

## **Justice and Security Bill: ISC Memorandum of Understanding**

### **Summary of intended content from HMG perspective**

1. The Justice and Security Bill provides (Clause 2<sup>1</sup>) that any memorandum of understanding (MoU) for the purposes of the Bill must be agreed between the Prime Minister and the ISC. The ISC must publish it and lay a copy before Parliament.
2. This document sets out the areas that HMG expects the Memorandum of Understanding to cover and is premised on the assumption that the ISC-related provisions in the Bill are enacted, substantially, in their current form.
3. The following paragraphs represent HMG's current thinking. HMG is currently in discussion with the ISC as to the contents of the MoU.

### **Purpose of the memorandum of understanding**

4. The matters which the Bill provides that an MoU will specify are:
  - a. the activities of HMG in relation to intelligence or security matters (other than the activities of the Agencies) that the ISC may oversee – (Clause 2(2));
  - b. Additional principles and provisions (other than those specified in the Bill itself – see further below) with which the ISC's consideration of operational matters must be consistent (Clause 2(3A)); and
  - c. the arrangements by which the Agencies and other government Departments will make information available to the ISC (paragraph 3(2) (a) of Schedule 1).
5. In addition, the Bill provides that the MoU may:
  - a. identify the relevant Ministers of the Crown responsible for making information available to the ISC (see paragraph 3(7)(a) of Schedule 1); and
  - b. include other provisions about the ISC or its functions (Clause 2(4) (a)).

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<sup>1</sup> References are to the Bill as at Committee in House of Commons.

## **Matters that the Bill provides that an MoU will specify**

*The activities of HMG in relation to intelligence or security matters (other than the activities of the Agencies) that the ISC may oversee (Section 2(2))*

6. It is HMG's intention that substantively all of central Government's intelligence and security activities will be subject to ISC oversight and that the MoU will state that the ISC may oversee the following activities:-
  - a. MOD. The strategic intelligence direction, collection, analysis and training activities undertaken by the Chief of Defence Intelligence. General military operations conducted by the MOD are not part of the ISC's oversight responsibilities;
  - b. Cabinet Office: central intelligence functions: 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 of the Office of Cyber Security and Information Assurance (OCSIA).
  - c. Cabinet Office: Joint intelligence Organisation;
  - d. Home Office: Office of Security and Counter-Terrorism.

*The additional principles and provisions with which the ISC's consideration of operational matters must be consistent (Clause 2(3) (b))*

7. The ISC may oversee operational matters, whether through its power to consider or otherwise oversee the operations of the Agencies the activities of HMG in relation to intelligence or security matters more generally. One of the following three sets of circumstances must apply before the ISC may consider operational matters:
  - a. 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 [Clause 2(3)(a) and 2(3A)] ("Route A");
  - b. 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 [Clause 2(3)(b) and 2(3A)] ("Route B");



- c. the ISC's consideration of the matter is limited to the consideration of information provided voluntarily to the ISC by SIS, the Security Service, GCHQ or a government Department [Clause 2(3)(c)] ("Route C").
8. HMG intends that the following principles are outlined in the MoU.
9. With regard to Route A the MoU will list factors that may be taken into account when judging when a matter is 'not part of any ongoing intelligence or security operation'. It is HMG's intention that the following factors will be taken into account by the ISC and the Prime Minister when considering whether an activity 'is not part of any ongoing intelligence or security operation':
  - a. have the objectives of the particular operation been achieved or is there now no reasonable prospect of further operational activity to seek to achieve them;
  - b. will the ISC's examination of the particular activity jeopardise the success of an operation or compromise the security and safety of those involved.
10. With regard to Route A the MoU will state factors that may be taken into account when judging whether a matter is of 'significant national interest'.
11. With regard to Routes A and B the MoU will list other principles to be taken into account in considering whether the ISC may proceed with its oversight of an operational matter. It is HMG's intention that these should be:
  - a. the ISC's examination of an operational matter should not impede the operational effectiveness of an Agency or another part of HMG engaged in intelligence and security matters;
  - b. it will not, other than in exceptional circumstances, be appropriate for the ISC to proceed with consideration of an operational matter which is already the subject of current legal proceedings (criminal or civil), inquest proceedings or other inquiries;
  - c. the ISC's examination of the particular activity should not jeopardise the success of an operation or compromise the security and safety of those involved.
12. With regard to Route B the MoU will make clear that it is only likely to be exceptionally that the Prime Minister will consider it necessary to invite the

ISC to consider an operational matter which falls outside the 'retrospective' and 'significant national interest' criteria.

13. With regard to Route C the MoU will make clear that the ISC's consideration of a particular operational matter is limited to considering information that has been provided to the ISC by the Agencies or other government Departments on a voluntary basis. The ISC's powers to require the Agencies or other government Departments to provide it with information (paragraph 3 of Schedule 1) are not available under Route C. It will also make clear that Route C provides a mechanism by which the ISC may be kept informed of significant operational matters falling within its remit. The ISC is free to approach the Agencies or other government Departments with requests that they volunteer information about particular operational matters in which the ISC is interested.

*The arrangements by which the Agencies and other government Departments will make information available to the ISC (paragraph 3(2) (a) of Schedule 1).*

14. HMG intends that the MoU will set out the ways that the ISC will typically access information in support of its work:
- oral evidence sessions. These sessions allow the ISC to ask detailed questions about particular issues, but also to get a broader sense of the issues that Agencies, Departments and Ministers are facing that might demand further scrutiny;
  - written briefings, whether regular briefs on agreed lines of reporting or responses to specific questions. As a general rule HMG should keep the ISC properly and promptly informed of significant matters falling within the Committee's remit;
  - access to relevant material obtained through members of the ISC's staff working with the Agencies and other Departments during the course of an investigation.

15. HMG intends also that the MoU will set out the processes by which the ISC will have access to relevant material.

**Matters that the Act provides that an MoU may include**

*Identify the relevant Ministers of the Crown responsible for making information available to the ISC, which it has requested (see paragraph 3(2) and 3(6)) of Schedule 1);*



16. HMG intends that the MoU should provide more detail on the process that would have to be followed in order for HMG to withhold information from the ISC. Under the Bill, a Secretary of State can withhold information from the ISC on the basis that it is either (1) 'sensitive information (as defined in paragraph 4 of Schedule 1 of the Bill) which, in the interests of national security, should not be disclosed' to the ISC or (2) that 'it is information 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 it (on grounds which were not limited to national security) proper not to do so'.
17. HMG intends that the MoU will explain that these powers are expected to be used infrequently.
18. With regard to the second category, HMG intends that the MoU should explain that there are a number of types of information that may be withheld from Select Committees, in certain circumstances, and in line with certain long-standing conventions on the provision of information which have been observed in practice by successive administrations on grounds of public policy. The categories are outlined and explained in the Cabinet Office Guidance "Departmental Evidence and Response to Select Committees" (July 2005) (otherwise known as the "Osmotherly Rules").
19. It is also HMG's intention that the MoU will state that the power is discretionary, and one that it is expected will be required very rarely. In exercising this discretion it is HMG's intention that the Secretary of State will have 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, which the Minister would have withheld from a Commons Select Committee. The ISC has in the past received information about matters *sub judice* and contained in papers of a previous administration, and we would expect that to continue to be the case in the future.
20. It is HMG's intention that for specific government Departments, the MoU will state the relevant Ministers of the Crown, for the purposes of making information available to the ISC (paragraphs 3(2) and 3(6) of Schedule 1) are as follows.
  - a. Cabinet Office: Any Minister of the Crown
  - 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

21. To be clear, this list of Ministers is only relevant with regard to making information available to the ISC. Under the Bill only a Secretary of State can withhold information from the ISC.

*Other provisions about the ISC or its functions Clause 2(4) (a)).*

Public Evidence Sessions

22. In order to perform its oversight functions effectively, the ISC has access to, and must consider, protectively marked information, public disclosure of which could cause significant damage to national security. The way that it operates is inevitably different from Departmental Select Committees. Its work must largely be done in private. For that reason, it is HMG's intention that the MoU will make clear that HMG and the ISC will need to agree adequate safeguards in advance of each session. This will allow them to take place without risking disclosure of protectively marked information, while still enabling a substantive hearing.

Reporting

23. The Bill states that the ISC must exclude any matter from its report 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 any person carrying out activities falling within Clause 2(2).

24. It is HMG's intention that the MoU will make clear that HMG will continue to work constructively with the ISC to publish as much of its reports as is possible. It is also HMG's intention that the MoU will make clear that the ISC will continue to work with HMG to ensure an appropriate process, including a timescale, for the consideration of sensitive material that may need to be removed from ISC reports prior to publication.

25. It is HMG's intention that the MoU will also say that:

- a. in common with Departmental Select Committees, HMG will aim to respond to the ISC's Annual and other Reports, once published, within 60 days;
- b. on some issues it may be necessary, because of the nature of the subject matter, that a report is made only to the Prime Minister, and not to Parliament. In such instances, a response will be made privately to

the ISC. HMG will aim to respond to the ISC's private reports to the Prime Minister within 60 days.

- c. through its Annual Report, the ISC will publish details of its staffing and of its running costs.

#### Other Matters

26. HMG considers that it may be helpful for the MoU to cover the following matters:

- a. any necessary principles or practices for communications between the HMG and the ISC;
- b. the ISC's responsibilities with regard to protection and handling of sensitive information;
- c. the resourcing of the ISC and the role of the ISC Secretariat.