

JUSTICE AND SECURITY ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Oversight of intelligence and security activities

Section 1: The Intelligence and Security Committee of Parliament

22. *Subsections (1) and (2)* of section 1 state that the Intelligence and Security Committee of Parliament (the “ISC”) is to consist of nine members who are drawn both from members of the House of Commons and members of the House of Lords.
23. The new body replaces the Intelligence and Security Committee created by the Intelligence Services Act 1994. Its name reflects the Parliamentary nature of the Committee.
24. *Subsection (3)* provides that each member of the ISC is appointed by the House of Parliament of which he is a member.
25. *Subsections (4)(a) and (5)* state that, although members of the ISC will be selected by the House of Parliament from which they are each drawn, a person is not eligible to be a member of the ISC unless nominated for membership by the Prime Minister after consultation with the Leader of the Opposition. ISC members have access to highly sensitive information the unauthorised disclosure of which could lead to damage to national security. The purpose of this provision is to ensure that the Government retains some control over those eligible to access this material.
26. *Subsection (4)(b)* states that a Minister of the Crown is not eligible to be a member of the ISC. This is to ensure that, in line with the general practice for select committees, members are drawn from the backbenches.
27. *Subsection (6)* requires the Chair of the ISC to be chosen by its members.
28. *Subsection (7)* introduces Schedule 1, which makes further provision about the ISC.

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.

Section 2: Main functions of the ISC

50. *Subsection (1)* gives the ISC the power to examine or otherwise oversee the expenditure, administration, policy and operations of the Agencies.
51. *Subsection (2)* states that the ISC may examine or otherwise oversee such other activities of the Government in intelligence and security matters as are set out in a memorandum of understanding. The Government's intelligence and security work goes wider than the Agencies and is undertaken in parts of other Government bodies. These include the Joint Intelligence Organisation in Cabinet Office, the Office for Security and Counter-Terrorism in the Home Office and Defence Intelligence in the Ministry of Defence. This provision enables the ISC to provide oversight of the intelligence and security community beyond the Agencies. Intelligence and security functions, and the parts of Government departments that undertake those functions, may change over time. Describing those functions in a memorandum of understanding enables changes to be made to the ISC's remit, in response to changes to the structure and work of the wider intelligence community, by the agreement of the ISC and the Government. The ISC created by the Intelligence Services Act 1994 did in practice hear evidence from, and make recommendations in relation to, bodies other than the Agencies. These provisions formalise the position so far as the new ISC is concerned. The Government intends that, through the provisions in the memorandum of understanding from time to time, substantively all of central Government's intelligence and security activities will be subject to ISC oversight.
52. *Subsection (3)* provides three routes by which the ISC may consider particular operational matters. The first route is available where the ISC and the Prime Minister are satisfied that the particular operational matter is not part of any ongoing operation and is a matter of significant national interest (*subsection (3)(a)*).
53. The second route is where the Prime Minister asks the ISC to consider the particular operational matter (*subsection (3)(b)*).
54. The third route is where the ISC's consideration of a particular operational matter is limited to the consideration of information provided voluntarily to the ISC by the Agencies or a government department (*subsection (3)(c)*). Such information can be provided for these purposes in response to a request by the Committee as well as at the initiative of the relevant department.
55. For the first and second routes only, the ISC and the Prime Minister need, additionally, to be satisfied that the consideration of the particular operational matter is consistent with the Memorandum of Understanding agreed between them (*subsection (4)*).
56. The Committee's powers to require the Agencies or other government departments to provide it with information on operational matters (see *paragraph 4* of Schedule 1) are available for the first and the second route but not for the third route.
57. The ISC created by the Intelligence Services Act 1994 did on occasion hear evidence, and report on operational matters, for instance, in its Report into the London Terrorist Attacks on 7 July 2005. With the formalisation of a role in oversight of operational

matters, the Government expects the new ISC to provide such oversight on a more regular basis.

58. *Subsections (5) and (6)* make further provision in relation to the memorandum of understanding: it may include other provisions about the ISC; it must be agreed between the Prime Minister and the ISC; it may be altered with the agreement of the Prime Minister and the ISC; it must be published by the ISC and laid before Parliament.

Section 3: Reports of the ISC

59. *Subsections (1) and (2)* require the ISC to make an annual report to Parliament on the discharge of its functions and enable it to make such other reports as it considers appropriate concerning any aspect of its functions. The present ISC makes its reports only to the Prime Minister.
60. *Subsection (4)* requires the ISC to exclude any matter from a 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 Agencies or the functions of any of the other bodies whose activities the ISC oversees by virtue of section 2(2).
61. *Subsection (5)* states the report must contain a statement as to whether any matter has been excluded from the report.
62. *Subsection (7)* states that the ISC may report to the Prime Minister in relation to matters which would be excluded by virtue of *subsection (4)* if the report were made to Parliament.

Section 5: Additional review functions of the Commissioner

63. This section adds to the functions of the Intelligence Services Commissioner (the “Commissioner”) set out in section 59 of the Regulation of Investigatory Powers Act 2000 (“RIPA”). Section 59 provides for the appointment of a Commissioner who will provide oversight of a number of key investigatory techniques employed by the Agencies, and by members of Her Majesty’s forces and Ministry of Defence personnel outside Northern Ireland. Under section 60 of RIPA all relevant persons are required to disclose or provide to the Commissioner all such documents or information as might be required for the purpose of enabling the Commissioner to carry out the Commissioner’s functions under section 59. This power to require documents and information is to apply also to the new functions of the Intelligence Services Commissioner under this section (see [paragraph 4](#) of Schedule 2).
64. The section inserts a new section 59A into RIPA. *Subsections (1), (2) and (3)* of that new section add to the Commissioner’s existing functions by enabling the Prime Minister to issue a direction to the Commissioner, either of the Prime Minister’s own motion or on the recommendation of the Commissioner, to keep under review other aspects of the functions of the Agencies or any part of Her Majesty’s forces or the Ministry of Defence engaged in intelligence activities. *Subsection (4)* provides an example of the type of activity which the Commissioner may be directed to provide oversight of, by reference to the policies which govern the manner in which the Agencies carry out their functions.
65. The purpose of this statutory extension of the Commissioner’s remit is twofold: (i) to provide a clear statutory basis for the duties which the Commissioner has occasionally agreed, at the request of the Prime Minister, to take on outside the Commissioner’s previous statutory remit; and (ii) to enable an extension of that remit in the future. With regard to the former it is the intention that the Prime Minister will give a direction to the Commissioner to monitor compliance with the Consolidated Guidance on Detention and Interviewing of Detainees by Intelligence Officers and Military Personnel in relation to detainees held overseas, which has previously been an extra-statutory function.

*These notes refer to the Justice and Security Act 2013
(c.18) which received Royal Assent on 25 April 2013*

66. Under *subsection (5)*, a direction given by the Prime Minister to the Commissioner should be brought to the attention of the public in such manner as the Prime Minister considers appropriate (except in some cases where doing so would be detrimental, for example because it would prejudice national security). In practice, it is envisaged that the Prime Minister will write to the Commissioner and a copy of that letter will be placed in the House of Commons library.