



INTELLIGENCE AND SECURITY COMMITTEE OF PARLIAMENT

Chairman: The Rt. Hon. Dominic Grieve QC MP



DRO (15-16) 018

The Rt. Hon. Harriet Harman QC MP
Chair, Joint Committee on Human Rights
House of Commons
London
SW1A 0AA

ISC6.5/114

14 January 2016

Dear Harriet,

ISC INQUIRY ON DRONES

I read with interest the official record of the Liaison Committee's evidence session with the Prime Minister on 12 January. You asked a number of questions regarding the Government's policy on drone strikes, their legal justification, and the intelligence basis for those strikes, including the extent of disclosure to the Intelligence and Security Committee of Parliament. The ISC's position on these matters has always been clear, but in light of the exchange you had with the Prime Minister I feel there is benefit in setting this out in more detail in this open letter.

On 29 October 2015, I issued a statement setting out the ISC's immediate priorities which included that the ISC would consider the intelligence basis for recent drone strikes. The Committee has been clear from the outset that the Government's policy in relation to conducting lethal strikes is a matter of considerable and legitimate interest for Parliament and its committees. There are legal, justice and human rights policy issues that can be scrutinised by your and other select committees, and it would seem to me that such matters can be discussed quite openly. Equally, there are matters of military policy and doctrine that could be scrutinised openly by the Defence Select Committee and others.

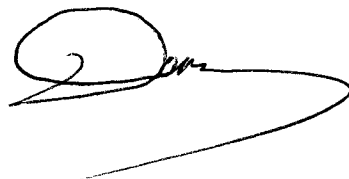
Where the ISC can bring a unique contribution to Parliament's collective oversight of this policy is in its statutory power to access highly classified material and its ability to examine the intelligence which led to the decision to conduct the operation. How serious and imminent was the threat and what would have been the consequences of inaction? What intelligence was there regarding the viability or otherwise of alternative actions, including possible arrest and other disruption options?

While the ISC is best placed to investigate such matters, I do not feel any other Select Committees need feel constrained in their scrutiny of the wider policy. Our statutory remit is intelligence and this is the focus of our inquiry – we do not wish to intrude into matters that should rightly fall to others to investigate.

Finally, you may be interested in the progress of our inquiry thus far. You will appreciate that the sensitive nature of the intelligence has meant that it has taken rather longer than we had hoped to finalise the scope of our Inquiry and to reach agreement on the disclosure of material to the Committee. (The policy governing the disclosure to the ISC of intelligence relating to ‘current operations’ is explained in our Memorandum of Understanding with the Prime Minister which was published in November 2014 – a copy of which is enclosed.) Nevertheless, I can now say that we have reached agreement and this has been confirmed in a letter from the Prime Minister dated 5 January (unfortunately, I had not had the chance to see the letter before we spoke on 12 January). We are therefore due to consider contemporaneous intelligence material and take further evidence on these matters in the coming weeks. You will appreciate it is too early to say when, or in what format, we will be in a position to report our findings.

I am copying this to Andrew Tyrie and Julian Lewis.

Yours ever

A handwritten signature in black ink, appearing to read 'D. Grieve', with a long, sweeping underline that extends to the right.

DOMINIC GRIEVE

ANNEX A: A MEMORANDUM OF UNDERSTANDING AGREED BETWEEN THE PRIME MINISTER AND THE INTELLIGENCE AND SECURITY COMMITTEE OF PARLIAMENT (ISC)

Introduction

1. The Justice and Security Act 2013 (“the Act”) provides for the oversight of the intelligence and security activities of HM Government (HMG) by the Intelligence and Security Committee of Parliament (ISC).
2. The Act states that any memorandum of understanding (MoU) for the purposes of the Act must be agreed between the Prime Minister and the Intelligence and Security Committee of Parliament. The ISC shall publish the MoU and lay a copy before Parliament (see section 2(6) of the Act).
3. In addition to addressing certain particular matters specified by the Act,⁶ this MoU also sets out the overarching principles which will govern the relationship between the ISC and those parts of Government it oversees.

The Intelligence and Security Committee of Parliament

4. The ISC is a Committee of Parliament created by statute and comprising members of each House of Parliament.⁷ For the purposes of its work, the ISC has a staff, known as the ISC Secretariat.
5. Parliament appoints the members of the ISC, by vote on a motion of the relevant House. Candidates for membership must first have been nominated by the Prime Minister. The ISC elects its own Chair from amongst the appointed members of the Committee.
6. The ISC makes its reports to Parliament, subject to the requirement that material must be redacted from a report if the Prime Minister considers that its inclusion would prejudice the functions of the Security Service, the Secret Intelligence Service, the Government Communications Headquarters (collectively, “the Agencies”) or of other parts of the intelligence and security community. The ISC may also, as appropriate, report to the Prime Minister.
7. All members of the ISC, and their staff, are notified under the Official Secrets Act 1989 (section 1(1)(b) and 1(6)). They may not, without lawful authority, disclose any information related to security or intelligence which has come into their possession as a result of their work on, or for, the ISC.

⁶ *The activities of HMG that the ISC shall oversee; the principles governing the ISC's consideration of operational matters; the arrangements by which the Agencies and other government Departments will make information available to the ISC; and the relevant Ministers of the Crown responsible for providing information to the ISC.*

⁷ *The Standing Orders of the House of Commons and House of Lords, which govern the procedures of their Select Committees in general, do not apply to the ISC. The ISC has the power to hear evidence on oath, but it is expected that this will only be used exceptionally.*

Remit

8. The Act provides that the ISC may oversee the expenditure, administration, policy and operations of the Agencies; and that it may examine or otherwise oversee such other activities of HMG in relation to intelligence or security matters as are set out in a memorandum of understanding. The ISC is the only committee of Parliament that has regular access to protectively marked information that is sensitive for national security reasons: this means that only the ISC is in a position to scrutinise effectively the work of the Agencies and of those parts of Departments whose work is directly concerned with intelligence and security matters.⁸ In addition to the expenditure, administration, policy and (subject to paragraphs 11–17) operations of the Agencies, the ISC and HMG have agreed that the ISC shall also oversee the following activities:-

- a. MOD:
 - i. The strategic intelligence activities undertaken by the Chief of Defence Intelligence, including intelligence collection, analysis and training.⁹
 - ii. Offensive cyber.
- b. Cabinet Office:
 - i. The activities of the National Security Adviser and National Security Secretariat in relation to matters of intelligence and security. In practice this will include the activities of the Cabinet Office: in providing support to the Prime Minister in his role as Minister with overall responsibility for intelligence and security matters; coordinating intelligence policy issues of strategic importance and public scrutiny of intelligence matters; managing the Single Intelligence Account; and certain activities (relating to matters of intelligence and security) of the Office of Cyber Security and Information Assurance (OCSIA).
 - ii. The activities of the Joint Intelligence Organisation.
- c. Home Office: the activities of the Office for Security and Counter-Terrorism (OSCT).

9. There are a number of other individuals or bodies that oversee intelligence and security matters. For example: the Independent Reviewer of Terrorism Legislation; the Intelligence Services Commissioner; and the Interception of Communications Commissioner. The ISC will continue to have a relationship with those bodies and should cooperate with them so far as is reasonable to avoid any unnecessary duplication in their respective remits.

10. Likewise, the ISC will seek to avoid unnecessary duplication with the work of courts or tribunals (such as the Investigatory Powers Tribunal) which may, from time to time, have cases before them concerned with intelligence and security matters.

⁸ This will not affect the wider scrutiny of departments such as the Home Office, FCO and MOD by other parliamentary committees. The ISC will aim to avoid any unnecessary duplication with the work of those Committees.

⁹ In respect to operational matters, addressed in paragraphs 11–17, general military operations conducted by the MOD are not part of the ISC's oversight responsibilities.

Oversight of Operational Matters

11. The ISC may consider or otherwise oversee the operational activities¹⁰ of the Agencies and the specified activities of other Government Departments referred to in paragraph 8 above (“the Departments”). The ISC may consider particular operational matters in three sets of circumstances:

- a. Where the ISC and the Prime Minister are satisfied that the matter is not part of any ongoing intelligence or security operation and is of significant national interest and the consideration of the matter is consistent with any principles set out in, or with any other provision made by, the MoU (see section 2(3)(a) and 2(4) of the Act); or
- b. Where the Prime Minister has asked the ISC to consider the matter and the consideration of the matter is consistent with any principles set out in, or with any other provision made by, the MoU (see section 2(3)(b) and 2(4) of the Act); or
- c. Where consideration of an operational matter is not covered by (a) or (b) above, but information is nevertheless provided voluntarily to the ISC by the Agencies or a Department, whether or not in response to a request by the ISC (see section 2(3)(c) of the Act).

Further detail regarding the ISC’s oversight of operational matters in these circumstances is set out below.

12. The ISC recognises the sensitivity of intelligence and security operations. Its role overseeing such operational activity will therefore be governed by the following overarching principles:

- a. this work must not jeopardise the success of an operation or compromise the security and safety of those involved; and
- b. the ISC’s examination of an operational matter must not unduly impede the operational effectiveness of an Agency or Department.

13. Where there are legal proceedings (criminal or civil), inquiries¹¹ or inquest proceedings, the ISC and HMG will consider carefully whether it is appropriate to proceed with an investigation.

14. Under section 2(3)(a) of the Act, the ISC’s power to oversee operational activity is retrospective and on matters of significant national interest. When considering whether an activity ‘is not part of any ongoing intelligence or security operation’, the ISC and the Prime Minister will take into account:

- a. Whether the main objectives of the particular operation have been achieved or whether there is now no reasonable prospect of further operational activity to seek to achieve the main objectives in the near future;

¹⁰ Certain long-running ‘operations’ may be considered within the ISC’s remit, for example, where the entire intelligence gathering effort for a particular country is undertaken for long periods under the guise of a single operational code word.

¹¹ Including statutory inquiries or other independent judge-led inquiries.

- b. That the operational activity of the Agencies and Departments can vary greatly in scope, type and magnitude and in some cases it may not be clear when a particular operation has ended. Deciding whether a matter is or is not part of ‘any ongoing intelligence or security operation’ will be a matter of judgement for the Prime Minister and the ISC;
- c. When two or more operational activities may be separated in time but closely linked in objective, the ISC will be entitled to have retrospective oversight of such operations that have been completed, unless such oversight would jeopardise the success of such future operations; and
- d. The ISC and HMG are agreed that the operational activity or event in question will only be regarded as ‘of significant national interest’ if it raises issues of wider significance or raises serious questions relating to Agency or Departmental conduct, competence, resourcing and policy in the operational context, including in situations where there is, or is likely to be, significant parliamentary or public interest in relation to such issues or questions.

15. The Prime Minister will nominate the National Security Adviser and his deputy for intelligence matters to consider, on his behalf, whether the conditions for such oversight are met. The final decision will rest with the Prime Minister, in conjunction with the ISC.

16. Under section 2(3)(b) of the Act, the Prime Minister may, at his discretion, consider it appropriate to invite the ISC to consider an operational matter which falls outside the ‘retrospective’ and ‘significant national interest’ criteria.

17. Under section 2(3)(c) of the Act, the ISC may consider operational matters not covered by sections 2(3)(a) or 2(3)(b) where information is provided voluntarily to the ISC by the Agencies or a Department, whether or not in response to a request by the ISC.

Provision of Information

18. The ISC requires information from HMG in order to carry out its oversight function. The importance of the ISC’s oversight role is recognised by the fact that, while officials and Ministers are able to provide information to the ISC, only a Secretary of State has the power to withhold it. This is reflected in paragraph 4 of Schedule 1 to the Act.

19. The duty to provide information to the ISC rests, for the Departments, with the relevant Minister of the Crown (this may, but need not necessarily, be a Secretary of State),¹² and for the Agencies, with the Heads of the Agencies.

20. In practice there will be a range of methods which the ISC may use in order to obtain the information it requires from HMG, including:

- a. oral evidence sessions with Ministers, Agency Heads and other senior officials. These sessions allow the ISC to ask detailed questions about particular issues within their remit, but also to get a broader sense of the issues that Agencies, Departments and Ministers are facing and to decide whether any particular issue might need further scrutiny;

¹² For the following Departments, the relevant Ministers of the Crown, for the purposes of making information available to the ISC (paragraphs 4(3) and 4(7) of Schedule 1) are as follows:

- a. Cabinet Office: Any Minister of the Crown in a relevant Government department;
- b. MOD: Secretary of State for Defence;
- c. Home Office: Secretary of State for the Home Department;
- d. Foreign and Commonwealth Office: Secretary of State for Foreign and Commonwealth Affairs.

- b. Written material, both regular briefs on agreed lines of reporting and responses to specific questions. HMG and the Agencies will keep the ISC fully and promptly informed of any significant matters falling within the ISC's remit;
 - c. Members of the ISC's staff working with the Agencies and the Departments to obtain information on the ISC's behalf, ensuring that the ISC has all the information it needs to do its job in relation to matters consistent with its remit.
21. The responsibility for ensuring the ISC has access to relevant information consistent with its remit will fall to the appropriate Agency or Department, who will make available the information the ISC needs. The ISC will work together with the Agencies and Departments to ensure that the provision of such information does not involve disproportionate cost or diversion of effort.
22. The Committee may seek confirmation from HMG of the factual accuracy or completeness of information it has gathered before drawing on it in its reports.
23. Committee members may, as part of their work, undertake visits to the Agencies and Departments that the ISC oversees, to familiarise themselves with the broader context of their work. Information provided to Committee members in the course of such visits will not constitute formal evidence gathering unless it is agreed as such by both parties either in advance or retrospectively.
24. On occasion the Prime Minister may write to the ISC specifically to draw to the Committee's attention an area of work it may wish to scrutinise.
25. In common with the practice for departmental select committees, the ISC should be informed of impending Ministerial statements or announcements which are relevant to its current enquiries or general remit in good time. The ISC will also be informed in advance of the appointments of the heads of the Agencies, the Chief of Defence Intelligence and the Chair of the Joint Intelligence Committee (JIC).
26. The ISC will seek to keep HMG informed as to its future work plans, as far as that is possible and reasonable. The ISC, in consultation with the Agencies and Departments, will set reasonable deadlines when it makes requests for information. Where it becomes clear that, exceptionally, HMG is unable to meet a particular deadline set by the ISC for provision of information, then the Agency or Department concerned will notify the ISC and provide a written explanation in advance of the deadline.

Protection and Handling of Sensitive Information

27. The ISC is responsible for ensuring that information disclosed to it is handled in accordance with HMG's document handling, storage and security procedures. The ISC will be provided with appropriate accommodation and facilities for this purpose and/or the requisite resources.
28. The Act sets out restrictions on the ISC's ability to publish or disclose information (section 3(4) of, and paragraph 6 of Schedule 1 to, the Act). In practice, the ISC and HMG agree that these provisions of the Act will only prevent the ISC publishing or disclosing information if it is information of the kind that it could not include in one of its reports to Parliament.

29. Paragraph 1(3) of Schedule 3 to the Act allows the ISC created by the Act to access documents or other information provided by or belonging to the previous Intelligence and Security Committee (i.e. the Committee established by section 10 of the Intelligence Services Act 1994). The ISC in a new Parliament will inherit the documents, and will be able to continue the ongoing work, of its predecessor in the preceding Parliament (paragraphs 1(6) and (7) of Schedule 1 to the Act). The Committee's staff will continue in post notwithstanding a dissolution of Parliament.

Withholding Information

30. The ISC regularly sees protectively marked material in the course of their work but there may, exceptionally, be circumstances in which it would not be appropriate for the ISC to see particular information, as set out in paragraph 4 of Schedule 1 to the Act. The power to withhold information from the ISC can only be exercised by a Secretary of State (given the ISC's remit this will generally be the Foreign, Home or Defence Secretaries).

31. It is agreed by HMG and the ISC that no decision will be taken to withhold information from the ISC without the ISC being informed of that decision. If the Secretary of State, after considering advice from the Agencies and/or the Departments, decides that there is reason to withhold certain information, the relevant Minister will discuss the matter with the ISC Chair, if requested.

32. The power to withhold information from the ISC under paragraph 4(4)(b) of Schedule 1 is discretionary,¹³ and one that it is expected will be required to be exercised very rarely. In exercising this discretion the Secretary of State will have particular regard to the provisions that the ISC has for keeping material confidential. In some cases, having regard to those provisions and other features of the ISC that distinguish it from select committees, the Minister might well consider it appropriate that information be provided to the ISC. For example, the ISC has in the past received information about matters *sub judice* and/or contained in papers of a previous administration.

Oral Evidence Sessions: Closed

33. The ISC's evidence sessions are generally with Ministers (Home Secretary, Foreign Secretary) and senior officials (Heads of Agencies, National Security Adviser, Chair of the JIC, Chief of Defence Intelligence, Head of OSCT). This is not an exhaustive list, and the ISC may invite any Minister or senior official to give evidence.

34. During an evidence session, if witnesses consider that answering a question put to them would disclose information that a Minister might consider ought properly to be withheld from the ISC, in accordance with paragraph 4(4) of Schedule 1 to the Act, then the witnesses should state that they will need to take further advice before answering the question. A response must be provided to the ISC in writing as soon as possible after the evidence session (generally within 14 days). This will take the form of a substantive response to the question, or a response setting out the Secretary of State's decision, informing the ISC that they will be exercising the power to withhold the information.

¹³ In considering whether to withhold information on these grounds the Secretary of State will have regard to any guidance issued by a Minister of the Crown or a Department concerning the provision of evidence by civil servants to Select Committees (paragraph 4(5) of Schedule 1). Currently, this means the Cabinet Office Guide "Departmental Evidence and Response to Select Committees" (July 2005) (sometimes referred to as the "Osmotherly Rules"). The Osmotherly Rules outline the categories of information where it may sometimes be appropriate to decline to provide information to Select Committees. These include information: as to officials' personal views (as distinct from views of Ministers) on policy options; requiring substantial research be carried out by a Department or which could only be supplied at excessive cost; about matters *sub judice*; about the conduct of particular individuals, where the Committee's line of questioning appears to be not just to establish facts but with the implication of allocating individual blame; and contained in papers of a previous administration.

35. The Committee will supply witnesses giving oral evidence with copies of their verbatim transcripts as soon as possible after their appearance (generally within 14 days). This is to enable witnesses to check that the transcript is an accurate record of what they said and, if necessary, provide corrections.

Open Sessions

36. HMG and the ISC are committed to enabling occasional evidence sessions in public on matters agreed by both parties. The nature of the Committee's work and the need for it to consider protectively marked material in carrying out its functions means that the majority of sessions will continue to be held in private. HMG and the ISC will agree adequate safeguards (including on physical security, attendance, and arrangements for broadcast) in advance of each public session. This will allow them to take place without risking disclosure of protectively marked information, while still enabling a substantive hearing. The ISC will provide those giving evidence with an indication of the main issues to be discussed, in keeping with the practice of Parliamentary Select Committees.

Reporting

37. Whilst the Act provides that information must be redacted from a report if the Prime Minister considers its inclusion would be prejudicial to the continued discharge of the functions of the Agencies or of the wider intelligence and security community, HMG will work constructively with the ISC to ensure that as much of its reports that can be published, is published. HMG and the ISC will work together to apply a reasonable process for identifying, in consultation with the ISC, sensitive material that must be removed from ISC reports prior to publication.

38. HMG will aim to respond substantively to any report by the ISC within 60 days.

39. The ISC will provide information on its staffing and budget in its published reports.