

Ends and means: experts debate the democratic oversight of the UK's intelligence services

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By Democratic Audit UK

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Revelations from [Edward Snowden](#) about the scope of intelligence activities in the UK have led to renewed attempts to enhance democratic oversight of the UK's security services. The heads of MI5, MI6 and GCHQ [appeared before the Intelligence and Security Committee for the first time](#), while [Lord Macdonald](#) called for strengthened parliamentary accountability. In this post, we ask democracy and security experts to consider the need for further reform.

Sir Malcolm Rifkind MP, Chair of the Intelligence and Security Committee of Parliament

On 7th November 2013, the Intelligence and Security Committee of Parliament (ISC), which I chair, held an open evidence session with the three heads of the UK intelligence and security Agencies. Given that until 1994 these agencies did not officially exist, the evidence session marks another staging post of a remarkable and ongoing transformation in the relationship between the intelligence and security community and the public.



The 2013 Justice and Security Act, given Royal Assent earlier this year, has radically transformed the ISC's powers and capabilities. Whereas the ISC used to only be able to 'request' the evidence it needed in order to carry out its investigations, it now has the statutory power to 'require' it. It has been given the statutory responsibility for the oversight of operations, and it has been given the capabilities required in order to fulfil their new powers and responsibilities, with its budget doubled.

Oversight is necessary not just in order to prevent flagrant abuses of power, although that is its ultimate function. It is also to ensure that public money is spent wisely, that Parliament as a whole can properly hold the agencies to account, and that public confidence is maintained – but only if and when that confidence is deserved.

Sir Stephen Sedley, Visiting Professor at the Faculty of Law, University of Oxford, and former Lord Justice of Appeal

[The UK has] a statutory surveillance regime shrouded in secrecy, part of a growing constitutional model which has led some of us to wonder whether the tripartite separation of powers – legislature, judiciary, executive – conventionally derived from Locke, Montesquieu and Madison still holds good. The security apparatus is today able in many democracies to exert a measure of power over the other limbs of the state that approaches autonomy: procuring legislation which prioritises its own interests over individual rights, dominating executive decision-making, locking its antagonists out of judicial processes and operating almost free of public scrutiny. The arbitrary use of



sweeping powers of detention, search and interrogation created by the (pre-9/11) Terrorism Act, which recently made headlines with the [detention of David Miranda](#) at Heathrow, illustrates a long-term shift both in what is constitutionally permissible and in what is constitutionally acceptable. The former may be a matter for Parliament, but the latter is still a matter for the rest of us. This is an extract of an article for the [London Review of Books](#).

Dr Ian Brown, Associate Director of the Cyber Security Centre, University of Oxford

The extent of GCHQ's surveillance activities revealed by Edward Snowden's leaks appeared to be a surprise to members of Parliament's Intelligence and Security Committee (ISC), let alone the National Security Council, other parliamentarians, and the broader public. While the [Justice and Security Act 2013](#) makes some welcome improvements to the independence and powers of the ISC, more is needed – beginning with the steps suggested by Lord Macdonald. However, the much stronger Congressional intelligence oversight committees did not prevent the US National Security Agency developing parallel capabilities “on autopilot”, as Secretary of State John Kerry [told a London conference](#) last autumn.



This points to a need both for stronger statutory limits on GCHQ activities, and a much broader public debate on the legal framework governing them. The parliamentary debates that led to the Regulation of Investigatory Powers Act 2000 and its statutory instruments were desperately lacking substance on the astonishing new capabilities of intelligence agencies in the modern technological environment. We need a new framework if we are to effectively protect privacy in future, and give democratic legitimacy to the targeted, proportionate surveillance that almost everyone agrees is needed to counter terrorism and serious crime.

Hugh Bochel, Professor of Public Policy, University of Lincoln

Lord Macdonald's [recent call](#) on Democratic Audit for the Intelligence and Security Committee to become a select committee is not new, and is likely to remain topical for some time.

However, whatever the status of the ISC, whether a committee of Parliament or a select committee, there remains a further challenge for parliamentary oversight: the role of other select committees in relation to intelligence issues.

There is, it must be said, no evidence that they have any desire to take on the ISC's role. Yet, the Home Affairs and Foreign Affairs committees, and the Joint Committee on Human Rights, have, from time-to-time, raised concerns about their lack of access to individuals and papers related to intelligence on issues over which they would appear to have very reasonable interest (the [recent refusal by Theresa May](#) to allow Andrew Parker, head of MI5, to appear before the Home Affairs committee to justify his claim that the publication by The Guardian of materials leaked by Edward Snowden put national security at risk, being one obvious example). Some agreement on how to provide reasonable access to select committees and how to deal with overlaps of interest with the ISC would arguably do a great deal to aid oversight and transparency and also to educate more



parliamentarians about intelligence issues.

Read Hugh Bochel's article on this topic in [Parliamentary Affairs](#) (with Andrew Defty and Jane Kirkpatrick)

Caroline Wilson Palow, Legal Officer, Privacy International

Despite recent attempts by the UK Government to reform the Intelligence and Security Committee through the [Justice and Security Act 2013](#), the continuing Snowden revelations show how feeble UK oversight actually is. It is now widely acknowledged that the ISC's weaknesses have resulted in an almost 'siloed' body with little transference of knowledge or expertise from a core group of representatives to the wider Parliament, much less the public. This in turn leads to a severe lack of accountability, transparency, and ultimately a breakdown in trust – both of the oversight mechanism and of the agencies themselves. But it does not have to be this way.



The ISC's unwavering defence of the intelligence agencies' actions is in contrast to the reaction of the similar bodies in the US. While far from perfect, the US response to the Snowden revelations has resulted in a [more robust debate about the powers of the intelligence services](#) than we have thus far seen in the UK. Congress and the US courts have placed significant pressure on the US executive and intelligence services to acknowledge the Snowden revelations and reveal additional details regarding the decision-making process that led to such potential abuses of power. That pressure has resulted in much more transparency, which in turn has led to substantive discussions regarding reform. The ISC should take notes.

Nick Pickles, Director, Big Brother Watch

Substantial reform is essential if our oversight system is to command public confidence. Parliamentary questions, let alone those from the public, are met with the standard retort 'we do not comment on intelligence matters.' In one recent exchange in the Lords, the Government minister refused to even say which legislative provision was being used to justify publicly known programmes.



In the US, a system already far more rigorous than our own, the Government was able to make an argument in a secret court – unopposed – that the word 'relevant' justified collecting in bulk the phone call data of millions of innocent people. As President Obama's NSA review noted, the interpretation did 'violence' to the meaning of the word 'relevant'. We have absolutely no idea if the same over-reach is occurring here. Our Investigatory Powers Tribunal does not award legal costs, even for those who successfully challenge surveillance.

With an oversight committee still nominated by the Prime Minister, rather than elected by Parliament, and with no judicial authorisation of surveillance at any point for the intelligence agencies, we have an oversight system that fails every test of rigour, confidence and objectivity.

Mathias Vermeulen is a Research Fellow at the European University Institute in Florence

Lord MacDonald offered a stringent critique on the composition and functioning of the Intelligence and Security Committee, and its impact on the introduction of closed material procedures. I share his proposals for further reform, which would bring the UK's parliamentary oversight regime more in line with [internationally accepted best practices](#).



In my view, the main flaw of the UK's 'parliamentary' oversight regime is its lack of independence from the executive. The adoption of the Justice and Security Act did not change the fact that (a) ISC-members are still nominated by the Prime Minister (instead of both Houses of Parliament), who (b) receives ISC reports before they are sent to Parliament and (c) even has a veto power to exclude certain matters from such a report. If one combines this with the ISC's lack of subpoena-powers and its ability to only review operational matters post-facto, you create a situation where no real parliamentary accountability is possible, only 'accountability theatre'.

Professor Ian Leigh, Durham Law School, Durham University

Intelligence oversight is now at the crossroads, not just in the UK but in many other countries also. The fundamental challenge is not fine-tuning the composition or powers of oversight bodies like the ISC, although clearly some further useful reforms could be made. The problem is that oversight legislation was drafted with twentieth century abuses in mind and, post 9/11, is now left facing in the wrong direction.

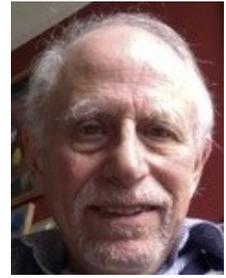


In their counter-terrorism work the UK agencies are now cooperating with several hundred international partners. At best nationally-based oversight committees are only able to see one side of this global picture. At worst- as has been alleged by Edward Snowden – international partnerships could be exploited to escape the limits of national legislation. The antidote is not to attempt to create a supra-national oversight body but, rather, to enhance the existing domestic structures. A useful start would be for the ISC to begin to coordinate investigations with their counterparts overseeing the UK agencies' closest intelligence partners. In the longer term, however, changes will be needed to strengthen accountability for the approval of intelligence cooperation and to remove the current legal barriers to examining it.

In time the agencies will come to see that this is in their best interests too – certainly it would be better than a steady drip of damaging disclosures about their dangerous overseas liaisons.

Charles Raab, Professor of Government, University of Edinburgh

Lord Macdonald rightly insists on better parliamentary scrutiny of the intelligence services through an effective select committee. Recent revelations about GCHQ, the US National Security Agency, and so on, have dramatised this scrutiny gap. Democracy can only benefit from a greater transparency and accountability, exposing what is clandestine and eroding the secrecy that abets self-serving interests operating in the name of an unexamined 'national security'. A strengthened ISC would certainly help. But select committees in both Houses have written many reports on surveillance, privacy invasion, and so on. These should not be overlooked even if they only touch the foothills of Snowden's grand intelligence and surveillance issues.



I served on the Lords Constitution Committee as the Specialist Adviser for an investigation leading to the report. '[Surveillance: Citizens and the State](#)'. It remains relevant because the Committee's concern about surveillance's effects on the rule of law and state-citizen relations – fundamental matters in a democracy – led it to investigate and criticise information practices in many domains. Material examined was not about intelligence services but related to the effects on daily life of the operation of the Regulation of Investigatory Powers Act 2000; the national DNA database; data-mining and -sharing; camera surveillance; and so on. These too are marked by obscurity and weak controls, posing palpable threats to the rule of law and the prospects for an informed citizenry.

The 'surveillance/security state' applies also to such mundane but significant contexts nearer the 'soft' end of a spectrum of intelligence activities that stretches to a mass surveillance that undermines reasonable expectations about the privacy-protective integrity of modern communications. Safeguarding democracy and the rule of law is required at both ends. Parliament has more work to do on surveillance practices that are sometimes wrongly considered to be less important, even if scrutiny of the intelligence services is also transformed in the current ferment.

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