

*Parliamentary monitoring mechanism on
intelligence agencies in selected places*

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Executive Summary

1. This report studies the mechanisms adopted by four selected overseas legislatures to monitor government intelligence agencies. The selected legislatures are the House of Representatives of the United States (US) Congress, the House of Representatives of the Parliament of Australia, the House of Commons of the United Kingdom (UK) Parliament and the House of Commons of the Parliament of Canada. The mechanisms are examined in the following aspects: statutory basis, powers and functions; composition and design; administration and procedure; access to sensitive information; and restrictions on disclosure of sensitive information.
2. In the US, the House of Representatives has a permanent congressional committee on intelligence and security, i.e. the House Permanent Select Committee on Intelligence (HPSCI). Empowered by various statutes, primarily the *National Security Act of 1947* and the *Intelligence Oversight Act of 1980*, HPSCI monitors a wide range of activities of all government intelligence agencies, including their budgets, administration, policies and intelligence operations. HPSCI also considers bills relating to intelligence matters and authorizes funding for intelligence agencies, but does not investigate any complaints against those agencies' activities. HPSCI can compel the attendance of witnesses and the production of documents before it. Appointed by the House, all HPSCI members, who must include the House's Speaker and the Minority Leader as ex officio members, are serving Members of the House, with the majority being drawn from the majority party in the House in practice. HPSCI can access most finished intelligence products that are circulated within the executive branch, and occasionally access sensitive information such as identities of intelligence sources, intelligence methods, raw intelligence and written intelligence products provided to the US President. With leave of the House, HPSCI can disclose sensitive information on intelligence matters publicly, even when the US President objects to such disclosure.

3. In Australia, the House of Representatives has established a joint parliamentary standing committee with the Senate, i.e. the Parliamentary Joint Committee on Intelligence and Security (PJCIS), which is empowered primarily by the *Intelligence Services Act 2001* to monitor the expenditure and administration of all government intelligence agencies. Nonetheless, PJCIS does not monitor those agencies' intelligence operations and policies, which are monitored by the statutory Inspector-General of Intelligence and Security appointed by the Governor-General upon recommendation by the Prime Minister, who is required to consult the House's Leader of the Opposition before making the recommendation. In addition, PJCIS does not consider bills relating to intelligence matters, authorize funding for intelligence agencies or investigate any complaints against those agencies' activities. PJCIS can require witnesses to give evidence or produce documents, but such evidence or documents must not reveal intelligence agencies' operationally sensitive information. Appointed by the House on the nomination by the executive branch, all PJCIS members must be serving Members of Parliament, and the majority of them must be Members representing the government. Before nomination, the Prime Minister must consult the opposition parties that are represented in the House and do not form part of the government. PJCIS cannot access operationally sensitive information, including sources of information, operational methods, particular operations and classified information provided by foreign governments. Whether it may publicly disclose sensitive information on intelligence matters is determined by the executive branch.

4. In the UK, the House of Commons does not have a parliamentary committee monitoring government intelligence agencies. Instead, under the *Intelligence Services Act 1994*, the statutory Intelligence and Security Committee (ISC) is established to monitor the expenditure, administration and policy of all those agencies. ISC does not consider bills relating to intelligence matters, authorize funding for intelligence agencies or investigate any complaints against those agencies' activities. Nor can it compel the attendance of witnesses and the production of documents before it. Appointed by the Prime Minister, all ISC members must be serving Members of Parliament who are not Ministers, although ISC is not a parliamentary committee. Before the appointment, the Prime Minister must consult the Opposition of the House. Subject to the executive branch's approval, ISC can access sensitive information such as sources of information, operational methods, particular operations and classified information provided by foreign governments. However, after consulting ISC, the Prime Minister may exclude sensitive information from a report by ISC to be laid before the House.

5. In Canada, the House of Commons does not have a parliamentary committee monitoring government intelligence agencies. Instead, under the *Canadian Security Intelligence Service Act*, the statutory Security Intelligence Review Committee (SIRC) is established to perform such monitoring functions. SIRC reviews only the past activities of the government's primary intelligence agency, i.e. the Canadian Security Intelligence Service (CSIS). It does not review CSIS's current activities, which are reviewed by the statutory Inspector General, who reports to SIRC through the responsible Minister. Nor does SIRC consider bills relating to intelligence matters or authorize funding for intelligence agencies. SIRC can investigate complaints filed by members of the public against CSIS's activities and compel the attendance of witnesses and the production of documents before it. Appointed by the Governor General acting on the advice of the federal Cabinet led by the Prime Minister, all SIRC members must be Privy Councillors who are not serving Members of Parliament, although the Prime Minister must consult the leaders of major opposition parties in the House on the appointment of SIRC members. SIRC can access any information held by CSIS, except Cabinet confidences. Nevertheless, whether it may publicly disclose sensitive information is determined by the executive branch.
6. The Analysis chapter compares the main features of the monitoring mechanisms on intelligence adopted by the four selected places and Hong Kong.

Parliamentary monitoring mechanism on intelligence agencies in selected places

Chapter 1 – Introduction

1.1 Background

1.1.1 At the meeting of the Panel on Security on 8 May 2007, the Panel requested the Research and Library Services Division (RLSD) to collect current information on how overseas legislatures monitor government intelligence agencies, with reference to the 1995 RLSD paper entitled "Parliamentary Monitoring Mechanism on Intelligence Agencies".

1.2 Scope of research

1.2.1 This study focuses on the following aspects of the mechanisms established by selected legislatures in monitoring government intelligence agencies:

- (a) statutory basis, powers and functions;
- (b) composition and design;
- (c) administration and procedure;
- (d) access to sensitive information; and
- (e) restrictions on disclosure of sensitive information.

1.3 Selected legislatures

1.3.1 Consistent with the 1995 paper, this study covers the following legislatures, each of which has certain distinctive features in monitoring government intelligence agencies:

- (a) the House of Representatives of the United States (US) Congress;
- (b) the House of Representatives of the Parliament of Australia;
- (c) the House of Commons of the United Kingdom (UK) Parliament; and
- (d) the House of Commons of the Parliament of Canada.

1.3.2 In the US, the House of Representatives has a permanent congressional committee with statutory powers to monitor the expenditure, administration, policies and activities of government intelligence agencies. Both the Speaker and the Minority Leader are ex officio members of the committee. With leave of the House, the committee may disclose sensitive information on intelligence matters publicly, even when the US President objects to such disclosure. The committee is similar but not identical to the Senate's Committee on Intelligence, the key features of which are also presented in this study, at the request of the Panel on Security.

1.3.3 Like the House of Representatives of the US Congress, the House of Representatives of the Parliament of Australia has a parliamentary standing committee with statutory powers to monitor the expenditure and administration of government intelligence agencies. The majority of the committee's members must be government Members. The committee has specific limitations on its operation. In particular, it cannot require a person or body to disclose to it operationally sensitive information on intelligence matters.

1.3.4 In the UK, the House of Commons has enacted legislation to establish a statutory committee to monitor the expenditure, administration and policies of government intelligence agencies. The committee is not a parliamentary committee, although its members must be Members of Parliament who are not Ministers. The committee can access a wide range of intelligence agencies' activities and sensitive information, subject to the approval of the executive branch. It submits reports to the Prime Minister, who is required to lay them before the House. In consultation with the committee, the Prime Minister may exclude sensitive information from a report of the committee to be laid before the House.

1.3.5 Like the House of Commons of the UK Parliament, the House of Commons of the Parliament of Canada does not have a parliamentary committee directly monitoring government intelligence agencies. The House has enacted legislation to establish a statutory committee, which is independent of both the House and the government, to review the past activities of the government's primary intelligence agency. The committee's members cannot be Members of the House, although the government is required to consult the leaders of major opposition parties in the House on the appointment of the committee members.

1.3.6 This study focuses on the parliamentary monitoring mechanisms on government intelligence agencies in these selected places at the national level only, because the local legislatures in these places do not have an intelligence committee or any mechanism with statutory powers to exercise such specific monitoring functions.

1.4 Research method

1.4.1 This study adopts a desk research method, which involves literature review, documentation analysis, Internet research and correspondence with the relevant authorities.

Chapter 2 – House of Representatives of the United States Congress

2.1 Background

Government intelligence agencies

2.1.1 In the US, the federal government has various agencies conducting intelligence activities. Such agencies are collectively known as the Intelligence Community, which is defined in the *National Security Act of 1947* as amended.¹ The Intelligence Community currently includes:²

- (a) the Office of the Director of National Intelligence (DNI) headed by DNI, who serves as the head of the Intelligence Community and the principal adviser to the President, and oversees and directs the implementation of the National Intelligence Program;³
- (b) the Central Intelligence Agency (CIA), which is the keystone of the Intelligence Community responsible for collecting, evaluating and disseminating foreign intelligence to assist the President and senior government officials in making decisions relating to national security;
- (c) the intelligence elements of the Federal Bureau of Investigation (FBI), which is the principal investigative arm of the Department of Justice;
- (d) the intelligence elements of the Department of the Treasury, which collects and processes information that may affect the US fiscal and monetary policies;
- (e) the elements of the Department of Homeland Security concerned with the analysis of intelligence information;
- (f) the Bureau of Intelligence and Research, which is an analytical agency of the Department of State; and

¹ 401a(4), Title 50 of *U.S. Code*; Best (2007a) pp.2-4; and Office of the Director of National Intelligence (2007).

² The Intelligence Community also includes the Office of Intelligence and Counter-intelligence of the Department of Energy, the US Air Force, the US Army, the US Coast Guard, the US Marine Corps, the US Navy, and the Office of National Security Intelligence of the Drug Enforcement Administration.

³ Under 401a(6) of 50 *U.S. Code*, "National Intelligence Program" refers to all programmes, projects and activities of the Intelligence Community, and any other programmes of the Intelligence Community designated by DNI, the head of a US department or agency, or the President. The term does not include programmes, projects or activities of the military departments to acquire intelligence solely for the planning and conduct of tactical military operations by the US Armed Forces.

- (g) the intelligence agencies under the Department of Defense, namely the National Security Agency, which is responsible for signals intelligence; the National Reconnaissance Office, which develops and operates reconnaissance satellites; the National Geospatial-Intelligence Agency, which prepares the geospatial data; and the Defense Intelligence Agency, which is a combat support agency providing military intelligence to "warfighters", defence policy makers and force planners.

Congress's monitoring on intelligence agencies

2.1.2 Before the mid-1970s, the monitoring of Congress's House of Representatives on government intelligence agencies was regarded as "minimal and sporadic".⁴ In 1947, with the enactment of the *National Security Act of 1947*, the House could for the first time hold such agencies accountable. Nevertheless, the House did not have an intelligence committee with necessary jurisdiction to exercise its monitoring functions routinely and regularly.

2.1.3 From 1947 to 1976, although some Members of the House, as well as some Senators, proposed in different intervals that both Houses of Congress should form a joint committee on intelligence to strengthen congressional monitoring on CIA, these proposals were defeated.⁵ Instead, the House assigned the statutory duty of monitoring intelligence agencies to some of its existing standing committees, principally the Armed Services Committee and the Appropriations Committee. Each of these committees set up special intelligence subcommittees, which usually met two to three times a year, with its meetings unannounced to avoid public or media attention.⁶ Generally, Congress was "willing to defer to executive-branch leadership" in the monitoring of intelligence agencies, because it recognized the need for a strong and effective Intelligence Community in the light of the intelligence failure of the 1941 Pearl Harbor attack and the mounting threat from the Soviet Union to the US during the Cold War.⁷

2.1.4 It was Congress's investigations of the Watergate scandal in 1973 and 1974 that ushered in a significant development of the House's monitoring on intelligence agencies. The Watergate investigations revealed extensive and serious abuses committed by the Intelligence Community, including attempts to manipulate CIA and FBI for political purposes.⁸ Added to the Watergate scandal were allegations of massive and illegal CIA domestic intelligence operations against the anti-Vietnam War movement and other dissident groups in the US.

⁴ Kaiser (1992) p.279.

⁵ Kaiser (1992) pp.279-280, and Kaiser (2007a) p.1.

⁶ Smist (1990) pp.7-8.

⁷ Smist (1990) p.4.

⁸ Kaiser (1992) p.281.

2.1.5 In July 1975, the House formed the Pike Committee chaired by Otis Pike, a Member of the House, to review the House's monitoring on government intelligence agencies. The Committee recommended the establishment of a permanent committee on intelligence with jurisdiction over all legislation and monitoring functions relating to government agencies engaged in intelligence as well as budget authorization for all intelligence activities. In July 1977, the House established the House Permanent Select Committee on Intelligence (HPSCI), the key features of which have since remained intact.

2.1.6 In May 1976, a year before the House formed HPSCI, the Senate formed the Senate Select Committee on Intelligence (SSCI). The key features of SSCI are similar but not identical to HPSCI, as shown in the **Table** on pages 15 and 16.

2.1.7 As a result of the terrorist attacks on 11 September 2001, which revealed the weaknesses of Congress in identifying and addressing the problems in intelligence agencies, interest in reforming and strengthening Congress's committees on intelligence has arisen. In its 2004 public report, the National Commission on Terrorist Attacks Upon the United States (commonly known as the 9/11 Commission) found that "congressional oversight for intelligence" was "dysfunctional". It proposed that both Houses should either form a powerful joint committee on intelligence to replace the existing HPSCI and SSCI or enhance the status and powers of the two committees. Congress has not adopted either of the proposals. To date, HPSCI remains the House's key monitoring mechanism on government intelligence agencies.

2.2 House Permanent Select Committee on Intelligence

Statutory basis

2.2.1 HPSCI is a congressional committee established by the House and governed by the Rules of the House. It is also empowered by various statutes to monitor government intelligence agencies. Such statutes include the *National Security Act of 1947* as amended and the *Intelligence Oversight Act of 1980*.⁹

⁹ These two statutes are consolidated under §401-441d, Title 50 of *U.S. Code*.

President's accountability to HPSCI

2.2.2 Under the statutes, the President must ensure HPSCI to be kept "fully and currently informed"¹⁰ of the US intelligence activities, including "any significant anticipated intelligence activity", although the initiation of such activities do not require the approval of HPSCI.¹¹ The President must ensure that any illegal intelligence activity or any corrective action that has been taken or is planned in connection with such an illegal activity, are reported promptly to HPSCI.¹²

2.2.3 In particular, the President is required to ensure that any covert action he or she approved¹³ must be reported to HPSCI "as soon as possible after such approval and before the initiation of the covert action".¹⁴ If the President determines to limit access to the information relating to the covert action to meet "extraordinary circumstances affecting vital interests of the United States", such information may be reported to the chair and ranking minority member of HPSCI, the Speaker and the minority leader of the House, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership designated by the President, with a statement of reasons for limiting such access.¹⁵ This notification procedure is called "Gang of Eight" notification because it usually involves the notification of eight Members of Congress. The term "extraordinary circumstances affecting vital interests of the United States" is not defined in law. The President appears to have sole discretion in making such a determination.¹⁶

2.2.4 If the President cannot have the covert action reported to HPSCI as soon as possible after the approval and before the initiation of the covert action, or if the President does not provide a "Gang of Eight" notification, the President must "fully inform" HPSCI "in a timely fashion" and provide a statement of reasons for not providing a prior notice to HPSCI.¹⁷ The President must also ensure that HPSCI or the Gang of Eight is notified of any significant change in a covert action previously approved by the President.¹⁸

¹⁰ The term "fully and currently informed" is not defined in law. There is a general understanding that the term is intended to mean that complete and timely notice of actions and policies is provided, and that both HPSCI and SSCI are informed of intelligence activities in such detail as the committees may require. Cumming (2006) p.2.

¹¹ §413(a)(1) and (2), Title 50 of *U.S. Code*.

¹² §413(b), Title 50 of *U.S. Code*.

¹³ Under §413b(e), Title 50 of *U.S. Code*, "covert action" means an activity (or activities) of the US government to influence political, economic or military conditions abroad but is not intended to render the role of the US government apparent or acknowledged publicly.

¹⁴ §413b(c)(1), Title 50 of *U.S. Code*.

¹⁵ §413b(c)(2), Title 50 of *U.S. Code*.

¹⁶ Cumming (2006) p.5.

¹⁷ §413b(c)(3), Title 50 of *U.S. Code*.

¹⁸ §413b(d), Title 50 of *U.S. Code*.

Intelligence agencies' accountability to HPSCI

2.2.5 DNI and the heads of all other intelligence agencies must:¹⁹

- (a) keep HPSCI "fully and currently informed of all intelligence activities", including any significant anticipated intelligence activity other than covert actions, and any significant intelligence failure; and
- (b) furnish HPSCI any information or material concerning activities, other than covert actions, which is within their custody or control.

Congress's statutory responsibilities

2.2.6 Congress can establish procedures to prevent unauthorized disclosure of classified information, which is furnished to HPSCI (and SSCI) or Members of Congress.²⁰ In addition, Congress is empowered to control most of the appropriations for government intelligence activities. Under the statutes, "appropriated funds available to an intelligence agency may be obligated or expended for an intelligence or intelligence-related activity", only if "those funds were specifically authorized by the Congress for use for such activities". While covert actions approved by the President may be funded by the Reserve for Contingencies of CIA (i.e. non-appropriated funds) instead of appropriations by Congress, the Director of CIA is required to provide a prior notice to HPSCI and the Appropriations Committee²¹ on the intent to make the funding available for such actions.²²

Functions

2.2.7 HPSCI can initiate and consider bills relating to intelligence, monitor the activities and organization of intelligence agencies, and authorize appropriations for such agencies. It has oversight of "proposed legislation, messages, petitions, memorials and other matters" relating to:²³

- (a) CIA, DNI and the National Intelligence Program;

¹⁹ §413a(a), Title 50 of *U.S. Code*.

²⁰ §413(d), Title 50 of *U.S. Code*.

²¹ Rule X, 1(b), Rules of the House. The Committee on Appropriations has jurisdiction to authorize appropriation of the revenue for the support of the government.

²² §414(a), Title 50 of *U.S. Code*.

²³ 11(b)(1), Rules of the House.

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- (b) "intelligence and intelligence-related activities"²⁴ of all other government department and agencies, including the "tactical intelligence and intelligence-related activities" of the Department of Defense;
 - (c) organization or re-organization of a government agency to the extent that such organization or re-organization relates to a function or activity involving intelligence or intelligence-related activities; and
 - (d) authorization for appropriations for items (a) and (b) and an agency or a programme that is a successor to an agency or a programme referred to in items (a) and (b).

2.2.8 HPSCI does not have exclusive oversight of all government intelligence agencies in the Intelligence Community mentioned in **paragraph 2.1.1**. It holds "exclusive authorizing and legislative powers" only for CIA, DNI and the National Intelligence Program, as mentioned in item (a) of the above paragraph.²⁵ Its functions and powers mentioned in items (b) to (d) of the above paragraph, which relate to the other agencies of the Intelligence Community, have been shared by certain standing committees of the House, including the Appropriations Committee, the Armed Services Committee²⁶ and the Committee on Homeland Security.²⁷

²⁴ Under 11(j) of the Rules of the House, "intelligence and intelligence-related activities" refer to: (a) the collection, analysis, production, dissemination or use of information that relates to (i) a foreign country or government, political group, party, military force, movement or other association in a foreign country, and (ii) the defence, foreign policy, national security or related policies of the US and other activity in support of the collection, analysis, production, dissemination or use of such information; (b) activities taken to counter similar activities directed against the US; (c) covert or clandestine activities affecting the relations of the US with a foreign country or government, political group, party, military force, movement or other associations; and (d) the collection, analysis, production, dissemination or use of information about activities of persons within the US, its territories and possessions, or the US nationals abroad whose political and related activities pose a threat to the internal security of the US or may be considered by a federal department, agency, bureau, office, division, instrumentality, or employee of the US to pose such a threat.

²⁵ Kaiser (2007a).

²⁶ Rules X, 1(c), Rules of the House. The Armed Services Committee has jurisdiction to oversee the Department of Defense and its tactical intelligence and intelligence-related activities.

²⁷ Rule X 1(i), Rules of the House. The Committee on Homeland Security has jurisdiction to oversee the overall homeland security policy, and organization and administration of the Department of Homeland Security.

Powers

2.2.9 HPSCI may conduct investigations upon the approval from the chair of HPSCI in consultation with the ranking minority member of HPSCI. Upon consultation with the ranking minority member, or by vote of HPSCI, the chair may authorize subpoenas to compel the attendance of witnesses and testimony before HPSCI or the production of documents to HPSCI.²⁸

2.2.10 HPSCI does not investigate complaints, including those referred to by the House, Members of the House or members of the public. Nor does it have power to approve the appointments of the heads of intelligence agencies.

Composition and design

Membership

2.2.11 Under the Rules of the House, "not more than 21 Members, Delegates or the Resident Commissioner" can be appointed by the House's resolution to be HPSCI's members,²⁹ of whom "not more than 12 may be from the same party". Its membership must include at least one Member, Delegate or the Resident Commissioner from each of the following four standing committees of the House: the Committee on Appropriations, the Committee on Armed Services, the Committee on Foreign Affairs and the Committee on the Judiciary. The Speaker and the Minority Leader serve as ex officio members without a vote, and they cannot be counted for determining a quorum.³⁰ At present, HPSCI has a total of 19 members with the voting right.

²⁸ 10, Rules of Procedure for the Permanent Select Committee on Intelligence.

²⁹ The post of Delegate was established by ordinance from the Continental Congress (the provisional government of the US operating from 1774 to 1781) and confirmed by an act of Congress. The House has admitted Delegates from Territories or Districts (such as the District of Columbia and the Virgin Islands). The Post of the Resident Commissioner was created by Congress in 1904, applying to Puerto Rico and the Philippines. From 1946 onwards, only Puerto Rico has a Resident Commissioner. Delegates and the Resident Commissioner may participate in House debates but are not permitted to vote on the floor. They all serve on committees of the House and have powers and privileges equal to other Members in committees. The formal duties of Delegates and the Resident Commissioner are identical, but Delegates serve a two-year term, while the Resident Commissioner serves a four-year term.

³⁰ Under 11(a)(3) of Rules of the House, as ex officio members of HPSCI, the Speaker and the Minority Leader each may designate a member of his or her staff to assist him or her, with the same access to committee meetings, hearings, briefings and materials and subject to the same security clearance and confidentiality requirements as employees of HPSCI.

2.2.12 When HPSCI was established in 1977, it reflected the House's party ratio, resulting in an initial nine-to-four majority-minority party membership. Over the years, the minority party has been granted additional seats on HPSCI, while the majority-minority party-ratio in the House has grown closer. Consequently, the current HPSCI membership has a 12-to-9 majority-minority party ratio.

Chairmanship

2.2.13 HPSCI has a chair who must be from the majority party in the House. In the absence of the chair, the next ranking majority party member of HPSCI will act as the chair.

Tenure

2.2.14 Other than the Speaker or the Minority Leader, a Member, Delegate or the Resident Commissioner cannot serve as a member of HPSCI during more than four Congresses in a period of six successive Congresses.³¹ However, the tenure of the chair or ranking minority member of HPSCI is not limited.³²

Differences from other congressional committees

2.2.15 HPSCI is designed as a hybrid of the House's standing and select committees, adopting characteristics of both types. It can consider bills, a power usually reserved to standing committees.³³ Like other select committees, the tenure of the HPSCI membership is limited but non-exclusive in that members of other standing committees of the House may serve on HPSCI.³⁴

³¹ 11(a)(4)(A), Rules of the House.

³² 11(a)(4)(B), Rules of the House.

³³ Kaiser (2007a) p.3.

³⁴ Ibid.

Administration and procedure

2.2.16 The administration and procedure of HPSCI are mainly governed by the Rules of Procedure for the Permanent Select Committee on Intelligence (Committee Rules). Except those staff provided to the minority party members of HPSCI, the Committee staff are appointed, and may be removed, by the chair of HPSCI, and are required to work under his or her general supervision and direction. Those staff provided to the minority party members of HPSCI are appointed, and may be removed, by the ranking minority member of HPSCI, and are required to work under his or her general supervision and direction. All offers of employment for prospective Committee staff positions must be contingent upon the results of background investigation and determination by the chair that requirements for the appropriate security clearances have been met.³⁵

2.2.17 HPSCI's meetings for the transaction of business and its hearings are generally open to the public, while briefings to HPSCI are closed to the public. A particular meeting of HPSCI may be closed to the public, if HPSCI determines that disclosure of the matters to be discussed may "endanger national security", "compromise sensitive law enforcement information", "tend to defame, degrade, or incriminate any person", or "otherwise violate any law or Rules of the House".³⁶ HPSCI may also vote to make its hearing closed to the public, if at least two committee members are present, with one of them being a member of the minority party and voting upon the motion.³⁷

Accountability to the House of Representatives

2.2.18 HPSCI is required to make "regular and periodic" reports to the House on the nature and extent of the intelligence and intelligence-related activities conducted by intelligence agencies.³⁸ In addition, it is required to "promptly" inform the House or any other appropriate committee of a matter requiring the attention of the House or the committee concerned.³⁹

Access to sensitive information

2.2.19 HPSCI generally has access to most finished intelligence products that are published for general circulation within the executive branch. A finished intelligence product is one in which an analyst evaluates, interprets, integrates and places into context raw intelligence.⁴⁰

³⁵ 11, Rules of Procedure for the Permanent Select Committee on Intelligence.

³⁶ 4 (a) and (b), Rules of Procedure for the Permanent Select Committee on Intelligence.

³⁷ 4(c), Rules of Procedure for the Permanent Select Committee on Intelligence.

³⁸ 11(c)(1), Rules of the House.

³⁹ Ibid.

⁴⁰ Cumming (2005).

2.2.20 In addition, HPSCI can obtain annual reports, which "review the intelligence and intelligence-related activities of the agency or department concerned and the intelligence and intelligence-related activities of foreign countries directed at the US or its interests" from DNI, the Director of CIA, the Director of FBI, the Secretary of State and the Secretary of Defense, all of whom are involved in foreign intelligence.⁴¹

2.2.21 However, HPSCI is generally not allowed to have routine access to four types of intelligence information, although it occasionally has sought and obtained such information:⁴²

- (a) identities of intelligence sources;
- (b) methods used by the Intelligence Community to collect and analyze intelligence;
- (c) raw intelligence obtained through human intelligence (i.e. spying), signals intelligence (such as interception of communication) and imagery intelligence (such as photo intelligence); and
- (d) written intelligence products tailored to the needs of the President and other high-level executive branch policy makers, such as the President's Daily Brief, which is briefed orally by senior Intelligence Community analysts to the President.

Restrictions on disclosure of sensitive information

Information not allowed for public disclosure

2.2.22 HPSCI may exercise its discretion to make available to the public the unclassified versions of annual reports obtained from intelligence agencies. Nevertheless, the following information in such reports cannot be disclosed to the public:⁴³

- (a) the names of persons engaged in intelligence or intelligence-related activities for the US;
- (b) the intelligence methods employed;
- (c) the sources of information on which the reports are based; or
- (d) the amount of funds authorized to be appropriated for intelligence and intelligence-related activities.

⁴¹ 11(c)(2), Rules of the House.

⁴² Cumming (2005) pp.4-8.

⁴³ 11(c)(2), Rules of the House.

2.2.23 HPSCI is required to formulate and carry out necessary rules and procedures to prevent the disclosure, without the consent of the persons concerned, of information possessed by HPSCI that "unduly infringes on the privacy", or "violates the constitutional rights", of those persons.⁴⁴ Nevertheless, the matter of privacy or constitutional rights does not prevent HPSCI from publicly disclosing such information, if it determines that the national interest in such disclosure clearly outweighs any infringement on a person's privacy.⁴⁵

Arrangement for determining public disclosure of sensitive information

2.2.24 HPSCI may disclose publicly any information in its possession (including the information mentioned in **paragraph 2.2.22**) under certain procedures, if it determines that such disclosure would serve the public interest.⁴⁶ If a member of HPSCI requests a vote on public disclosure of certain classified information, HPSCI is required to meet to vote on the matter within five days after the member so requested. Before the vote, the member may not make such a disclosure.⁴⁷ If HPSCI votes for public disclosure of any information that has been classified under established security procedures and requested by the executive branch to be kept secret, HPSCI is required to notify the President of such a vote. HPSCI can disclose publicly such information after a five-day period following the day on which notice of the vote is transmitted to the President, who has no objection to the disclosure. However, if the President, before the end of the five-day period, notifies HPSCI that he or she objects to the disclosure and "certifies that the threat to the national interest of the United States posed by the disclosure is of such gravity that it outweighs any public interest in the disclosure",⁴⁸ HPSCI may, by majority vote, refer the question of disclosure with a recommendation to the House for consideration in a closed session. HPSCI may not publicly disclose such information, without leave of the House. If the House does not approve the recommendation, it will recommit the question of disclosure to HPSCI for further recommendations.⁴⁹

⁴⁴ 11(f), Rules of the House.

⁴⁵ Ibid.

⁴⁶ 11(g)(1), Rules of the House.

⁴⁷ 11(g)(1)(A) and (B), Rules of the House.

⁴⁸ According to the Library of Congress, the terms "public interest" and "national interest" have not been further defined, either specifically in Rules of the House or statutes, or in Congress's debate.

⁴⁹ 11(g)(2), Rules of the House. On unauthorized disclosure of information, under 11(g)(4) and (5) of the Rules of the House, the Committee on Standards of Official Conduct (the Committee), which is the House's only standing committee having a membership evenly divided by party, can investigate any unauthorized disclosure of intelligence or intelligence-related information by Members, Delegates, the Resident Commissioner, officers or employees of the House. If the Committee determines that there is a significant breach of confidentiality or unauthorized disclosure, it must report its findings to the House. After investigation, the Committee can recommend appropriate actions, including censure, removal from committee membership or expulsion from the House in the case of a Member, or removal from office or employment or punishment for contempt in the case of an officer or employee.

2.3 Senate Select Committee on Intelligence

2.3.1 Established in 1976 under the Senate Resolution 400, SSCI was not originally designed as a permanent committee, but attained permanent status early in its history.⁵⁰ The key features of SSCI have remained intact since its establishment. The statutory basis of SSCI is the same as that of HPSCI so that both committees are similar in their functions, powers and operation. Nevertheless, they differ in certain aspects, as shown in the **Table** on pages 15 and 16:

⁵⁰ Kaiser (1992) p.287. The Senate's Rules Committee stated in 1977 that SSCI "should be able to carry out its important work without any question as to its future".

Table – Comparison between the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence

| Features | House Permanent Select Committee on Intelligence | Senate Select Committee on Intelligence |
|---|--|--|
| Functions | HPSCI has exclusive oversight of CIA, DNI and the National Intelligence Program, and intelligence and intelligence-related activities of all other government departments and agencies, including the tactical intelligence and intelligence-related activities, which include tactical military intelligence. | The functions of SSCI are the same as those of HPSCI, except that SSCI does not cover tactical intelligence and intelligence-related activities, which include tactical military intelligence. |
| Powers | The powers of HPSCI include initiating and considering bills and authorizing subpoenas to compel the attendance of witnesses and the production of documents. However, HPSCI or the House does not have the power to approve the Presidents' appointments of intelligence agency heads. | The powers of SSCI are the same as those of HPSCI. In addition, the Presidents' appointments of intelligence agency heads are required to obtain the consent and advice of the Senate. |
| Total number of members | 21, accounting for 5% of the total number of Members of the House (435). | 17, accounting for 17% of the total number of Senators (100). ⁽¹⁾ |
| Number of members with the voting right | 19. | 15. |
| Number of ex officio members | 2 (the Speaker and the ranking minority member, both of whom do not have the voting right). | 2 (the Majority and Minority Leaders, both of whom do not have the voting right). |

Note: (1) Since the Senate has a smaller membership than the House, a larger proportion of Senators serves on SSCI (15%) than do Members on HPSCI (4%). Consequently, a smaller number and percentage of Senators have been "on the outside looking in". This is a reason for SSCI to adopt a less elaborate and exacting rules governing access to its classified information. In particular, SSCI can disclose classified information publicly on its own, but HPSCI cannot do so, if the President objects to its release. In the latter case, it is for the House to make the determination by a majority vote. Kaiser (1992) pp.290-291.

Table – Comparison between the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence (cont'd)

| Features | House Permanent Select Committee on Intelligence | Senate Select Committee on Intelligence |
|--|--|---|
| Party ratio of members with the voting right | 12-to-9 majority-minority party ratio. | 8-to-7 majority-minority party ratio. |
| Other committees represented | At least one member from each of four House standing committees: Appropriations; Armed Services; Foreign Affairs; and Judiciary. | Two members (one from the majority party and the other from the minority party) from each of four Senate standing committees: Appropriations; Armed Services; Foreign Relations; and Judiciary. |
| Length of term | Not more than four Congresses in a period of six successive Congresses. | Not more than eight years of continuous service with staggered rotation. |
| Chairmanship | The committee only has a chair, who must come from the majority party. When absent, the chair is replaced by the next ranking majority member. | The committee has a chair, who must come from the majority party, and a vice-chair, who must be from the minority party and the vice-chair will take over in the absence of the chair. |
| Disclosure of information | HPSCI cannot disclose classified information publicly on its own, if the President objects to the disclosure. In such cases, it is the House which makes the determination by a majority vote. | SSCI can disclose classified information publicly on its own. |

Chapter 3 – House of Representatives of the Parliament of Australia

3.1 Background

3.1.1 In Australia, the federal government currently has the following intelligence agencies:

- (a) the Australian Security Intelligence Organization (ASIO), which obtains and evaluates intelligence relevant to security, and advises the government on matters relating to security;
- (b) the Australian Secret Intelligence Service (ASIS), which obtains and communicates intelligence about the capabilities, intentions or activities of individuals and organizations outside Australia;
- (c) the intelligence agencies of the Department of Defence, namely the Defence Signals Directorate (DSD), which collects, produces and disseminates signal intelligence; the Defence Imagery and Geospatial Organization (DIGO), which acquires, produces and distributes imagery and geospatial-based intelligence; and the Defence Intelligence Organization (DIO), which provides all-source intelligence assessment at the national level; and
- (d) the Office of National Assessments (ONA), which is an independent intelligence evaluation body reporting directly to the Prime Minister on international matters that are of political, strategic or economic significance to Australia.

Parliamentary monitoring on intelligence agencies

3.1.2 Before the late 1980s, the House of Representatives (as well as the Senate) of the Parliament of Australia did not have a mechanism monitoring the government intelligence agencies, although Parliament had enacted the *Australian Security Intelligence Organization Act 1956* to provide the first statutory basis for ASIO. The activities of such agencies were primarily accountable to their responsible Ministers and exempt from parliamentary scrutiny.

3.1.3 It was not until 1988 that both Houses of Parliament first formed the Parliamentary Joint Committee on ASIO (the ASIO Committee) to review the administration and expenditure of ASIO. In 2002, through the enactment of the *Intelligence Service Act 2001*, which put ASIS and DSD on a statutory footing, Parliament expanded the mandate of the ASIO Committee to cover ASIS and DSD. The ASIO Committee was subsequently renamed the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD), which was responsible for reviewing the administration and expenditure of the three intelligence agencies.

3.1.4 In March 2004, in view of the public controversy over the Australian intelligence agencies' handling of intelligence in the run-up to the Iraq War which began in 2003, the Prime Minister appointed Philip Flood, the former head of ONA and a former diplomat, to inquire into activities related to those agencies, including the effectiveness of the oversight and accountability mechanisms on them. The inquiry report (commonly known as the Flood Report) submitted to the Prime Minister in July 2004 considered that PJCAAD had provided "a significant parliamentary insight into the intelligence community, as well as opportunities for the [intelligence] agencies to benefit from the perspectives of experienced parliamentarians".⁵¹ Further, in the case of Iraq's Weapon of Mass Destruction, PJCAAD had provided "independent scrutiny of a particular issue of considerable community concern, without jeopardizing the confidentiality required for the work of the [intelligence] agencies".⁵²

3.1.5 The Flood Report recommended extending the mandate of PJCAAD to all intelligence agencies in that PJCAAD could also cover ONA, DIO and DIGO on the same basis as it covered ASIO, ASIS and DSD. This expansion "would enhance confidence in the parliament and the public that the full range of intelligence agencies is accountable to a senior group of parliamentarians".⁵³ The recommendations were accepted by the government and implemented via the *Intelligence Service Legislation Amendment Act 2005*. Accordingly, in December 2005, PJCAAD changed its name to the Parliamentary Joint Committee on Intelligence and Security (PJCIS), which has been Parliament's key monitoring mechanism on government intelligence agencies.

⁵¹ Australian Government (2004) p.55.

⁵² Ibid.

⁵³ Australian Government (2004) pp.57-58.

3.2 Parliamentary Joint Committee on Intelligence and Security

Statutory basis

3.2.1 PJCIS is a parliamentary committee with a statutory basis provided by the *Intelligence Services Act 2001* and the subsequent amendments to it (collectively referred to as the IS Act), which govern PJCIS's functions, powers, accountability, procedures and administration.

Functions

3.2.2 The statutory functions of PJCIS are to review:⁵⁴

- (a) the administration and expenditure of all intelligence agencies, namely ASIO, ASIS, DIGO, DIO, DSD and ONA, including the annual financial statements of these agencies;
- (b) any matter relating to any one of the six agencies referred to PJCIS by the responsible Minister or a resolution of either House of Parliament; and
- (c) the operation, effectiveness and implications of certain legislative measures relating to intelligence and security matters, such as border security and the suppression of terrorist bombings and financing.

3.2.3 In addition, PJCIS may request the responsible Minister to refer a matter relating to the activities of any of the six agencies to PJCIS for review.⁵⁵ PJCIS is required to report its comments and recommendations to Parliament and the responsible Minister.⁵⁶

3.2.4 However, PJCIS does not review:⁵⁷

- (a) the intelligence gathering and assessment priorities of the six intelligence agencies; the sources of information, other operational assistance or operational methods available to them; and an aspect of their activities that does not affect an Australian citizen or a permanent resident in Australia;

⁵⁴ Section 29 (1), the IS Act.

⁵⁵ Section 29 (2), the IS Act.

⁵⁶ Section 29 (1), the IS Act.

⁵⁷ Section 29 (3), the IS Act.

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- (b) particular operations that have been, are being or are proposed to be undertaken by ASIO, ASIS, DIGO, DIO or DSD;
 - (c) information provided by a foreign government which does not consent to the disclosure of the information;
 - (d) rules made by the responsible Ministers in relation to ASIS, DIGO and DSD regulating the communication and retention by the relevant agency of intelligence information concerning Australian citizens or permanent residents;
 - (e) the content of, or conclusions reached in, assessments or reports made by DIO or ONA, or sources of information on which such assessments or reports are based; and
 - (f) the co-ordination and evaluation activities undertaken by ONA.

3.2.5 In Australia, operation matters of the six intelligence agencies are monitored and reviewed by the statutory Inspector-General of Intelligence and Security (IGIS) established by the *Inspector-General of Intelligence and Security Act 1986*. IGIS is appointed by the Governor-General upon the recommendation of the Prime Minister, who is required to consult the Leader of the Opposition of the House before making such a recommendation. IGIS may investigate complaints, including those filed by members of the public, against the activities of any of the six intelligence agencies. The Office of IGIS is situated within the Prime Minister's portfolio for administrative purposes, but it is not part of any government agency or department and "not subject to general direction from the Prime Minister".⁵⁸ IGIS furnishes an annual report on his or her activities to the Prime Minister, who is required to table the report before Parliament. The Prime Minister can make deletions from the report furnished where necessary to avoid prejudice to security, the defence of Australia, Australia's relations with other countries or the privacy of individuals.⁵⁹

Powers

3.2.6 Under the IS Act, PJCIS may request the heads of the six intelligence agencies and IGIS to "brief" PJCIS. In addition, the chair of PJCIS or another member authorized by PJCIS may give a person written notice requiring the person to appear before PJCIS to give evidence or produce documents to PJCIS, but such evidence or documents cannot reveal operationally sensitive information, as to be mentioned in **paragraph 3.2.15**. In addition, unlike IGIS, PJCIS does not investigate complaints about the activities of intelligence agencies.

⁵⁸ Inspector-General of Intelligence and Security (2007) p.8.

⁵⁹ Section 35, Inspector-General of Intelligence and Security Act 1986.

Composition and design

Membership

3.2.7 PJCIS comprises nine members, five of whom must be Members of the House and four of whom must be Senators.⁶⁰ The majority of PJCIS must be drawn from those Members of Parliament (MPs) representing the government.⁶¹

Appointment

3.2.8 The IS Act requires members of PJCIS who are Members of the House to be appointed by the House's resolution on the Prime Minister's nomination. Before nomination, the Prime Minister is required to consult the Leaders of each recognized political party that "is represented in the House and does not form part of the Government".⁶² Similarly, members of PJCIS who are Senators must be appointed by the Senate's resolution on the nomination of the Senate Leader of the Government. Before nomination, the Senate Leader of the Government is required to consult the Leader of each recognized political party that is represented in the Senate and does not form part of the Government.⁶³

3.2.9 In nominating members of PJCIS, the Prime Minister and the Senate Leader of the Government "must have regard to the desirability of ensuring that the composition of the Committee reflects the representation of recognized political parties in the Parliament".⁶⁴ In addition, a Member or Senator is not eligible for appointment as a member of PJCIS if he or she is a Minister, the Senate's President or the House's Speaker.⁶⁵

⁶⁰ Section 28 (1), the IS Act.

⁶¹ Section 28 (3), the IS Act. At present, PJCIS comprises five MPs representing the government and four MPs representing the opposition. Of the five government MPs, three are Members of the House and two are Senators. The four opposition MPs comprise two Members of the House and two Senators.

⁶² Clause 14, Part 3, Schedule 1, the IS Act.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

Chairmanship

3.2.10 PJCIS has a chair and a deputy chair. Both are elected by and from among the members of PJCIS, and hold office during the pleasure of PJCIS. The chair must be a government MP, while the deputy chair is not subject to this requirement. If the chair is absent from a PJCIS meeting at which a question is to be decided by voting or could reasonably be expected to be so decided, or if the chair has been absent from duty or Australia for a continuous period of more than one month immediately preceding the day of a meeting, the members present is required to appoint a government MP, instead of the deputy chair, to preside. Only when the members of PJCIS are not required to appoint a government MP to preside will the deputy chair preside at a meeting in the absence of the chair. Any member, including the chair, presiding at a meeting has a casting vote.⁶⁶

Tenure

3.2.11 A member of PJCIS holds office during the pleasure of the House or the Senate by which the member was appointed.⁶⁷

Differences from other parliamentary committees

3.2.12 Unlike other statutory or standing committees of Parliament, PJCIS has specific limitations on its operations, dictated by the nature of the intelligence agencies it monitors and the subject matters it handles. According to PJCIS, "[b]alancing national security and parliamentary scrutiny remains a constant challenge for the Committee".⁶⁸ Nevertheless, where the IS Act is silent, the powers and privileges of PJCIS are no different from those of the other committees of Parliament. These powers and privileges include powers to require the attendance of witnesses and production of documents.

Administration and procedure

3.2.13 PJCIS may meet and transact business even when Parliament has been prorogued. It may determine the manner in which its proceedings are to be conducted. It may conduct a review in public on an intelligence agency, subject to the pre-approval of the Minister responsible for the agency.⁶⁹ At a meeting of PJCIS, a quorum is constituted if at least five members are present and the majority of the members present are government MP.⁷⁰

⁶⁶ Clauses 17(4), (5) and (5A), Part 3, Schedule 1, the IS Act.

⁶⁷ Clause 15, Part 3, Schedule 1, the IS Act.

⁶⁸ Parliamentary Joint Committee on Intelligence and Security (2008) p.3.

⁶⁹ Clause 20(2), Part 3, Schedule 1, the IS Act.

⁷⁰ Clause 18, Part 3, Schedule 1, the IS Act.

Accountability to Parliament

3.2.14 PJCIS is required to provide an annual report on its activities to Parliament "as soon as practicable" after each year ending on 30 June.⁷¹

Access to sensitive information

3.2.15 PJCIS must not require a person or body to disclose to it operationally sensitive information or information that "would or might prejudice Australia's national security or the conduct of Australia's foreign relations".⁷² While PJCIS may request the heads of intelligence agencies and IGIS to brief PJCIS, it cannot require such briefings to disclose "operationally sensitive information", which is:⁷³

- (a) information about sources of information, other operational assistance or operational methods available to the six intelligence agencies;
- (b) information about particular operations that have been, are being or are proposed to be undertaken by ASIO, ASIS, DIGO, DIO or DSD; or
- (c) information provided by a foreign government (or its agency), which does not consent to the public disclosure of the information.

Restrictions on disclosure of sensitive information

Minister's certificate against the attendance of witnesses and production of documents

3.2.16 PJCIS is subject to certain statutory restrictions on disclosure of sensitive information. In particular, while PJCIS may require a person to produce documents to it or appear before it to give evidence on an intelligence agency, the Minister responsible for the agency may prevent the person from doing so, in order that "operationally sensitive information" will not be disclosed. To indicate this intention, the Minister may provide a certificate stating his or her opinion to the chair of PJCIS, the House's Speaker, the Senate's President and the person required to give evidence or produce documents.⁷⁴ The Minister's decision to issue the certificate "must not be questioned in any court or tribunal".⁷⁵

⁷¹ Section 31, the IS Act.

⁷² Clause 1, Part 1, Schedule 3, the IS Act.

⁷³ Clause 1A, Part 1A, Schedule 1, the IS Act.

⁷⁴ Clause 4, Part 1, Schedule 1, the IS Act.

⁷⁵ Clause 4(4), Part 1, Schedule 1, the IS Act.

Information that must not be disclosed

3.2.17 While PJCIS is required to provide annual reports on its activities to Parliament, it is not allowed to disclose in such reports:⁷⁶

- (a) the identity of a person who is or has been a staff member of ASIO or ASIS or an agent of ASIO, ASIS, DIGO or DSD, or any information from which the identity of such a person could reasonably be inferred, unless the agency head determines to disclose the person's identity; and
- (b) "operationally sensitive information" or "information that would or might prejudice Australia's national security or the conduct of Australia's foreign relations or the performance by an agency of its functions".

3.2.18 Before presenting its annual reports to Parliament, PJCIS is required to obtain the advice of the responsible Minister about the information to be disclosed in such reports.⁷⁷ Unlike PJCIS, other parliamentary committees need not obtain the advice of the responsible Minister before presenting their annual reports to Parliament.

Publication of evidence or documents

3.2.19 PJCIS may disclose or publish any evidence or the contents of any document provided by a witness, but must meet certain conditions. First, the information mentioned in **paragraph 3.2.17** must not be published. Second, if the evidence is taken or the document is produced in a private review, PJCIS must obtain the written authority of the witness or the agency head (if the witness is a staff member of the agency), unless the evidence or document has already been lawfully disclosed or published. PJCIS may obtain the advice of the responsible Minister on whether it might disclose or publish certain information restricted by the IS Act.⁷⁸

⁷⁶ Clauses 7(1), Part 1, Schedule 1, the IS Act.

⁷⁷ Clauses 7(3) and (4), Part 1, Schedule 1, the IS Act.

⁷⁸ Clause 6, Part 1, Schedule 1, the IS Act.

Chapter 4 – House of Commons of the United Kingdom Parliament

4.1 Background

Government intelligence agencies

4.1.1 In the UK, the government has three key intelligence agencies:

- (a) the Security Service (MI5), which is responsible for protecting the national security, safeguarding the economic well-being of the UK against threats posed by the actions or intentions of persons outside the UK, and acting in support of the activities of police forces and other law enforcement agencies in the prevention and detection of serious crime;⁷⁹
- (b) the Secret Intelligence Service (MI6), which is responsible for obtaining and providing information relating to the actions or intentions of persons overseas and performing other tasks relating to the actions or intentions of such persons in the interests of national security and the economic well-being of the UK and in support of the prevention or detection of serious crime;⁸⁰ and
- (c) the Government Communications Headquarters (GCHQ), which is responsible for gathering intelligence through the interception of communications and providing services and advice about languages and cryptography to the armed services and other organizations as required.⁸¹

4.1.2 Besides the three stand-alone agencies, the government has three intelligence agencies established within key departments. The Ministry of Defence has its own intelligence agency, the Defence Intelligence Staff, which provides intelligence products, assessments and advice in support of policy making, crisis management and the generation of military capability. Under the Cabinet Office, there are the Joint Intelligence Committee, which provides Ministers and other senior officials with co-ordinated inter-departmental intelligence assessments on issues important to national interests, and the Intelligence and Security Secretariat, which is responsible for ensuring the Prime Minister and Ministers to be well served on cross-government intelligence and security issues.

⁷⁹ Section 1, *Security Service Act 1989*.

⁸⁰ Section 1, *Intelligence Services Act 1994*.

⁸¹ Section 3, *Intelligence Services Act 1994*.

Parliamentary monitoring on intelligence agencies

4.1.3 Before the late 1980s, government intelligence agencies were subject to Ministers' directives instead of statutory regulation. They were accountable to Ministers instead of Parliament. The government had a convention of declining to answer questions from Members of Parliament on matters about these agencies.⁸² The agencies were also exempt from monitoring by any committee of Parliament, although their works received occasional attention by a House select committee, the Home Affairs Committee.⁸³

4.1.4 It was not until 1989 that the enactment of the *Security Service Act 1989* (the 1989 Act) put MI5 on a statutory footing for the first time, defining its functions and management. The enactment of the Act was prompted by a series of legal controversies over the disclosure of information about the UK intelligence agencies and the UK's obligation under the European Convention on Human Rights.⁸⁴

4.1.5 The 1989 Act focused on strengthening the judicial monitoring on MI5 by establishing two mechanisms, namely a Commissioner to review the issuing of warrants for entry into and interference with property and for interception of telecommunications, and a Tribunal to consider complaints against MI5. Nevertheless, it did not establish a monitoring mechanism on intelligence agencies for Parliament. Under the 1989 Act, MI5 remained accountable to the executive branch, not Parliament. While the Prime Minister was required to lay before Parliament an annual report made by the Commissioner on the discharge of his or her functions, the Prime Minister could exclude from the report any matter that, in his or her opinion, would be prejudicial to the continued discharge of the functions of MI5. In addition, the Tribunal only reported its investigation findings to the responsible Minister and the Commissioner, and such reports needed not be laid before Parliament. According to the Home Affairs Committee, even after the 1989 Act, the UK intelligence agencies "remained among the most secretive in the developed world".⁸⁵ MI6 and GCHQ were not touched upon in the 1989 Act.

⁸² Leigh (2002) p.2.

⁸³ The Home Affairs Committee is a departmental select committee (similar to a Panel of the Legislative Council in Hong Kong) responsible for monitoring the work of the government's Home Office headed by the Home Secretary.

⁸⁴ Article 8 of the European Convention on Human Rights states that "[e]veryone has the right to respect for his private and family life, his home and his correspondence", and "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others".

⁸⁵ Select Committee on Home Affairs (1999).

4.1.6 In 1993, the Home Affairs Committee issued a report recommending that MI5 be placed under scrutiny by a departmental select committee. The government rejected this recommendation, but conceded to keep the matter under review.⁸⁶ This led in due course to the enactment of the *Intelligence Services Act 1994*, which not only put MI6 and GCHQ on a statutory footing similar to that of MI5, but also established a statutory committee, the Intelligence and Security Committee (ISC), involving Members of Parliament for the first time in the monitoring on MI5, MI6 and GCHQ. ISC came into operation in 1995 and has been the key intelligence monitoring mechanism in which Members of Parliament can take part.

4.2 Intelligence and Security Committee

Statutory basis

4.2.1 ISC is a statutory committee instead of a parliamentary committee. In other words, it is not part of Parliament. Nor is it subject to rules and practices of Parliament. It is governed by the *Intelligence Services Act 1994*, which defines its functions, powers, composition, accountability mechanisms and access to information.

Functions

4.2.2 The statutory function of ISC is to "examine the expenditure, administration and policy" of MI5, MI6 and GCHQ.⁸⁷ ISC does not initiate or consider bills relating to intelligence, or authorize appropriations for those agencies. Nor can ISC examine the operational matters of those agencies, although some information on such matters may be made available to ISC so that it may report on other matters within its remit.⁸⁸ Subject to the government's agreement, ISC also takes evidence and briefings from the Joint Intelligence Committee of the Cabinet Office, the Defence Intelligence Staff of the Ministry of Defence, and other law enforcement departments and organizations that receive intelligence from MI5, MI6 and GCHQ.

⁸⁶ Select Committee on Home Affairs (1999).

⁸⁷ Section 10 (1), *Intelligence Services Act 1994*.

⁸⁸ Jeffs et al. (1994) p.30.

Powers

4.2.3 ISC does not have a formal investigation remit. Nor does it have subpoena powers to compel the attendance of witnesses or production of documents, although Ministers and intelligence agency heads give testimony to ISC as needed. Nevertheless, ISC may employ an Investigator to pursue intelligence matters in greater detail. Working under the statutory authority of ISC, the Investigator can inspect all documents, files and reports connected with the investigations assigned by ISC, and interview key personnel, in preparing his or her reports. The Investigator submits his or her reports to ISC, in consultation with the appropriate intelligence agency heads to ensure that operationally sensitive information is not unnecessarily disclosed.⁸⁹

Composition and design

Membership

4.2.4 ISC comprises nine Members of Parliament who must be drawn from both houses of Parliament. There is no rule on the proportion of Members to Lords as to the membership of ISC. In practice, ISC must have at least one Member and at least one Lord. Since its establishment, ISC has comprised eight Members and one Lord, and has retained this proportion in its composition. In addition, Ministers, who by convention are Members of Parliament, are not allowed to be ISC members, but past service is "no bar to appointment" as an ISC member.⁹⁰

Appointment

4.2.5 ISC members are appointed by the Prime Minister after consultation with the Leader of the Opposition.⁹¹ The current practice adopted though not strictly required is that nominations to ISC are put forward by the government and whips of opposition parties, in a broadly similar way to the nomination of departmental select committee members in the House.⁹²

⁸⁹ Intelligence and Security Committee (1999), p.iv.

⁹⁰ Schedule 3, Section 1 (2), *Intelligence Services Act 1994*.

⁹¹ Section 10 (3), *Intelligence Services Act 1994*.

⁹² Intelligence and Security Committee (2005), p.iv.

Chairmanship

4.2.6 The ISC chair is appointed by the Prime Minister from among the ISC members. If on any matter there is an equality of voting among the ISC members, the chair has a casting vote. In his or her absence, the chair may appoint one of the ISC members to act as the chair at any ISC meeting, but the chair so appointed does not have a casting vote.

Tenure

4.2.7 The *Intelligence Services Act 1994* does not spell out the tenure of ISC members or the circumstances in which the Prime Minister may require an ISC member to step down. The Act only states that an ISC member may resign at any time by notice to the Prime Minister.⁹³

Differences from parliamentary committees

4.2.8 While ISC comprises Members of Parliament, it is designed as a statutory committee instead of a parliamentary committee in that:

- (a) members are appointed by the Prime Minister instead of Parliament;
- (b) its remit is similar in terms to that of the House's departmental select committees which "examine the expenditure, administration and policy of the principal government departments",⁹⁴ but it has none of the powers of such select committees, such as sending for persons, papers or records;⁹⁵ and
- (c) it primarily reports to the Prime Minister instead of Parliament.

4.2.9 According to the House's Home Affairs Committee, being a statutory instead of parliamentary committee is an "obvious drawback" for ISC, and "the principle of parliamentary, as opposed to statutory, scrutiny of the intelligence and security services has not yet been conceded" by the government.⁹⁶ The Home Affairs Committee recommended in 1999 that ISC be replaced by a parliamentary inter-departmental select committee, which could report to Parliament instead of the Prime Minister. However, the majority of ISC did not support the recommendation.⁹⁷

⁹³ Section 1(3), Schedule 3, *Intelligence Services Act 1994*.

⁹⁴ Standing Order 152(1), House of Commons of the UK Parliament.

⁹⁵ Standing Order 152(4), House of Commons of the UK Parliament.

⁹⁶ Select Committee on Home Affairs (1999).

⁹⁷ Intelligence and Security Committee (1999).

Administration and procedure

4.2.10 For security reasons, ISC meets and takes evidence in the Cabinet Office where a small Secretariat under the Clerk to ISC is also based. ISC meets roughly weekly while Parliament is sitting, and the meetings are not open to the public. ISC does not hold public hearings. The *Intelligence Services Act 1994* empowers ISC to determine its own procedures. The quorum of ISC is three.

Accountability to Parliament

4.2.11 ISC is required to provide to the Prime Minister an annual report on the discharge of its functions. The Prime Minister is then required to lay the report before the House. In addition, ISC may produce ad hoc reports on specific topics to the Prime Minister from time to time.⁹⁸

Access to sensitive information

4.2.12 ISC may have access to sensitive information from the heads of MI5, MI6 or GCHQ, if the agency head concerned considers it "safe to disclose" such information, or if the responsible Minister considers it "desirable in the public interest" even when the agency head concerned considers that such information should not be made available to ISC.⁹⁹ According to ISC, it can see "significant amounts of classified material in carrying out its duties and it takes evidence from Cabinet Ministers and senior officials", and all the information is used to formulate its reports.¹⁰⁰

4.2.13 The information to be made available to ISC is subject to and in accordance with arrangements approved by the responsible Minister.¹⁰¹ "Sensitive information" is statutorily defined as:¹⁰²

- (a) information which "might lead to the identification of, or provide details of, sources of information, other assistance or operational methods" available to MI5, MI6 or GCHQ;

⁹⁸ Since its commencement of operation, ISC has produced nine annual reports to the Prime Minister and seven ad hoc reports. Its annual reports cover the expenditure and resources, administration and policies relating to the intelligence agencies, while its ad hoc reports cover a wide range of subjects, such as rendition, terrorist attacks, weapons of mass destruction, and policies and procedures for the handling of information.

⁹⁹ Sections 3(1), (2) and (3), Schedule 3, *Intelligence Services Act 1994*.

¹⁰⁰ Intelligence and Security Committee (1999), p.iv.

¹⁰¹ Schedule 3, Section 3 (1), *Intelligence Services Act 1994*.

¹⁰² Schedule 3, Section 4, *Intelligence Services Act 1994*.

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- (b) information about "particular operations which have been, are being or are proposed to be undertaken" in pursuance of any of the functions of MI5, MI6 or GCHQ; and
 - (c) information provided by the government (or its agencies) of a territory outside the UK where the government does not consent to the disclosure of the information.

4.2.14 The intelligence agency heads are required to inform ISC, if the information requested by ISC cannot be disclosed either because it is "sensitive" or because the responsible Minister has determined that it should not be disclosed.¹⁰³ The Minister's determination of not disclosing information to ISC can only be made if the Minister considers that, if requested to produce such information before a departmental select committee of the House, he or she would not think it proper to do so.¹⁰⁴ The Minister cannot make such a determination "on the grounds of national security alone".¹⁰⁵

Restrictions on disclosure of sensitive information

4.2.15 ISC members are subject to the relevant restrictions on disclosure of information under the *Official Secrets Act 1989*, and therefore are required to operate within "the ring of secrecy".¹⁰⁶ Specifically, under the *Intelligence Security Act 1994*, if it appears to the Prime Minister, after consultation with ISC that the publication of any matter in a report "would be prejudicial to the continued discharge of the functions" of MI5, MI6 or GCHQ, the Prime Minister may exclude that matter from the report as laid before Parliament.¹⁰⁷ The excluded parts of the report are indicated by *** in the text.

¹⁰³ Section 3(1), Schedule 3, *Intelligence Services Act 1994*.

¹⁰⁴ Jeffs et al. (1994) p.31. Information deemed not proper for disclosure to departmental select committees includes advice given by the Law Officers (who are the chief legal advisers to the government and responsible for all crown litigations) and confidential information about the private matters of individuals.

¹⁰⁵ Section 3(4), Schedule 3, *Intelligence Services Act 1994*.

¹⁰⁶ ISC members are subject to section 1(b) of the *Official Secrets Act 1989*, which states that "[a] person who is or has been a person notified that he is subject to the provision of this subsection is guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force".

¹⁰⁷ Section 10 (7), *Intelligence Security Act 1994*.

4.2.16 In practice, while the Prime Minister is required to lay before the House an ISC report on the discharge of its functions, the Prime Minister may:

- (a) determine the timing of publishing the report or laying the report before the House,¹⁰⁸ although ISC may ask the Prime Minister to lay it before the House as soon as possible;
- (b) publish the report and the government's response to the report simultaneously;¹⁰⁹ and
- (c) make a statement, accompanying the report, on "whether any matter has been excluded from that copy".¹¹⁰

4.3 Public consultation on Intelligence and Security Committee

4.3.1 In July 2007, the UK government indicated in a Green Paper, *The Governance of Britain*, that it would consider legislation to maximize the effectiveness of ISC and, in the interim, propose changes to improve its transparency and resourcing.¹¹¹ In particular, the government consulted the public on how the statutory basis of ISC should be amended to "bring the way in which it is appointed, operates and reports as far as possible into line with that of other select committees [of the House], while maintaining the necessary arrangements for access to, and safeguarding of, highly-classified information on which effective security depends".¹¹²

4.3.2 The government also proposed that some interim changes could be made within the existing legislation, including:¹¹³

- (a) greater transparency on how ISC members are appointed, using similar processes of consultation between the major parties as those for the selection of Members to the House's select committees;
- (b) giving ISC the option to meet in public and in the House;

¹⁰⁸ For example, in March 2006, ISC submitted the *Report into the London Terrorist Attacks on 7 July 2005* to the Prime Minister, who did not lay the report before the House until May 2006.

¹⁰⁹ For example, in May 2006, the Prime Minister laid ISC's *Report into the London Terrorist Attacks on 7 July 2005* and the *Government Response to the Intelligence and Security Committee's Report into the London Terrorist Attacks on 7 July 2005* before the House simultaneously.

¹¹⁰ Section 10 (6), *Intelligence Security Act 1994*.

¹¹¹ *The Governance of Britain* p.7.

¹¹² *The Governance of Britain* p.32.

¹¹³ *The Governance of Britain*, pp.32-33.

- (c) the House debates on ISC reports to be led by the chair of ISC rather than a Minister, with those reports also being debated in the House of Lords;
- (d) strengthening the secretariat to ISC and making the secretariat clearly separate from the staff of the Cabinet Office; and
- (e) seeking advice from the chair of ISC on how to maximize the effectiveness of the existing scrutiny role of ISC, such as strengthening the relationship of ISC with Parliament and its select committees relevant to intelligence and security.

4.3.3 According to the Secretary of State for Justice and Lord Chancellor, who made a statement to the House on the Green Paper in late October 2007, the government would announce in due course the new rules governing "a more open approach to the working" of ISC.¹¹⁴

¹¹⁴ Statement to the House of Commons by the Secretary of State for Justice and Lord Chancellor, 25 October 2007.

Chapter 5 – House of Commons of the Parliament of Canada

5.1 Background

Government intelligence agencies

5.1.1 In Canada, the federal government has the following key intelligence agencies:

- (a) the Canadian Security Intelligence Service (CSIS), which is the national civilian intelligence agency responsible for collecting, analyzing and retaining intelligence about activities that may be suspected of constituting threats to the security of Canada, and reporting to and advising the government;¹¹⁵
- (b) the Royal Canadian Mounted Police (RCMP), which is the national police service responsible for conducting law enforcement operations against organized crime and terrorism;¹¹⁶ and
- (c) the Communications Security Establishment (CSE), which is the national cryptologic agency responsible for providing the government with information technology security and foreign signals intelligence services, and providing technical and operational assistance to federal law enforcement and security agencies.¹¹⁷

Parliamentary monitoring on intelligence agencies

5.1.2 Before the enactment of the *Canadian Security Intelligence Service Act* (the CSIS Act) in 1984 when CSIS was created, the federal government's primary intelligence agency, the Security Service (SS), had been subsumed within RCMP and without distinct statutory basis. Although in 1975 the government gave SS an explicit mandate, which consisted of a cabinet directive in broad terms,¹¹⁸ the monitoring of the Parliament of Canada on SS or government intelligence activities was minimal. The practice was that sensitive information about intelligence and security ought not to be disclosed to Parliament and questions about such matters were seldom discussed in Parliament.¹¹⁹

¹¹⁵ Section 12, the CSIS Act.

¹¹⁶ Royal Canadian Mounted Police (2007).

¹¹⁷ Section 273.64, the *Anti-terrorism Act*.

¹¹⁸ Rosen (2000).

¹¹⁹ For instance, in 1973, the government tabled in the House its views that government papers or documents should be exempt from production to the House, if the release of such papers "would be detrimental to the security" of Canada or "might be detrimental to the future conduct of Canada's foreign relations". *Beauchesne's: Parliamentary Rules & Forms of the House of Commons of Canada* (1989) pp.129-130.

5.1.3 During the 1960s and 1970s, with its extensive intelligence activities directed at left-wing and radical groups nationwide, particularly the Quebec separatist movement, SS was increasingly accused of committing illegal and improper acts, and became an issue of public concern. From 1966 to 1981, the government formed six major commissions of inquiry into the allegations of SS wrongdoing. In particular, the federal Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (commonly known as the McDonald Commission), which was formed in 1977 and led by Judge David C. McDonald, published its report in 1981 recommending the tightening of accountability over SS. The McDonald Commission recommended that a domestic civilian intelligence agency separate from RCMP be established and the new agency's activities be governed by an Act of Parliament, which would define its functions and powers, the conditions for the use of its powers, and its organizational structure. The McDonald Commission also recommended both the House and the Senate to form a special joint parliamentary committee to monitor the new intelligence agency.

Creation of Security Intelligence Review Committee

5.1.4 The government accepted most of the McDonald Commission's recommendations. In particular, it introduced the CSIS Act to replace SS with CSIS. However, the government did not support the establishment of a special joint parliamentary committee to exercise direct parliamentary monitoring on CSIS, although opposition parties argued that the setting up of the committee would assure Parliament of CSIS being operated legally and properly. Instead, the government established the Security Intelligence Review Committee (SIRC) to monitor CSIS. Governed by the same CSIS Act, SIRC is Canada's "only independent external review body with a legal mandate" given by Parliament to review the activities of CSIS.¹²⁰ The "independent" and "external" status of SIRC means that SIRC is "at arm's-length from the Government and does not report to any Minister but, rather, directly to Parliament".¹²¹ SIRC has "the absolute authority" to examine all information about CSIS activities, except for Cabinet confidences. Nevertheless, SIRC is authorized to examine only past CSIS activities. The key features of SIRC are explained in **section 5.2**.

¹²⁰ Security Intelligence Review Committee (2007b) p.57.

¹²¹ This comment was made by Susan Pollak, Executive Director of SIRC, in 2005, see Pollak (2005).

5.1.5 While SIRC reviews only past CSIS activities, current CSIS activities are monitored by the statutory Inspector General, who provides review reports to SIRC through the Minister of Public Safety.¹²² Meanwhile, SIRC does not review the activities of RCMP and CSE. RCMP is monitored by the Commission for Public Complaints Against the RCMP, which is an administrative tribunal empowered to conduct external and independent reviews of public complaints concerning the conduct of RCMP members in the course of carrying out their duties.¹²³ As to CSE, it is monitored by the Communications Security Establishment Commissioner established in 1996 under the *Inquiries Act*. The Commissioner is responsible for reviewing the activities of CSE to ensure their compliance with the law and investigating complaints against CSE.¹²⁴

5.1.6 The House of Commons has the set-up of a standing committee, the Committee on Public and National Security, which has a mandate covering matters relating to security generally. However, it does not have legislative mandate to review and investigate the activities of intelligence agencies, and access their sensitive information. It only provides a limited basis for substantive and direct parliamentary monitoring on intelligence. With the legislative mandate given by Parliament, SIRC remains the key monitoring mechanism on government intelligence agencies in Canada.

5.2 Security Intelligence Review Committee

Statutory basis

5.2.1 SIRC is a statutory committee, which is not part of Parliament and therefore not subject to the rules and practices of Parliament. Its statutory basis is provided by the CSIS Act, which defines its composition, functions, powers and administration, and empowers it to determine the procedures to be followed in performing its functions.

¹²² Established under the CSIS Act and appointed by the Governor in Council, the Inspector General is responsible for monitoring CSIS's compliance with its "operational policies" and reviewing CSIS's "operational activities". The Inspector General has the same access to sensitive information as SIRC. It does not report to Parliament, but submits its reports to the Minister of Public Safety, who provides them to SIRC. At the request of SIRC, the Inspector General may conduct a review of specific activities of CSIS and provide the review report to SIRC directly. The Inspector General may make recommendations, which are not binding on CSIS.

¹²³ Raaflaub (2006). The Commission chair reports annually to Parliament through the government's Solicitor General. The Commission may convene public hearings and make recommendations, which are not binding on RCMP.

¹²⁴ Raaflaub (2006). The Commissioner reports the review results to the Minister of National Defence but does not disclose the results to the public. Reviews conducted are listed every year in the Commissioner's annual report to the Minister, which is subsequently tabled before Parliament. The Commissioner has access to all CSE information holdings, but may not convene public hearings. The Commissioner may make recommendations, which are not binding on CSE. While the *National Defence Act* empowers the Commissioner to undertake any investigation that he or she considers necessary in response to a complaint, only complaints made by Canadian citizens and permanent residents, including CSE employees, are accepted.

Functions

5.2.2 The statutory functions of SIRC are to "review generally" CSIS's past performance of its duties and functions, including:¹²⁵

- (a) reviewing the periodic reports of the Director of CSIS on the operational activities of CSIS submitted to the Minister of Public Safety, and the certificates submitted by the Inspector General to the Minister on whether the Inspector General is satisfied with those reports and whether any act or thing done by CSIS is considered by the Inspector General as being unauthorized by the CSIS Act, contravening any directions issued by the Minister, or any unreasonable or unnecessary exercise of CSIS's powers;¹²⁶
- (b) reviewing the directions issued to CSIS by the Minister of Public Safety, and monitoring any request made to CSIS by the Minister of National Defence or the Minister of Foreign Affairs;
- (c) reviewing the arrangements authorizing CSIS to provide security assessments, and the provision of information and intelligence according to those arrangements;¹²⁷
- (d) reviewing all CSIS internal regulations and policies; and
- (e) compiling and analyzing statistics on the operational activities of CSIS.

5.2.3 In addition, SIRC can investigate complaints from members of the public against any act or thing done by CSIS, provided that:¹²⁸

- (a) the complainant has made a complaint to the Director of CSIS and has not received a response within such period of time as SIRC considers reasonable or is dissatisfied with the response given;
- (b) SIRC is satisfied that the complaint is not "trivial, frivolous, vexatious or made in bad faith"; and

¹²⁵ Section 38, the CSIS Act.

¹²⁶ Sections 33 (1), (2), (3), the CSIS Act.

¹²⁷ Sections 38 (a)(iii) and (iv), 13 (2) and (3), and 17(1). Such arrangements are those entered into by CSIS with a federal government department, a provincial government, a police force in a province responsible for policing in the province, a foreign government or an international organization of states.

¹²⁸ Section 41, the CSIS Act.

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- (c) the complainant is not entitled to seek redress through a grievance procedure established under the CSIS Act or the *Public Service Labour Relations Act*.

5.2.4 To perform its functions, SIRC may "direct" CSIS or the Inspector General to "conduct a review of specific activities of CSIS" and provide SIRC with the review report.¹²⁹ If SIRC considers that a review by CSIS or the Inspector General "would be inappropriate", it may "conduct such a review itself".¹³⁰ In practice, SIRC has occasionally directed the Inspector General, but not CSIS, to conduct such reviews. For the most part, SIRC has carried out reviews itself.¹³¹

5.2.5 It should be noted that SIRC is designed as a review body examining past CSIS activities only. SIRC is not an oversight agency, which monitors, on a continual basis, what is taking place inside an intelligence agency, or has the mandate to evaluate current investigations or works in real time.¹³² According to SIRC, the advantage of review in comparison to oversight is that SIRC "can make a full assessment of CSIS's past performance, without being compromised by any involvement in its day-to-day operational decisions and activities".¹³³

Powers

5.2.6 SIRC has power to:¹³⁴

- (a) summon and enforce the appearance of persons before SIRC, and compel them to give oral or written evidence on oath and produce such documents and things as SIRC deems requisite to the full investigation and consideration of a complaint "in the same manner and to the same extent as a superior court of record";¹³⁵
- (b) administer oaths; and

¹²⁹ Sections 38 (b) and 40, the CSIS Act.

¹³⁰ Section 40, the CSIS Act.

¹³¹ Office of the Auditor General of Canada (1996).

¹³² Security Intelligence Review Committee (2007b).

¹³³ Security Intelligence Review Committee (2007b) and Office of the Auditor General of Canada (1996). In the 1996 Report, which covered the control and accountability of the Canadian Intelligence Community, the Auditor General of Canada considered that "the creation of SIRC was an innovative and unique response to the need to provide independent external review and a measure of public accountability for CSIS while avoiding the difficulties involved in making classified information regularly available to parliamentarians".

¹³⁴ Section 50, the CSIS Act.

¹³⁵ Ibid.

- (c) receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as SIRC sees fit, whether or not that evidence or information is or would be admissible in a court of law.

5.2.7 While SIRC has powers to make recommendations to CSIS, the Supreme Court of Canada has held that such recommendations are not binding on the government.¹³⁶ In addition, SIRC cannot hold public hearings.

Composition and design

Membership

5.2.8 SIRC comprises a chair and not fewer than two and not more than four other members. All must be members of the Queen's Privy Council for Canada (i.e. Privy Councillors) who are not serving Members of the House of Commons or Senators.¹³⁷ According to SIRC, the restricted membership is to "ensure the independence of SIRC".

Appointment

5.2.9 All SIRC members are appointed by the Governor in Council after consultation by the Prime Minister with the Leader of the Opposition in the House of Commons and the leader of each party having at least 12 Members in the House.¹³⁸ The implication of this consultation is that the membership of SIRC "should broadly reflect the makeup of the House".¹³⁹ Nevertheless, mirror representation of Parliament has not always been the case in practice, because some SIRC members are without past political affiliation.¹⁴⁰

¹³⁶ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), footnote 200 p.279.

¹³⁷ Section 34(1), the CSIS Act, and Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), footnote 200, p.301. In practice, some SIRC members are named Privy Councillors in order to assume office. Established under the *Constitution Act 1867*, the Privy Council is to advise the Crown. It includes all past and present Cabinet Ministers and a number of distinguished persons. Privy Councillors are appointed for life by the Governor General on the Prime Minister's recommendation.

¹³⁸ Section 34(1), the CSIS Act. "Governor in Council" means that the Governor General, who is Canada's head of state, acts on the advice of the Federal Cabinet led by the Prime Minister.

¹³⁹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), footnote 201 pp.301-302.

¹⁴⁰ Ibid.

Chairmanship

5.2.10 The CSIS Act does not provide for how the chair of SIRC is selected. According to SIRC, the chair is appointed by the Prime Minister. In the event of his or her absence or incapacity, the chair may designate another member of SIRC to act as the chair. If no such designation is in force or the chair's office is vacant, the Minister of Public Safety may designate a SIRC member to act as the chair.¹⁴¹

Tenure

5.2.11 A SIRC member is appointed for a term not exceeding five years, and can be re-appointed for one more term.¹⁴²

Administration and procedure

5.2.12 With the approval of the government's Treasury Board, SIRC may engage a secretary and such other staff as it requires, and determine and pay their remuneration and expenses. Since much of the information accessed by SIRC is sensitive, SIRC is required to conduct its reviews on site. CSIS has provided a separate office and computers at its headquarters for the exclusive use of SIRC.¹⁴³

5.2.13 SIRC members work on a part-time basis. Each member is entitled to be paid for each day that the member performs his or her statutory duties and functions. Such remuneration is fixed by the Governor in Council.¹⁴⁴ According to SIRC, given their part-time status, SIRC members may pursue other interests, but are bound by the same ethics rules governing public office holders.

Accountability to Parliament

5.2.14 SIRC reports annually to Parliament through the Minister of Public Safety. Under the CSIS Act, SIRC is required to submit, no later than 30 September of a fiscal year, a report of its activities during the preceding fiscal year. The Minister is required to lay the report before each House of Parliament on any of the first 15 days when that House is sitting after the day when the Minister receives it.¹⁴⁵

¹⁴¹ Section 35, the CSIS Act.

¹⁴² Sections 34(2) and (3), the CSIS Act.

¹⁴³ Security Intelligence Review Committee (2007b).

¹⁴⁴ Section 34(4), the CSIS Act.

¹⁴⁵ Section 53, the CSIS Act.

Access to sensitive information

5.2.15 SIRC is entitled to:¹⁴⁶

- (a) have access to any information under the control of CSIS or of the Inspector General that relates to the performance of the duties and functions of SIRC, and receive from the Inspector General and the Director and employees of CSIS such information, reports and explanations as SIRC deems necessary for the performance of its duties and functions; and
- (b) during any investigation have access to any information under the control of CSIS that is relevant to the investigation.

5.2.16 Accordingly, SIRC has the "absolute authority" to examine all the records of CSIS, "no matter how sensitive and no matter how classified that information may be".¹⁴⁷ The sole exception is Cabinet confidences, which are records, or any information in records, that describe the individual or collective decisions and policy-making process of Ministers or Cabinet. According to SIRC, the exception is "quite common in Westminster-style parliamentary democracies". Further, "for the decision-making process to be fully effective and to foster Cabinet solidarity, it is essential that Ministers be able to have full and frank exchanges between and among themselves, and have the assurance that these exchanges will be protected".

Restrictions on disclosure of sensitive information

5.2.17 The CSIS Act does not impose specific restrictions on SIRC's disclosure of sensitive information. It only requires all SIRC members and every person engaged by SIRC "to comply with all security requirements" and "take the oath of secrecy".¹⁴⁸ SIRC is also required to consult the Director of CSIS to ensure such compliance.¹⁴⁹

¹⁴⁶ Section 39 (2), the CSIS Act.

¹⁴⁷ Security Intelligence Review Committee (2007b).

¹⁴⁸ Section 37, the CSIS Act.

¹⁴⁹ Section 55, the CSIS Act.

Chapter 6 – Analysis

6.1 Introduction

6.1.1 The previous four chapters present the monitoring mechanisms on government intelligence agencies adopted in four selected overseas places, namely:

- (a) the House Permanent Select Committee on Intelligence (HPSCI) of the House of Representatives of the United States (US) Congress;
- (b) the Parliamentary Joint Committee on Intelligence and Security (PJCIS) of the Parliament of Australia;
- (c) the Intelligence and Security Committee (ISC) of the United Kingdom (UK); and
- (d) the Security Intelligence Review Committee (SIRC) of Canada.

6.1.2 This chapter highlights the following aspects of these committees to facilitate Members' deliberation on how the Legislative Council (LegCo) may monitor the Government's intelligence activities in Hong Kong:

- (a) nature, functions and powers;
- (b) composition and appointment;
- (c) accountability to the legislature;
- (d) access to sensitive information; and
- (e) public disclosure of sensitive information.

6.1.3 In Hong Kong, LegCo does not have a committee or any mechanism with statutory functions and powers to monitor government departments involved in intelligence activities. While the Panel on Security of LegCo has a function of monitoring and examining "government policies and issues of public concern relating to security, public order, public safety, corruption-related matters, nationality and immigration",¹⁵⁰ it has no power to review and investigate the activities of government departments involved in intelligence. The Panel can "receive briefings and formulate views on any major legislative or financial proposals in respect of the above policy areas" prior to their formal introduction to LegCo or its Finance Committee which is responsible for scrutinizing and approving public expenditure proposals put forward by the Government. However, the Panel cannot access sensitive information on intelligence matters held by the Government. Whether such information can be disclosed to the Panel or LegCo is determined by the Government, unless the Panel or LegCo seeks authorization by a resolution of the Council to exercise the power to order attendance of witnesses and production of documents in accordance with the relevant provisions of the Legislative Council (Powers and Privileges) Ordinance.¹⁵¹

6.1.4 Outside LegCo, there is the statutory Commissioner on Interception of Communications and Surveillance, who is responsible for overseeing whether certain government law enforcement agencies and their officers comply with the requirements under the Interception of Communications and Surveillance Ordinance (ICSO).¹⁵² Established by ICSO, the Commissioner is appointed by the Chief Executive of the Hong Kong Special Administrative Region (HKSAR), who is the head of the HKSAR. The Commissioner's remit concerns the law enforcement agencies specified by ICSO, namely the Customs and Excise Department (C&ED), the Hong Kong Police Force and the Independent Commission Against Corruption (ICAC) in relation to interception, and C&ED, Police, ICAC and the Immigration Department in relation to surveillance.¹⁵³ Nevertheless, the Commissioner is concerned with neither persons other than public officers of those specified law enforcement agencies who may engage in interception and surveillance, nor any forms of surveillance not within the definition of that term under ICSO.¹⁵⁴ The Commissioner is not required to attend meetings of LegCo or its committees (such as the Panel on Security) to brief Members on the performance of his or her functions. The Commissioner is only required to submit reports to the Chief Executive, who is required to table such reports in LegCo. It is incumbent upon the Commissioner to consider what should be disclosed in such reports as well as to the public to avoid prejudicing the prevention or detection of crime or the protection of public security.¹⁵⁵ In addition, the Chief Executive may exclude any matter in such reports, the publication of which he or she considers would result in the prejudice being caused.¹⁵⁶

¹⁵⁰ *Panel on Security* (2008).

¹⁵¹ Sections 9, 13 and 14, *Legislative Council (Powers and Privileges) Ordinance*.

¹⁵² Section 40, ICSO. ICSO came into force on 9 August 2006.

¹⁵³ Schedule 1 to ICSO.

¹⁵⁴ *The Commissioner on Interception of Communications and Surveillance* (2007) pp.8-9.

¹⁵⁵ *The Commissioner on Interception of Communications and Surveillance* (2007) p.5.

¹⁵⁶ Section 49(5), ICSO and *The Commissioner on Interception of Communications and Surveillance* (2007) pp.4-5.

6.1.5 For Members' reference, the **Appendix** compares the main features of the arrangements for monitoring government intelligence activities in the four selected places and Hong Kong.

Nature

6.1.6 While all of the four selected places have established parliamentary or statutory committees to monitor government intelligence agencies, the nature of those committees is not identical with each other.

6.1.7 Both HPSCI of the US House of Representatives and PJCIS of the Parliament of Australia are parliamentary committees with statutory functions and powers to monitor government intelligence agencies. They are appointed by the legislature, and report directly to the legislature. Besides rules and practices of the legislature, they are governed by specific legislation. HPSCI is empowered by various US statutes, primarily the *National Security Act of 1947* as amended and the *Intelligence Oversight Act of 1980*, to hold intelligence agencies accountable. In Australia, the establishment and operation of PJCIS are governed by the *Intelligence Services Act 2001* as amended. Where the Act is silent, the powers and functions of PJCIS are no different from those of the other committees of Parliament.

6.1.8 The UK House of Commons and the Canadian House of Commons do not have their own committees monitoring government intelligence agencies. Both the UK's ISC and Canada's SIRC are statutory committees as they are not established by the legislature but by legislation. ISC is established by the *Intelligence Services Act 1994*, while SIRC is established by the *Canadian Security Intelligence Service Act*. The two committees are not part of the legislature and therefore not subject to the rules and practices of the legislature. In any event, they report directly to the responsible Ministers who are required to lay their reports before the legislature.

6.1.9 In Hong Kong, LegCo does not have any committee or mechanism with statutory functions and powers to monitor government departments involved in intelligence activities. Nor is there a statutory committee on intelligence in which Members can take part. The Government has established the statutory Commissioner on Interception of Communications and Surveillance, who is responsible for overseeing whether certain law enforcement agencies involved in interception and surveillance comply with law. The Commissioner is independent of LegCo, and is not required to report to LegCo directly.

Functions

Scope of monitoring

6.1.10 All of the selected committees on intelligence have statutory functions to monitor government intelligence agencies, but the scope of monitoring by each committee varies.

6.1.11 In the US, HPSCI monitors a wide range of activities of all intelligence agencies, which not only include the budgets and organization or reorganization of those agencies, but also their intelligence and intelligence-related activities, such as related policies and covert or clandestine operations.

6.1.12 In the UK, ISC monitors three particular areas of all intelligence agencies, namely expenditure, administration and policy. However, unlike HPSCI, it does not monitor the operational matters of those agencies.

6.1.13 Compared to HPSCI and ISC, PJCIS monitors only the expenditure and administration of all intelligence agencies in Australia, but does not monitor their policies. In addition, like ISC, PJCIS does not monitor those agencies' operational matters. Such matters are monitored by the statutory Inspector-General of Intelligence and Security appointed by the Governor-General (the head of state) upon the recommendation of the Prime Minister, who must consult the House's Leader of the Opposition before making the recommendation.

6.1.14 Unlike the selected committees in the US, UK and Australia, Canada's SIRC monitors only the past activities of the Canadian Security Intelligence Service (CSIS), which is Australia's primary intelligence agency, although its monitoring may cover CSIS's past operational activities and is not confined to the agency's expenditure and administration. The current activities of CSIS are monitored by the statutory Inspector General appointed by the Governor in Council, i.e. the Governor General as the head of state acting on the advice of the Federal Cabinet led by the Prime Minister. The Inspector General reports to the Minister of Public Safety, who is statutorily responsible for CSIS and required to provide the reports by the Inspector General to SIRC.

6.1.15 In addition, unlike the arrangements in the US, the UK and Australia, not all intelligence agencies in Canada are monitored by SIRC. SIRC monitors CSIS only. The other two intelligence agencies, the Royal Canadian Mounted Police (RCMP) and the Communications Security Establishment, are monitored by an administrative tribunal, the Commission for Public Complaints Against the RCMP, and a statutory reviewer, the Communications Security Establishment Commissioner, respectively.

6.1.16 In Hong Kong, the Panel on Security of LegCo monitors and examines government policies and issues relating to security, public order, public safety, corruption-related matters, nationality and immigration, but has no power to review or investigate the activities of government departments involved in intelligence.

Scrutinizing bills relating to intelligence matters

6.1.17 Among the four selected committees on intelligence, only the US's HPSCI has a legislative function to scrutinize bills relating to intelligence matters. In the UK, Australia and Canada, the functions of the selected committees are restricted to monitoring or reviewing specified activities of intelligence agencies or related government departments. The scrutiny of bills relating to intelligence matters rests with the legislature or its relevant committee in those places. In Hong Kong, the Panel on Security of LegCo does not scrutinize bills relating to intelligence matters. Such bills may be scrutinized by bills committees in LegCo.

Authorizing funding for intelligence agencies

6.1.18 Among the selected committees on intelligence, only the US's HPSCI is empowered to authorize appropriations for intelligence agencies. While the selected committees in Australia, the UK and Canada can monitor the expenditure of intelligence agencies, they cannot authorize funding for them. In Hong Kong, the Panel on Security of LegCo does not have such appropriation power either. The scrutiny and approval of the Government's public expenditure proposals, including those relating to departments involved in intelligence matters, rest with the Finance Committee of LegCo.

Investigating complaints

6.1.19 Canada's SIRC is the only selected committee having a function of investigating complaints, including those filed by members of the public, against any act or thing done by an intelligence agency. Similar to those committees in the US, Australia and the UK, the Panel on Security of LegCo in Hong Kong does not have power to investigate such complaints.

Powers

6.1.20 Among the four selected committees on intelligence, only the US's HPSCI and Canada's SIRC have power to compel the attendance of witnesses and the production of documents to them. In the UK, without a formal investigation remit, ISC cannot compel the attendance of witnesses or the production of documents, although Ministers and intelligence agency heads give testimony as needed. In Australia, while PJCIS can require witnesses to give evidence or produce documents, such evidence or documents must not reveal the intelligence agencies' operationally sensitive information, such as sources of information, operational methods and particular operations. In Hong Kong, the Panel on Security of LegCo cannot compel the attendance of witnesses or production of documents, unless it is authorized by a resolution of the Council pursuant to the relevant provisions of the Legislative Council (Powers and Privileges) Ordinance.

6.1.21 Canada's SIRC is the only selected committee having a statutory power to direct an intelligence agency to conduct a review of specific activities of the agency and provide it with the review report. In Hong Kong, the Panel on Security of LegCo does not have such power.

Composition and appointment

Eligibility requirements

6.1.22 Among the four selected committees on intelligence, those in the US, Australia and the UK must comprise serving Members of the legislature. Canada's SIRC is the only selected committee which is not allowed to have any serving Member of the legislature. All SIRC members must be Privy Councillors who are not serving Members of the House or Senators. Privy Councillors are appointed by the Governor General on the Prime Minister's recommendation. The Privy Council is a constitutional body comprising distinguished people, including past Cabinet Ministers.

6.1.23 HPSCI is the only selected committee which must have some members drawn from other designated congressional standing committees with certain monitoring functions relating to intelligence matters. HPSCI is also the only selected committee which must have the House's Speaker and the Minority Leader as ex officio members, although they do not have a vote and cannot be counted for determining a quorum.

Majority-minority party ratio

6.1.24 The membership of the selected committees on intelligence matters in the US and Australia is structured according to a majority-minority party ratio, which is in favour of the majority or government party. In the US, of the 21 HPSCI members, the majority has been from the majority party in practice. In Australia, under legislation, a majority (i.e. at least five) of the nine PJCIS members must be from the government party. On the other hand, neither the UK's ISC nor Canada's SIRC is required by law or parliamentary rules to have its membership bisected by a majority-minority party ratio.

Appointing authority

6.1.25 The US's HPSCI and Australia's PJCIS are committees of the legislature, with their members being appointed by resolution of the legislature. On the other hand, the UK's ISC and Canada's SIRC are statutory instead of parliamentary committees, with their members being appointed by the head of government or the head of state instead of the legislature. ISC members are appointed by the Prime Minister, while SIRC members are appointed by the Governor in Council.

Consultation on nomination of committee members

6.1.26 In Australia, the UK and Canada, the executive branch is statutorily required to consult the minority or opposition parties in the legislature as to the nomination of members to the respective committees on intelligence. In Australia, before nominating Members of Parliament to PJCIS, the Prime Minister must consult the Leaders of each recognized political party that is represented in the House and does not form part of the government. In the UK, before appointing ISC members, the Prime Minister must consult the Leader of the Opposition of the House on the nominations of such members. In Canada, before the appointment of SIRC members by the Governor in Council, the Prime Minister making the nominations must consult the Leader of the Opposition in the House and the leader of each party having at least 12 Members in the House.

Accountability to the legislature

6.1.27 Among the four selected committees on intelligence, only the US's HPSCI and Australia's PJCIS, which are committees of the legislature, report directly to the legislature. In the US, under the Rules of the House, HPSCI must provide reports to the House regularly on the nature and extent of the intelligence and intelligence-related activities of various government departments and agencies. It must also promptly inform the House or any other appropriate committee of any matter requiring the attention of the House or the committee concerned. In Australia, PJCIS is statutorily required to provide an annual report on its activities to Parliament as soon as practicable after the end of each year. In the UK and Canada, both ISC and SIRC provide their reports on intelligence agencies to the responsible Ministers, who are statutorily required to lay such reports before the legislature.

6.1.28 In Hong Kong, government departments involved in intelligence activities are not statutorily required to provide LegCo with annual reports on such activities. LegCo can only receive from the Chief Executive reports on interception and surveillance activities prepared by the Commissioner on Interception of Communications and Surveillance.

Access to sensitive information

Scope of sensitive information that can be accessed

6.1.29 In this study, it is noted that the US's HPSCI and Canada's SIRC have wider access to sensitive information on intelligence matters than the UK's ISC and Australia's PJCIS.

6.1.30 In the US, HPSCI can access most finished intelligence products that are circulated within the executive branch. It can obtain from the heads of intelligence agencies annual reports, which review the intelligence and intelligence-related activities of such agencies. In addition, it can occasionally, but not routinely, access certain sensitive information, such as identities of intelligence sources, intelligence methods, raw intelligence obtained through spying, interception of communication and photo intelligence, and written intelligence products specifically provided to the President and high-level policy makers. In Canada, SIRC is statutorily empowered to access any information held by CSIS, no matter how sensitive and classified that information may be. The only exception is that SIRC cannot access Cabinet confidences, which are records on individual or collective decisions and policy-making process of Ministers or Cabinet.

6.1.31 In the UK, under legislation, the scope of sensitive information that can be accessed by ISC is similar to that by HPSCI. The scope covers sources of information, operational methods, particular operations and information provided by foreign governments. Nonetheless, ISC may access sensitive information held by an intelligence agency, only when the agency head concerned considers it safe to disclose such information or if the Minister responsible for the agency considers it desirable in the public interest.

6.1.32 In Australia, the scope of sensitive information that PJCIS can access is significantly narrower than that can be accessed by the selected committees in the US, Canada and the UK. Under legislation, while PJCIS may request briefings by intelligence agency heads and the statutory Inspector General of Intelligence and Security, who reviews the operation matters of all Australian intelligence agencies, it cannot obtain operationally sensitive information, including sources of information, operational methods, particular operations and information provided by foreign governments which do not consent to the public disclosure of the information. In addition, the executive branch may prevent witnesses to give evidence or produce documents before PJCIS so as to keep such information from disclosure.

6.1.33 In Hong Kong, neither the Panel on Security nor LegCo is empowered to access sensitive information held by government departments involved in intelligence activities, unless the Panel or LegCo seeks authorization by a resolution of the Council to exercise the power to order attendance of witnesses or production of documents in accordance with the relevant provisions of the Legislative Council (Powers and Privileges) Ordinance.

Public disclosure of sensitive information

Information not allowed for public disclosure

6.1.34 All of the selected committees on intelligence in the US, Australia, the UK and Canada are subject to certain parliamentary or statutory restrictions on the public disclosure of sensitive information on intelligence matters, but the specifics of such restrictions vary significantly.

6.1.35 In the US, HPSCI is not allowed to disclose certain particular types of sensitive information in its reports to the public. Specified in the Rules of the House, such types of information include the names of persons engaged in intelligence or intelligence-related activities for the US; the intelligence methods used, the sources of information; and the amount of funds authorized to be appropriated for intelligence and intelligence-related activities. In Australia, the legislation disallows PJCIS to publicly disclose certain types of sensitive information, which is similar to those applicable to HPSCI in the US.

6.1.36 Unlike the specific restrictions on the selected committees in the US and Australia, those on the UK's ISC and Canada's SIRC are rather general. In the UK, the legislation only provides that before laying an ISC report before Parliament, the Prime Minister can exclude any matter from the report if the Prime Minister, after consultation with ISC, considers that the disclosure would be prejudicial to the continued discharge of the functions of intelligence agencies. Compared to ISC, Canada's SIRC is subject to an even more general statutory restriction on the public disclosure of sensitive information on intelligence matters. The legislation does not specify what types of sensitive information SIRC can disclose publicly; it only requires SIRC to consult the intelligence agency head concerned.

6.1.37 In Hong Kong, neither the Panel on Security nor LegCo is statutorily empowered to publicly disclose sensitive information held by government departments involved in intelligence activities.

Determining the public disclosure of sensitive information

6.1.38 The US's HPSCI is the only selected committee having discretion to disclose publicly any information in its possession, if it determines that the disclosure serves the public interest. Nevertheless, the US President may object to the disclosure on the ground that the threat posed by the disclosure to the national interest outweighs the public interest. In this case, HPSCI must have leave of the House before publicly disclosing such information. In Australia, the UK and Canada, whether the selected committees on intelligence may publicly disclose sensitive information is ultimately determined by the executive branch.

6.1.39 The arrangement in Hong Kong is similar to those adopted by Australia, the UK and Canada in that the disclosure of sensitive information held by government departments involved in intelligence activities is determined by the Government.

Appendix

Parliamentary monitoring mechanism on intelligence agencies in selected places

| | Hong Kong Legislative Council (LegCo) | House Permanent Select Committee on Intelligence (HPSCI) of the United States | Parliamentary Joint Committee on Intelligence and Security (PJCIS) of Australia | Intelligence and Security Committee (ISC) of the United Kingdom | Security Intelligence Review Committee (SIRC) of Canada |
|------------------------|---|---|--|---|---|
| Nature | LegCo does not have a specific committee or mechanism to monitor or investigate the activities of government departments involved in intelligence. | HPSCI is a congressional permanent committee of the House of Representatives of Congress. | PJCIS is a joint parliamentary standing committee under the authority of the House of Representatives and the Senate of the Parliament of Australia. | ISC is a statutory instead of parliamentary committee, the operation of which is independent of the United Kingdom Parliament and the government. | SIRC is a statutory instead of parliamentary committee, the operation of which is independent of the Parliament of Canada and the government. |
| Statutory basis | Neither the Panel on Security nor LegCo has specific statutory functions and powers to monitor government departments involved in intelligence activities. Nor is there a statutory committee on intelligence in which Members can take part. | The statutory basis of HPSCI is provided by various statutes, including the <i>National Security Act of 1947</i> as amended and the <i>Intelligence Oversight Act of 1980</i> . | The statutory basis of PJCIS is provided by the <i>Intelligence Services Act 2001</i> as amended. | The statutory basis of ISC is provided by the <i>Intelligence Services Act 1994</i> . | The statutory basis of SIRC is provided by the <i>Canadian Security Intelligence Service Act</i> . |

Appendix (cont'd)

Parliamentary monitoring mechanism on intelligence agencies in selected places

| | Hong Kong Legislative Council (LegCo) | House Permanent Select Committee on Intelligence (HPSCI) of the United States | Parliamentary Joint Committee on Intelligence and Security (PJCIS) of Australia | Intelligence and Security Committee (ISC) of the United Kingdom | Security Intelligence Review Committee (SIRC) of Canada |
|--------------------------------------|--|---|--|--|--|
| Statutory functions | | | | | |
| Scope of activities under monitoring | LegCo's Panel on Security generally monitors and examines government policies and issues relating to security, public order, public safety, corruption-related matters, nationality and immigration but has no power to review or investigate the activities of government departments involved in intelligence. | HPSCI monitors all government intelligence agencies, and its monitoring covers a wide range of activities, including their expenditure, administration, policies and operation matters. | PJCIS monitors all government intelligence agencies but its monitoring covers their expenditure and administration only. It does not monitor their policies and operation matters. | ISC monitors all government intelligence agencies in three aspects: expenditure; administration and policy. It does not monitor their operation matters. | SIRC monitors only the past activities of one intelligence agency, the Canadian Security Intelligence Service (CSIS), and its monitoring covers the agency's expenditure, administration, policies and operation matters. The current activities of CSIS are monitored by the statutory Inspector General. The activities of other government intelligence agencies are monitored by an administrative tribunal or a statutory commissioner. |

Appendix (cont'd)

Parliamentary monitoring mechanism on intelligence agencies in selected places

| | Hong Kong Legislative Council (LegCo) | House Permanent Select Committee on Intelligence (HPSCI) of the United States | Parliamentary Joint Committee on Intelligence and Security (PJCIS) of Australia | Intelligence and Security Committee (ISC) of the United Kingdom | Security Intelligence Review Committee (SIRC) of Canada |
|--|--|--|--|---|--|
| Statutory functions (cont'd) | | | | | |
| Scrutinizing bills relating to intelligence matters | The Panel on Security does not scrutinize bills relating to intelligence matters. Such bills may be scrutinized by bills committees in LegCo. | HPSCI can scrutinize bills relating to intelligence matters. | PJCIS does not scrutinize bills relating to intelligence matters.* | ISC does not scrutinize bills relating to intelligence matters.* | SIRC does not scrutinize bills relating to intelligence matters.* |
| Authorizing funding for intelligence agencies | The Panel on Security does not authorize funding for government departments involved in intelligence activities. This function rests with the Finance Committee of LegCo. | HPSCI can authorize funding for intelligence agencies. | PJCIS does not authorize funding for intelligence agencies.* | ISC does not authorize funding for intelligence agencies.* | SIRC does not authorize funding for intelligence agencies.* |
| Investigating complaints against intelligence agencies | The Panel on Security does not have statutory power to investigate complaints against the activities of government departments involved in intelligence. | HPSCI does not investigate complaints against the activities of intelligence agencies. | PJCIS does not investigate complaints against the activities of intelligence agencies. | ISC does not investigate complaints against the activities of intelligence agencies. | SIRC can receive and investigate complaints, including those filed by members of the public, against the activities of CSIS. |
| Powers to require witness attendance or production of documents | The Panel on Security cannot compel the attendance of witnesses or production of documents, unless it is authorized by a resolution of the Council pursuant to the relevant provisions of the Legislative Council (Powers and Privileges) Ordinance. | HPSCI can compel the attendance of witnesses or production of documents. | PJCIS can require witnesses to give evidence or produce documents, but such evidence or documents must not reveal operationally sensitive information. | ISC cannot compel the attendance of witnesses or production of documents, but Ministers and intelligence agency heads may give testimony as needed. | SIRC can compel the attendance of witnesses or production of documents. |

Remark: * This function is performed by the legislature or its relevant committee.

Appendix (cont'd)

Parliamentary monitoring mechanism on intelligence agencies in selected places

| | Hong Kong Legislative Council (LegCo) | House Permanent Select Committee on Intelligence (HPSCI) of the United States | Parliamentary Joint Committee on Intelligence and Security (PJCIS) of Australia | Intelligence and Security Committee (ISC) of the United Kingdom | Security Intelligence Review Committee (SIRC) of Canada |
|------------------------------------|---------------------------------------|--|---|--|---|
| Composition and appointment | | | | | |
| Eligibility | Not applicable. | HPSCI must comprise serving Members of the House. | PJCIS must comprise serving Members of Parliament. | ISC must comprise serving Members of Parliament. | SIRC must comprise Privy Councillors who are not serving Members of Parliament. |
| Party ratio | Not applicable. | Of the 21 HPSCI members, up to 12 have been from the House's majority party in practice. | Of the nine PJCIS members, the majority must be from the government party. | ISC is not subject to a majority-minority party ratio. | SIRC is not subject to a majority-minority party ratio. |
| Appointing authority | Not applicable. | HPSCI members are appointed by the House. | PJCIS members are appointed by Parliament. | ISC members are appointed by the Prime Minister, the head of government. | SIRC members are appointed by the Governor General (the head of state) acting on the advice of the Federal Cabinet led by the Prime Minister. |

Appendix (cont'd)

Parliamentary monitoring mechanism on intelligence agencies in selected places

| | Hong Kong Legislative Council (LegCo) | House Permanent Select Committee on Intelligence (HPSCI) of the United States | Parliamentary Joint Committee on Intelligence and Security (PJCIS) of Australia | Intelligence and Security Committee (ISC) of the United Kingdom | Security Intelligence Review Committee (SIRC) of Canada |
|---|---|--|--|--|---|
| Composition and appointment (cont'd) | | | | | |
| Consultation on nomination of members | Not applicable. | The executive branch is not involved in the consultation on nomination of Members to HPSCI. | The executive branch, which nominates Members of Parliament to PJCIS, must consult the leaders of each recognized political party that is represented in the House or the Senate and does not form part of the government. | Before appointing Members of Parliament to ISC, the Prime Minister must consult the Leaders of the Opposition of the House. | The Prime Minister, who nominates Privy Councillors to SIRC, must consult the Leader of the Opposition in the House and the leader of each party having at least 12 Members in the House. |
| Accountability to legislature | Government departments involved in intelligence are not statutorily required to provide the Panel on Security or LegCo with annual reports on those activities. | HPSCI reports to the House directly. It must provide regular and periodic reports to the House on the nature and extent of the intelligence and intelligence-related activities of government agencies and departments, and must promptly inform the House of matters requiring the House's attention. | PJCIS reports to Parliament directly. It must provide an annual report on its activities to Parliament as soon as practicable after the end of each year. | ISC does not report to Parliament directly, but must provide its reports to the Prime Minister, who must lay such reports before Parliament. | SIRC does not report to Parliament directly, but must provide its reports to the Minister of Public Safety, who must lay such reports before Parliament. |

Appendix (cont'd)

Parliamentary monitoring mechanism on intelligence agencies in selected places

| | Hong Kong Legislative Council (LegCo) | House Permanent Select Committee on Intelligence (HPSCI) of the United States | Parliamentary Joint Committee on Intelligence and Security (PJCIS) of Australia | Intelligence and Security Committee (ISC) of the United Kingdom | Security Intelligence Review Committee (SIRC) of Canada |
|--|---|--|--|---|--|
| Access to sensitive information on intelligence matters | | | | | |
| Scope of sensitive information that can be accessed | Neither the Panel on Security nor LegCo is empowered to access sensitive information held by government departments involved in intelligence activities, unless the Panel or LegCo is authorized by a resolution of the Council to exercise the power to order attendance of witnesses or production of documents pursuant to the relevant provisions of the Legislative Council (Powers and Privileges) Ordinance. | HPSCI can access most finished intelligence products that are circulated within the executive branch, and can occasionally assess such sensitive information as identities of intelligence sources, intelligence methods, raw intelligence and written intelligence products provided to the President and high-level policy makers. | While PJCIS may request briefings by intelligence agency heads and the statutory Inspector General of Intelligence and Security, who reviews the operation matters of all intelligence agencies, it cannot obtain operationally sensitive information, including sources of information, operational methods, particular operations, and secret information provided by foreign governments. | Subject to the approval of the executive branch, the scope of information that ISC can access covers sources of information, operational methods, information about particular operations and secret information provided by foreign governments. | SIRC can access any information held by CSIS, no matter how sensitive or classified that information may be, except Cabinet confidences. |

Appendix (cont'd)

Parliamentary monitoring mechanism on intelligence agencies in selected places

| | Hong Kong Legislative Council (LegCo) | House Permanent Select Committee on Intelligence (HPSCI) of the United States | Parliamentary Joint Committee on Intelligence and Security (PJCIS) of Australia | Intelligence and Security Committee (ISC) of the United Kingdom | Security Intelligence Review Committee (SIRC) of Canada |
|--|--|--|--|--|--|
| Restrictions on public disclosure of sensitive information on intelligence matters | | | | | |
| Information on intelligence matters not allowed for public disclosure | Not applicable. | Under the Rules of the House, HPSCI cannot disclose certain particular types of intelligence information, including names of persons, intelligence methods, sources of information and the amount of funds authorized to be appropriated for intelligence activities. | The legislation does not allow PJCIS to disclose such intelligence information as persons' identities, operationally sensitive information and information that would or might prejudice Australia's national security or foreign relations. | The legislation only provides that before laying an ISC report before Parliament, the Prime Minister may exclude any matter from the report if the Prime Minister, after consultation with ISC, considers that the disclosure would be prejudicial to the continued discharge of the functions of intelligence agencies. | The legislation does not specify what information is not allowed for public disclosure. It only requires SIRC to consult the intelligence agency head. |
| Discretion in determining public disclosure of sensitive information on intelligence matters | Whether sensitive information relating to intelligence matters can be publicly disclosed is ultimately determined by the executive branch. | HPSCI has discretion to publicly disclose any information in its possession if it determines that the disclosure serves the public interest. The President can object to the disclosure. In this case, HPSCI must have leave of the House before disclosing the information. | PJCIS has no discretion in determining the public disclosure of sensitive information. Whether such information can be publicly disclosed is ultimately determined by the executive branch. | ISC has no discretion in determining the public disclosure of sensitive information. Whether such information can be publicly disclosed is ultimately determined by the executive branch. | SIRC has no discretion in determining the public disclosure of sensitive information. Whether such information can be publicly disclosed is ultimately determined by the executive branch. |

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