

Parliamentary Monitoring Mechanism  
on Intelligence Agencies

Research and Library Services Division  
Legislative Council Secretariat  
October 1995

# Parliamentary Monitoring Mechanism on Intelligence Agencies

## **Background**

In May 1995, a Sub-committee was set up by the LegCo Panel on Security to study reports of the Police Management Review. All but one of the 42 reports have been provided to Members by the Administration. The remaining report, which is related to the review of the Security Wing of the Police Force has been withheld on the ground that it contains sensitive information concerning the security of Hong Kong. Despite Members' repeated requests for the report, the Administration maintains that it would be against the public interest to release it.

2. At the request of the Panel to study the power of overseas parliaments in obtaining information from the government, a paper entitled "Power of Parliamentary Committees in Obtaining Information from the Executive" was submitted to the Panel on 10 July 1995. The research found that while parliaments in countries such as the United Kingdom and Australia have the power to send for information, there were from time to time incidents where Ministers and government officials declined to provide specific documents on the grounds of national security or confidentiality. "Deadlocks" may develop under such circumstances if both sides refuse to compromise.

3. After studying the paper, Panel Members made a further request for research into parliamentary power in monitoring the activities of intelligence agencies. They also wanted to know if there are any precedent where the "deadlocks" between the Parliament and the Executive were resolved through adjudication in courts.

4. This paper is divided into two parts. Part I covers the various kinds of parliamentary monitoring mechanism on intelligence agencies in overseas countries. Part II discusses proposals to refer deadlocks between the Parliament and the Executive to court for adjudication.

## **Part I: Parliamentary Monitoring Mechanism on Intelligence Agencies**

5. Western countries have begun to set up external control and oversight mechanism on security and intelligence services during the 1970s and 1980s to increase the accountability of such agencies. Some parliaments have direct participation in such monitoring mechanism while others could only perform limited function depending on information supplied by the monitoring bodies.

## **The United Kingdom**

### *Intelligence agencies*

6. Intelligence services in the United Kingdom have a long history and cover a wide scope. Many countries model their intelligence agencies on those of the UK. The main intelligence agencies in the UK are as follows.

#### Secret Intelligence Service

The Secret Intelligence Service (SIS), sometimes known as MI6, is responsible for gathering intelligence overseas.

#### Security Service

The Security Service which is also known as MI5 performs internal security functions and counter-intelligence activities.

#### Government Communications Headquarters

The Government Communications Headquarters (GCHQ) derives signal intelligence by monitoring a variety of communications and signals.

### *Parliamentary oversight on intelligence agencies*

7. The British Parliament does not have a direct channel in monitoring the intelligence agencies. Instead, it monitors them indirectly by studying reports by a statutory oversight committee, the Intelligence and Security Committee. The Intelligence and Security Committee was established under section 10 of the Intelligence Services Act 1994 to examine the expenditure, administration and policy of the Security Service, SIS and GCHQ.

8. Although all nine committee members are parliamentarians, the committee does not report to the Parliament. Instead, the committee reports to the Prime Minister who appoints the members to the committee.

9. While the Intelligence and Security Committee is the main body responsible for monitoring the activities of the intelligence agencies, it does not have full access to information. Information sought by the committee can be withheld because it is sensitive. Sensitive information is defined in the Intelligence Services Act as:

- information which might lead to the identification of sources, other assistance or operational methods;
- information about particular operations; and
- information supplied by another government where that Government does not consent to its disclosure.

10. The ultimate authority to release, restrict or deny information to the committee lies with the Executive. The chiefs of the intelligence agencies and the Secretary of State may disclose sensitive information to the committee if they consider it safe and desirable in the public interest.

## **Australia**

### *Intelligence agencies*

11. The set up of intelligence services in Australia is similar to that in the UK. The main intelligence agencies are as follows.

#### Australian Defence Signals Directorate

The Australian Defence Signals Directorate (DSD) is the counterpart of the Government Communications Headquarters in Britain. It is responsible for signal intelligence.

#### Australian Security Intelligence Organisation

The Australian Security Intelligence Organisation (ASIO) is responsible for internal security and is a counterpart of MI5.

#### Australian Security Intelligence Service

The Australian Security Intelligence Service (ASIS) gathers intelligence overseas and is a counterpart of MI6.

### *Parliamentary oversight on intelligence agencies*

12. The Australian Parliament is in a better position to monitor the intelligence community than its UK counterpart. While it does not monitor DSD and ASIS, the Australian Parliament has a direct and statutory mechanism in overseeing the activities of ASIO. Under the *Australian Security Intelligence Act 1979*, the Parliamentary Joint Committee on the Australian Security Intelligence Organisation is

established to review aspects of ASIO that are referred to it by the Attorney General or either House of Parliament.

13. There are seven members in the committee. They are nominated by the Prime Minister and the Leader of the Government in the Senate respectively. They are then appointed by resolution of their respective Houses. The committee reports to both the Minister and to each House of Parliament after every review.

14. Although the committee provides a direct channel for parliamentary monitoring, there are limits to what it can review. The committee is not allowed to review any of the following areas.

- a matter that relates to the obtaining or communicating by the organisation of foreign intelligence;
- an aspect of the activities of the organisation that does not affect any person who is an Australian citizen or a permanent resident;
- a matter, including a matter that relates to intelligence collection methods or sources of information, that is operationally sensitive; and
- individual complaints concerning the activities of the organisation.

15. The Parliamentary Joint Committee on the Australian Security Intelligence Organisation has a statutory power in obtaining information. The committee may require persons to appear before it to give evidence or to produce documents by giving the person concerned five days' notice in writing.

16. A person may not refuse or fail, without reasonable excuse, to give evidence or to produce documents to the committee. The penalty for refusal or failure to comply is \$1,000 or imprisonment for six months or both.

17. However, the law also gives definite power to the Minister to restrict or deny access of information to the committee. The Minister may determine for security reasons that a person should not give evidence in whole or in part and/or produce documents to the committee. The Minister's decision is final.

18. If the Minister decides to restrict or deny information to the committee, he or she has to provide a certificate to committee members for his decision. The Minister also has to give a copy of the certificate to the Speaker of the House of Representatives, the President of the Senate and the person concerned.

## Canada

### *Intelligence agencies*

19. The main intelligence agencies in Canada are as follows.

#### Canadian Signals Executive

Unlike most western countries, Canada does not have an external intelligence service. However, it maintains the Canadian Signals Executive (CSE), performing similar functions as GCHQ in Britain.

#### Canadian Security Intelligence Service

The Canadian Security Intelligence Service (CSIS), a civilian intelligence service, was established by law in 1984 to replace the Security Service of the Royal Canadian Mounted Police (RCMP).

According to the *Canadian Security Intelligence Service Act 1984*, the basic function of the CSIS is to investigate, collect, analyse, and retain information and intelligence on security threats. Another function of CSIS is to provide security assessment with respect to individuals to be employed in the government.

### *Parliamentary oversight on intelligence agencies*

20. The Canadian Parliament does not monitor CSE but monitors the activities of CSIS through direct as well as indirect channels.

#### The Security Intelligence Review Committee

21. Similar to its UK counterpart, the Canadian Parliament oversees activities of intelligence agencies indirectly through a statutory committee. The Security Intelligence Review Committee (SIRC) is a permanent committee with oversight functions established under the *Canadian Security Intelligence Service Act*. The main function of SIRC is to review the performance and operations of CSIS. SIRC also deals with complaints about CSIS activities.

22. SIRC is accountable to the Executive and submits an annual report to the Solicitor General. The Solicitor General must table the SIRC annual report to the Parliament within 15 days of receiving it.

23. SIRC can have access to any information under the control of CSIS except cabinet documents. In relation to the investigation of any complaint, SIRC has power

to summon and enforce the appearance of persons before the committee and to compel them to give evidence and to produce documents.

24. However, it is not known how much of the information obtained by SIRC could be released to the Parliament to facilitate its scrutiny on intelligence agencies.

Special Committee on the Review of the Canadian Security Intelligence Service Act and the Security Offences Act<sup>1</sup>

25. In addition to the indirect channel, the Canadian Parliament has a direct mechanism to review activities of the intelligence service intermittently. The Canadian Parliament is required by law to establish a committee to review the provisions and operation of *the Canadian Security Intelligence Service Act* and *the Security Offences Act* five years after they came into operation in 1984. But the law does not specify further reviews after the first one.

26. The first review commenced when the Special Committee on the Review of the Canadian Security Intelligence Service Act and the Security Offences Act was established by an Order of the House of Commons on 27 June 1989.

27. The committee submitted the review report on 7 June 1990. The Government accepted one of the recommendations in the report that there should be another parliamentary review of the two acts. It undertook to arrange for a second review in 1998, about eight years after the first one.

28. Although the special committee has a statutory obligation to assess the provisions and operation of the two acts, it does not have power to compel information from the government. During the review, the special committee was denied access to documents that were vital for evaluating the operation of the *Canadian Security Intelligence Service Act*. The documents concerned were the Minister's written directions, the CSIS Director's annual reports, or the special reports of the SIRC, especially those concerning how the various branches of the Service function.

---

<sup>1</sup>In 1984, the Canadian Parliament enacted two pieces of legislation in connection with the establishment of a civilian security intelligence service. The first one was the *Canadian Security Intelligence Service Act* which established the Canadian Security Intelligence Service and introduced a system of checks and balances against the Service. The second one was the *Security Offences Act* which supplements the *Canadian Security Intelligence Service Act* by regulating the ways the RCMP and the federal Attorney General may deal with security-related offences.

Section 56 of the *Canadian Security Intelligence Service Act* and Section 7 of the *Security Offences Act* require the Parliament to appoint a Special Committee to conduct a comprehensive review of the provisions and operation of the act five years after they were enacted.

29. As a compromise, the government gave a briefing to members on some of the documents. However, parliamentary staff were not allowed to accompany members to the briefing.

30. The special committee concluded in its report entitled "In Flux but not in Crisis" that it was unable to fulfill its obligations to review the operation of the CS/S Act due to difficulties in obtaining information.

31. The special committee recommended the establishment of a continuing parliamentary monitoring mechanism on intelligence agencies. It suggested the Standing Committee on Justice and Solicitor General to establish a permanent Sub-committee to deal exclusively with security and intelligence matters.

32. Pursuant to the recommendation of the review committee, the House of Commons Standing Committee on Justice and Solicitor General established a permanent Sub-committee on National Security in June 1991.

33. The Sub-Committee does not have legislative power and has to rely on the prerogatives of the Parliament to require individuals to appear or produce documents. It is however not known if the Sub-committee has encountered any difficulties in obtaining information when it performs its mandate to review and consider the management and operations of CSIS and SIRC.

## **The United States**

### Central Intelligence Agency

34. The Central Intelligence Agency (CIA) is the principal intelligence and counter-intelligence agency of the US government. It was created by Congress in 1947 and is under the direction of the National Security Council (NSC).

35. The main functions of the CIA is to advise the NSC on intelligence matters which affect national security. It also correlates and evaluates intelligence and ensures the information is properly communicated within the government.

### *Congressional oversight on intelligence agencies*

36. Like its counterpart in Australia, the US Congress has a direct and permanent monitoring mechanism over intelligence agencies. The oversight mechanism was set up after it was revealed that former CIA agents were involved in the Watergate affair and the US was involved in the destabilisation of the Allende regime in Chile. The Senate and the House of Representatives established permanent select committees on intelligence in 1976 and 1977 respectively.

37. The Intelligence Oversight Act 1980 gives the Senate and House intelligence committees the sole authority to oversee the CIA and Director of Central Intelligence (DCI)). The appointment of the DCI and his Deputy must have the approval of the Senate intelligence committee.

38. When compared to its counterparts in Australia, Canada and the UK, the monitoring mechanism of the US Congress has much more power in obtaining information from the intelligence agencies. Under the Intelligence Oversight Act 1980, the Director of Central Intelligence and the heads of all intelligence departments and agencies have the following obligations towards the Congress.

- to keep the Senate and House intelligence committees fully informed of an intelligence activities that are currently being performed
- to furnish any information that is requested by Congress so that Congress could be assured that it has effective oversight controls
- to report to Congress promptly of any intelligence failure, along with the actions that would be taken to preclude a repeat of the failure in the future

39. In theory, there is no limit to information which the committees can request. The executive must produce any classified material which they demand to see. In practice, limits to access are negotiated between the committees and the Agency. The committees are told in general terms about the methods used, the types of operations conducted and the sources that the Agency has. Particular sources and methods are not usually identified.

40. In addition to the statutory power, the overseeing capacity of the committees are strengthened by the power over CIA's budget. Both committees examine in details the intelligence budget. The CIA is required to provide detailed justification of its budget to each committee.

41. The intelligence agencies are willing to provide information to the Congress because it has a good record of not leaking information to the outsiders. The Congress has taken great care in laying down procedures to ensure the security of information. This has helped to build up a trustful relationship with the intelligence agencies.

## **Part II : Adjudication of deadlocks between the Parliament and the Executive**

42. Parliaments' request for sensitive information such as that on activities of intelligence agencies would sometimes clash with the governments' wish to keep the information secret for public interest. If both sides refuse to compromise, "deadlock" may occur.

43. However, "deadlock" is unlikely to happen in countries where the ruling party forms the cabinet as well as controls the majority of the Parliament. Respective Parliament in the United Kingdom, Australia and Canada may have conflicts with their government in many occasions, there is no recorded incidents in the three countries that a disputed claim has been referred to the court for adjudication.

44. However, a proposal to refer disputed claims to courts generated some discussion in Australia last year. There was also discussion in UK on enforcing parliamentary committee powers through courts.

## **The United Kingdom**

45. Based on the limited information available, it is known that there were several occasions where the UK Parliament discussed the suggestion on subjecting the powers and privileges of the House to the jurisdiction of the courts. For example, the suggestion was discussed but rejected by the Select Committee on Parliamentary Privilege of 1967-68 and Committee of Privileges of 1976-77.

46. In the 1977-78 session, the Select Committee on Procedure examined the operation of the powers granted to most select committees to send for persons, papers and records with a view to ensuring that such powers can be enforced, if necessary. The study came after the Select Committee on Nationalised Industries had difficulties in obtaining certain papers by the Secretary of State for Industry, and papers by the Chairman of the British Steel Corporation.

47. One of the solutions considered by the committee at that time was to make a select committee's power of sending for persons, papers and records enforceable through the courts of law.

48. The Clerk of the House who assisted the Select Committee in gathering information and providing analysis set out in one of the three Memorandums to the Select Committee that it was not practicable to resort to courts in enforcing the power .

"The fact of the matter is that the provision of evidence and the production of papers especially by State institutions has always been, and still is, treated as a political issue; and that being so, the issue can only be tried within the House."<sup>2</sup>

## **Australia**

49. The proposal to refer a disputed claims to courts for adjudication was more concrete in Australia and was in the form of a private member's bill.

---

<sup>2</sup> p.25-26, Annex C, First Report from the Select Committee on Procedure of 1977-78

50. Senator Kernot introduced a private member's bill in 1994 after an unresolved conflict between the Senate Select Committee on Foreign Ownership Decisions in Relation to the Print Media and the government over the committee's request for documents concerning Foreign Investment Review Board decisions.

51. The bill, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders Bill) 1994*, aimed to establish a mechanism to transfer disputed claims of public interest immunity to the Federal Court for adjudication. Under the bill, the Federal Court would have the power to determine whether documents in dispute could be withheld from a House or a committee on public interest grounds.

52. The bill was referred to the Committee of Privileges of the Senate and the Committee of Privileges of the House for consideration. None of the committees supported the bill.

53. In the view of the Senate's Committee of Privileges, any claims of executive privilege or public interest immunity should be for a House of Parliament to determine.

54. The Committee of Privileges of the House believed the proposed mechanism would amount to a concession in powers by the two Houses and a transfer of authority from the Houses.

55. In commenting on the proposal, the government stressed that disputes between the Executive and the Parliament were not amenable to arbitration by courts or tribunals since the relationship between the two was political. A transfer of responsibility to the Federal Court would alter the relationship between the Executive and the Parliament and would involve the courts in political judgments.

## **Canada**

56. The Canadian Parliament does not have a mechanism to refer disputed claims to courts for adjudication. Information on suggestion to establish such a mechanism in Canada is not available.

57. While it is unlikely for the government to refer disputed claims between itself and the Parliament to courts, there is a mechanism for it to do so. Section 53 of the Supreme Court Act allows the government to refer questions to the Supreme Court for advice.

58. The reference procedure has been mainly for constitutional questions but it is also available for non-constitutional questions. The answer of the Court to a question posed on a reference is "advisory".

## **Concluding remarks**

59. Parliaments of the western countries have been trying to make intelligence agencies more accountable to prevent any abuse of power. However, not all of them have been successful in establishing mechanism to monitor the intelligence agencies. Some countries like the UK have up till now only indirect channel to monitor activities of the intelligence agencies. In countries where the parliamentary oversight mechanism exist, there are limits to what they could review and there are difficulties in obtaining information. The best parliaments could do in such circumstance is to reach a compromise with the government and obtain the necessary information by in camera briefings or abridged version of reports etc.

60. The US Congress has been more successful in monitoring the activities of the intelligence agencies since the law has given it wide power. It is also because the Congress has been able to gain the trust of the intelligence agencies by ensuring the security of information. More importantly, the congressional committees overseeing the intelligence agencies have the power to scrutinise the budget of the agencies.

61. Political bargaining and compromise between the Executive and the Parliament does not only take place in matters concerning intelligence and security services, it may happen in many other areas. The Executive and the Parliament would have to resolve their conflicts by whatever political means available to them and to prevent conflicts from developing into "deadlocks".

62. The idea of having courts as the third-party adjudicator in deadlock situation has not been welcomed since it would upset the balance between the Executive and the Parliament and would undermine the power and authority of the Parliament.

RP03/95-96  
Research and Library Services Division  
Legislative Council Secretariat  
October 1995

## Reference

### Australia

Chapter Five, Report by the Commission of Inquiry on the Australian Secret Intelligence Service (March 1995)

Report by the Senate Committee of Privileges on Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994

Report Concerning Proposal to Transfer to the Federal Court Certain Responsibilities in relation to Disputed Claims for Public Interest Immunity

### Canada

Chapter One and Chapter 14, Report by the Special Committee on the Review of the *Canadian Security Intelligence Act* and the *Security Offences Act*

*The Canadian Security Intelligence Service Act*

The Canadian Security Intelligence Service by Research Branch, Library of Parliament, Canadian Parliament (April 1995)

*The Security Offences Act*

*The Supreme Court Act*

### The United Kingdom

First Report from the Select Committee on Procedure, 1977-78 session - House of Commons, the UK Parliament

Research paper (94/34) on Intelligence Services Bill by the House of Commons Library of the UK Parliament (February 1994)

### The United States

"CIA Oversight", from Congress and the Nation, Volume V, 1977-1980, p. 174-176

"Renewed Charter Debate", from Regulating US Intelligence Operations: a study in Definition of the National Interest, by John M. Oseth, p.142-148