particularly critical of the calibre of appointments as 'not the kind of people to rock the boat'. It is highly unlikely that the most outspoken or critical politicians who might criticise the intelligence agencies or activities of government would have a chance of appointment. In that regard, it has been suggested that members are often too closely aligned with government, with a large proportion of ISC members and all Chairs having previously held Ministerial posts. Peers on the ISC have included a former member of MI6 and a former Cabinet Secretary. This has led to concerns that the Committee is too close to those it is charged with scrutinising, which has the potential to damage public confidence in its independence and the reliability of its reports. In this area, it's not simply a question of whether there is actual bias - the appearance of bias is of significant importance.

The importance of a robust ISC is paramount given that decisions about what information may be disclosed to Parliament are taken by the Prime Minister in consultation with the ISC.¹⁰

(2) Executive control over information passed to the ISC

⁹ H Bochel, A Defty and J Kirkpatrick, 2014.

Under the 2013 Act, if the ISC asks the chiefs of any of the three main intelligence and security agencies (the Security Service, SIS or GCHQ) or Government departments to disclose information, they must make it available. However the Secretary of State can veto disclosure.¹¹ Although this represents a change from the position in the 1994 Act, under which the Director-General of the Security Services, the Chief of the Intelligence Services or the Director of the Government Communications Headquarters were also able to veto the release of information, it is far from acceptable. There is no reason why the ISC should not have sight of all material, and in fact have the ability to subpoena material, given that all the members are subject to Section 1(1)(b) of the Official Secrets Act 1989 and have been security vetted.

Under the JSA 2013 the Secretary of State may veto disclosure of information on two grounds: ¹²

- that it is sensitive and should not be disclosed to the ISC in the interests of national security; or
- that it is information of such a nature that, if the Secretary of State were requested to produce it before a Departmental Select Committee of the House of Commons, the Secretary of State would consider (on grounds not limited to national security) it proper not to do so.¹³

The following information is deemed 'sensitive information':¹⁴

(a) information which might lead to the identification of, or provide details of, sources of information, other assistance or operational methods available to—

- (i) the Security Service,
- (ii) the Secret Intelligence Service,
- (iii) the Government Communications Headquarters, or
- (iv) any part of a government department, or any part of Her

¹¹ Schedule 1, Justice and Security Act 2013.

¹² Schedule 1, Section 4, Justice and Security Act 2013.

¹³ In deciding whether it would be proper not to disclose on the basis of the latter, the Minister must have regard to governmental guidance concerning the provision of evidence by civil servants to Select Committees. This would mean in particular that the Minister would have to have regard to the Cabinet Office Guidance Departmental Evidence and responses to Select Committees.

¹⁴ Schedule 1, section 5, Justice and Security Act 2013.

Majesty's forces, which is engaged in intelligence or security activities,

(b) information about particular operations which have been, are being or are proposed to be undertaken in pursuance of any of the functions of the persons mentioned in the above paragraph

(c) information provided by, or by an agency of, the Government of a country or territory outside the United Kingdom where that Government does not consent to the disclosure of the information.

Not having unfettered access to the above information cripples the ability of the ISC to effectively carry out its oversight functions and undermines confidence in its work. For example, allegations concerning rendition and other abuses committed in the context of the 'war on terror' involve information sharing and cooperation with other states. Such limitations were laid bare when the ISC found that the UK had not been involved in extraordinary rendition operations,¹⁵ a fact that was later contradicted by the Government when they accepted that Diego Garcia, a British overseas territory in the Indian Ocean, played a central role in a number of CIA extraordinary rendition operations and when the interim Report of the Detainee Inquiry¹⁶ highlighted that the evidence it received indicated that UK agents were aware of abuse of some detainees by other governments and that the UK government may have been involved in rendition. There is also some evidence that agencies have not been entirely candid with ISC, for example MI5 evidence to the inquest into victims of the 7/7 bombing was more complete than that provided to the ISC.¹⁷

(3) Executive control over information passed from the ISC to Parliament

Before making a report to Parliament, the ISC must send it to the Prime

¹⁵ It should be noted that the interim Report of the Detainee Inquiry http://www.detaineeinquiry.org.uk/wp-content/uploads/2013/12/35100_Trafalgar-Text-accessible.pdf, chaired by Sir Peter Gibson that examined allegations of UK complicity in torture and other ill-treatment of detainees held overseas, highlights a number of lines of inquiry that should be pursued in the course of further investigations, including whether complete and sufficient information was given by government and the relevant agencies to the ISC.

¹⁶ See footnote 10.

See for example, coverage of the inquest. Independent, *Coroner hits out at MI5 photo at 7/7 inquest*, 6 May 2011: "The inquest revealed a series of mistakes in the ISC's 2009 report into whether the 7/7 attacks could have been prevented, which was submitted to MI5 to be checked for accuracy." <http://www.independent.co.uk/news/uk/home-news/coroner-hits-out-over-mi5-photo-at-77-inquest-2280058.html>

¹⁷ Section 3 (3) of the Justice

Minister.¹⁸ The ISC must exclude any matter from any report to Parliament if the Prime Minister, after consultation with the ISC, considers that the matter would be prejudicial to the continued discharge of the functions of the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.¹⁹ A report by the ISC to Parliament must contain a statement as to whether any matter has been excluded from the report.²⁰ There is no definition of what constitutes 'prejudicial to the continued discharge of the functions of the Security Service, the Secret Intelligence Service or the Government Communications Headquarters' and thus the Prime Minister controls onwards disclosure to Parliament without any appropriate limitations (the ability to control onward disclosure is unfettered, subject to having to consult with the ISC, given the broad and undefined language) or safeguards (there is no independent body or person to decide whether the veto is justified, necessary and whether information cannot otherwise be disclosed by gisting or redacting information). It should also be noted that the Committee may report exclusively to the Prime Minister on matters that are considered too sensitive for publication. Again no appropriate oversight or safeguards exist to ensure that this is in fact justified, necessary and whether information cannot otherwise be disclosed subject to gisting or redactions. The simple existence of such statutory limitations and possibility of their use risks a perception of ISC weakness. Moreover, experience of litigating against the agencies has shown there can be a tendency in this area to resist public disclosure or gisting of even such matters as internal policies on how to handle sensitive legally privileged material or when intelligence sharing may occur (whose eventual release does not appear to have put anything at serious risk). Such a wide discretion without external independent assessment poses a clear risk to the effectiveness of the ISC's work.

(4) Executive control over the operational matters that the ISC may investigate

The Justice and Security Act 2013 expanded the powers of the ISC to allow it to look at operational matters of the intelligence and security agencies. However the Act does not provide the ISC with unfettered discretion to decide what matters it examines. The ISC may only examine such matters if the Prime Minister and the ISC are satisfied²¹ that the matter is not part of any ongoing intelligence or security operation and is of significant national interest.²² Again no

¹⁸ Section 3 (3) of the Justice and Security Act 2013

¹⁹ Section 3 (4) of the Justice and Security Act 2013

²⁰ Section 3 (5) of the Justice and Security Act 2013

²¹ The wording suggests that both the ISC and the Prime Minister must be satisfied. Accordingly, the Prime Minister retains control over what operational matters may be investigated.

²² Section 2 (3) of the Justice and Security Act 2013

definition is provided as to what constitutes part of an ongoing intelligence or security operations and no oversight mechanism exists. Accordingly, it can be envisaged that the Prime Minister could restrict the ability of the ISC to review a large number of operational matters if a broad definition of 'part of any ongoing intelligence and security operation' is adopted and/or if a narrow definition of 'significant national interest' is adopted. One of the priority issues that the ISC has decided to consider for 2015 is the intelligence basis for the recent drone strikes in which British nationals were killed. It remains to be seen whether the Prime Minister will adopt a broad definition of 'part of any ongoing intelligence and security operation' and object to the ISC examining this issue given that the UK will undoubtedly continue to use drone strikes in its current military operations in Syria.

Other important matters

Limited Resources

The ability of the ISC to do its job has been further restrained by investigative capacity & resources. For example an independent investigator was appointed in 1999 but the contract was terminated in 2004 and the position was never replaced. The ISC's resources have been doubled since 2013 with a significantly increased investigative capacity. This is a positive step, however to ensure that the ISC is appropriately funded going forward the budget of the ISC needs to be protected from executive discretion and ring fenced. Further, if it is to be able to provide effective oversight of the Agencies' work in the digital age, it needs to have the right kind of independent expert advice and support on the technology it is looking at.

As noted above, the ISC also needs the ability to fully and competently investigate the operational case for the intelligence agencies' powers, which may include examining threat modeling by agencies, their technical capabilities, and asking basic value for money questions. All of these factors are important for understanding whether surveillance techniques are proportionate.

It may be appropriate to involve non-Parliamentarians in looking at some of these questions in detail. The ISC should have access to technical advice that is independent of the security agencies in order to properly scrutinize their claims.

Credibility

The ISC has done little to engage with Parliament and there has been a strong argument that the existence of the ISC allowed Government to deny parliamentary access to intelligence information. The ISC has done little to work with parliamentary select committees and has viewed itself as separate, different and special. There needs to be appropriate systems established to ensure that the ISC engages appropriately and effectively with Parliamentary Select

Committees such as the Home and Foreign Affairs Committee and the Joint Committee on Human Rights.

The ISC should be fully staffed by individuals with appropriate legal and technical expertise. Its staffing should ideally be managed by Parliament. Unfortunately, historically, the staff of the Committee have instead been drawn from the civil service or secondments managed by the Cabinet Office. Access to truly independent advice and support is crucial to the actual and apparent independence and effectiveness of any oversight body.

In 1998 the government introduced an annual House of Commons debate on the work of the ISC (the annual House of Lords debates began in 2007). These have fallen into abeyance. The last time the ISC was debated in the House of Commons was in 2011.

On 7 November 2013 the ISC held its first ever unclassified open evidence session with the heads of MI5, GCHQ and SIS. Whilst this is a positive step and sought to address the criticism of the ISC's opaque nature, it did not engender much confidence in the ISC as the questioning could at best be described as meek, and it was subsequently revealed in the press that as a condition of their appearance, the agency heads were provided with all questions in advance - leading to a scripted session.

We regret that, despite the failings of the ISC model in the UK and the limits of its democratic engagement, its existence has been used to deflect calls for greater accountability and engagement by the intelligence services with other Parliamentary committees, MPs and Peers or for a full public inquiry into an issue of controversy.

In responding to the controversy surrounding the intelligence agencies' surveillance powers, which was created by the revelations of Edward Snowden, the ISC has fallen short. Shortly after the releases began in June 2013, the Committee reacted by giving the Government a clean bill of health with regard to its obtaining and use of information collected by the US National Security Agency (NSA).²³ The Investigatory Powers Tribunal (IPT), which hears legal challenges to the activities of the intelligence services, later found such sharing to have been unlawful.²⁴

²³ The ISC's statement of 17 July 2013 is available at <http://isc.independent.gov.uk/news-archive/17july2013>

²⁴ The IPT's judgment is available at http://www.ipt-uk.com/docs/Liberty_Ors_Judgment_6Feb15.pdf

Soon after the IPT's ruling, the ISC released a more thorough examination of the intelligence agencies' communication surveillance powers and practices.²⁵ The ISC's report was one of three released in 2015. The other two reports were authored by the Independent Reviewer of Terrorism Legislation, David Anderson Q.C.,²⁶ and the Royal United Services Institute.²⁷ Of the three, the ISC report was notable for being riddled with redactions and failing to take a critical view of certain practices, such as the UK's lack of judicial authorisation for warrants.

Germany as a Comparative Model²⁸

Parliamentary Control Panel

In 1978, the German Federal Intelligence Activity (Parliamentary Scrutiny) Act ("Federal Intelligence Activity Act") established the Parliamentary Control Commission (renamed the Parliamentary Control Panel in 1999).²⁹ In 2009, the Parliamentary Control Panel ("Panel") was enshrined in the Constitution by virtue of Article 45d of the Basic Law. The Panel oversees the activities of the German intelligence services, specifically the Federal Office for the Protection of the Constitution ("BfV"), the Military Counterintelligence Service ("MAD") and the Federal Intelligence Service ("BND").

The members of the Panel are elected by majority vote from among the Members of the Bundestag at the start of each electoral term. Chairmanship of the Panel alternates annually between a representative from the majority and a representative from the opposition.

²⁵ The ISC's report, entitled "Privacy and Security: A modern and transparent legal framework," is available at https://b1c9a9b3-a-5e6631fd-s-sites.google.com/a/independent.gov.uk/isc/files/20150312_ISC_P%2BS%2BRpt%28web%29.pdf?attachauth=ANoY7cpVn5WH9AjUwVlrZkjsUJhQ8t3SWpao0bVjw-5LgsguhHPjofkk11E6fJWfpFVjizgbzLYpumyoDGrDHhd5MP8OQwk57-FuRa6fKPfPcypgAAaAL6yvQg9acQUcfsSxBmlde_flpX_2ckOLTMqMLKt4tepYc_6nNaEdUIKxzW0IZg4zjXHzG9h42i00E-XbM5D2a5kxtHtr4flniybJ5_Qgn5jwMtn4eRh-kjLbC_4si8uifuv0nq-ZGJOY9UhTxcuSeBf&attredirects=0

²⁶ David Anderson's report is available at <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf>

²⁷ The RUSI report is available at <https://rusi.org/publication/whitehall-reports/democratic-licence-operate-report-independent-surveillance-review>

²⁸ The information contained in this section is largely summarised from a case study on Germany discussed in detail in EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR INTERNAL POLICIES, PARLIAMENTARY OVERSIGHT OF SECURITY AND INTELLIGENCE AGENCIES IN THE EUROPEAN UNION, Annex A (2011), available at <http://www.europarl.europa.eu/document/activities/cont/201109/20110927ATT27674/20110927ATT27674EN.pdf>

²⁹ The Commission replaced the Parliamentary Group Chairmen's Panel, which was comprised of the heads of each of the political parties in the Bundestag and scrutinized the intelligence services pursuant to an agreement with the Federal Chancellor.

The federal government is obligated under the Federal Intelligence Activity Act to disclose to the Panel certain information, including about the general activity of the intelligence services. Pursuant to other legislation, the federal government is subject to additional notification requirements such as, for example, information related to the surveillance of postal and telecommunications traffic.

The Panel can require the federal government and intelligence services to turn over files, interview its members and staff of other public authorities and visit the intelligence services. The federal government may refuse to provide information if necessary for purposes of acquiring intelligence, if it would infringe the rights of third parties or relates to an area of responsibility devolved exclusively to the executive. Where the federal government exercises the right to withhold information, it must explain its reason for doing so to the Panel. The Panel may also, after consulting the federal government, appoint an expert to investigate a particular issue.

The Panel reports regularly to the Bundestag and its reports are publicly accessible.

G10 Commission

The G10 Commission (“Commission”), which was established pursuant to the G10 Act in 1968, oversees the surveillance activities of the intelligence services infringing on the privacy of correspondence, posts and telecommunications.

The Panel appoints, after consulting with the federal government, the members of the Commission, who sit for an electoral term.³⁰ The Commission consists of a Chairman, who must be qualified as a judge and is elected from among the members of the Commission, and three additional members, who can be but are not necessarily Members of the Bundestag.³¹

The Commission is notified monthly of all individual surveillance measures – e.g. surveillance of a specific telephone line – and determines whether to authorise their implementation. As part of its determination, the Commission considers whether a measure is both lawful and proportionate. In making its determination, the Commission can request information from the federal government and intelligence services. In cases of imminent danger, the intelligence services may commence an individual surveillance measure prior to authorisation, but retrospective authorisation must be sought without delay.

³⁰ The Commission members remain in office until the appointment of their successors or three months after the end of the electoral term, whichever is earlier.

³¹ The Panel also appoints four substitute members who may attend and participate in meetings.

The Commission also plays a role with respect to strategic surveillance measures implemented by the BND for international correspondence, post or telecommunications. First, the Panel must consent to the scope of the measure. Second, the Commission assesses its legality. In cases of imminent danger, the Chairman and Vice-Chairman of the Panel and the Chairman of the Commission may grant provisional consent but full authorisation must be then obtained.

The Commission is informed monthly of all notifications to targeted persons that they were subjected to surveillance measures or the reasons why notification has not taken place. Notification is required by law with exceptions, including where it might prejudice the purposes of the investigation. Where notification has not taken place, the Commission assesses and can overturn this decision.

Finally, the Commission assesses the legality of the processing and use of personal data collected through the surveillance activities of the intelligence agencies.

The Panel can hear and decide on individual complaints challenging the legality or proportionality of surveillance measures undertaken by the intelligence agencies.