

JUSTICE AND SECURITY ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Oversight of intelligence and security activities

Schedule 1: The Intelligence and Security Committee

Tenure of office

29. *Paragraph 1* of Schedule 1 contains provisions regulating the tenure of office for ISC members.
30. The ISC is dissolved when Parliament is dissolved. Otherwise someone ceases to be an ISC member if they resign; if they become a Minister; if they cease to be a member of the relevant House of Parliament; or if they are removed from office by a resolution of the relevant House of Parliament.
31. Former members of the ISC may be reappointed.
32. *Sub-paragraph (5)* of *paragraph 1* ensures that (provided that the ISC remains quorate) a vacancy in its membership will not prevent it from carrying out its functions.
33. *Sub-paragraphs (6)* and *(7)* provide for continuity in the ISC's activities between Parliaments. For example, the memorandum of understanding (discussed below) agreed between the Prime Minister and the ISC in one Parliament will continue in force, and bind the ISC, in the next Parliament (unless or until it is amended).

Procedure

34. *Paragraph 2* of Schedule 1 states that the ISC may determine its own procedure, subject to the following: the Chair has a casting vote if on a matter there is an equality of voting; the Chair may appoint another member of the ISC to chair proceedings in that person's absence; the quorum of the ISC is 3.
35. *Sub-paragraph (6)* states that the ISC may hear evidence on oath. The general provision in *paragraph 2(1)* of Schedule 1, permitting the ISC to determine its own procedure, allows the ISC itself to decide who should administer oaths on its behalf.

Funding and other resources

36. *Paragraph 3* provides a power for the Government to provide funding and resourcing to the ISC.
37. As a Committee of Parliament, primary responsibility for funding and resourcing the ISC falls to Parliament. *Paragraph 3* provides a power that would, in particular, permit the Government to supplement the funding and resourcing that Parliament provides to the ISC.

38. For example, the power could be used to provide top-up funding for a limited period where the ISC is facing an exceptional workload and its resource requirements have temporarily increased; or it could be used to provide specific resources, such as IT security or physical security, where the ISC's requirements, because of the nature of the work it does, are different, and more costly to fulfil, than are the requirements of departmental Select Committees.

Access to information

39. *Paragraph 4* contains provisions by which the ISC may obtain information from the Government and describes the circumstances in which information can be withheld from the ISC.
40. The duty to provide information requested by the ISC rests, for government departments, with the relevant Minister of the Crown (this may, but need not necessarily, be a Secretary of State) and, for the Agencies, with the Agency Heads. The memorandum of understanding, agreed between the ISC and the Prime Minister (see commentary on section 2 below), will identify the relevant Ministers of the Crown for these purposes and set out the means and manner in which information can be provided to the ISC.
41. With regard to withholding information, the ability to decide that information is to be withheld from the ISC rests solely with the Secretary of State (under the comparable provisions of the Intelligence Services Act 1994, the Director-General of the Security Service, the Chief of the Intelligence Service or the Director of the Government Communications Headquarters (as well as the Secretary of State), were able to decline to disclose information because it was sensitive information which, in their opinion, should not be made available).
42. There are two grounds on which the Secretary of State may decide that information is not to be disclosed: that the information is sensitive information (as defined in *paragraph 5*) which for national security reasons should not be disclosed; or the information is of such a nature that, if the Minister were requested to produce it before a Departmental Select Committee of the House of Commons, the Minister would consider (on grounds which were not limited to national security) it proper not to do so. In deciding whether it would be proper not to disclose on the basis of the second ground, 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 (<http://www.cabinetoffice.gov.uk/resource-library/guidance-departmentalevidence-and-response-select-committees>), known as the Osmotherly Rules.

Sensitive information

43. *Paragraph 5* defines "sensitive information" in the context of *paragraph 4*. The position under the Intelligence Services Act 1994 was that information was considered sensitive information if it might lead to the identification of, or provide details of, sources of information, other assistance or operational methods available to the Agencies; or if it was information about particular operations which had been, were being or were proposed to be undertaken in pursuance of any of the functions of the Agencies; or if it was information provided by, or by an agency of, the Government of a territory outside the United Kingdom where that Government did not consent to the disclosure of the information. *Paragraph 5* extends the definition of sensitive information beyond the Agencies to cover also equivalent information relating to any part of a Government department, or any part of Her Majesty's forces, which is engaged in intelligence or security activities. Although the power to withhold sensitive information is widely

drawn, it is expected to be exercised sparingly in practice (as the equivalent power under the Intelligence Services Act 1994 was).

Publication of information received in private

44. The ISC (either as a committee of Parliament with a right to determine its own procedure, or simply by virtue of being a body of persons) may have a general (implied) power to publish information. Such a power sits alongside its express power to publish reports to Parliament as set out in section 3. Such a general power would undermine other safeguards for protection of sensitive information in the Act. *Paragraph 6* provides that the ISC may not publish material that it receives in private in connection with the exercise of its functions, other than through its reports, and may not disclose the information to any person if the ISC considers that there is a risk that the person will publish it.
45. These protections are subject to exceptions, contained in *sub-paragraph (3)*, permitting publication or disclosure of such material: if it has already been placed in the public domain; wherever publication is necessary to meet a legal requirement; and where both the Prime Minister and the Committee are satisfied that publication or disclosure would not prejudice the continued discharge of the functions of the Agencies or other government security and intelligence bodies. This last exception reflects the criterion on the basis of which the Prime Minister may require that the ISC exclude material from their reports to Parliament (see section 3(4)).

Protection for Witnesses

46. *Paragraph 7* protects evidence given by a person who is a witness before the ISC from being used in legal or disciplinary proceedings unless the evidence was given in bad faith.
47. *Paragraph 7* introduces two protections. *Paragraph 7(1)* prevents use of evidence given by a person who is a witness before the ISC in any civil or disciplinary proceedings. *Paragraph 7(2)* prevents the evidence of a witness before the ISC from being used against him or her in criminal proceedings. Both protections are subject to an exception where the evidence in question is given to the ISC in bad faith.
48. The purpose of these protections is to encourage witnesses before the ISC to be as full and frank as possible in the evidence they provide. The fuller the evidence is that the ISC receives (excepting evidence given in bad faith), the more effective the ISC is likely to be in supervising the work of the security and intelligence agencies and the other bodies falling within its oversight remit.
49. These protections mirror, to some extent, the protections that apply to witnesses appearing before Select Committees, by virtue of the application of Parliamentary privilege to Select Committee proceedings. However, the ISC is different from Select Committees in that it has something of a hybrid nature, being a statutory Committee of Parliament.