

# Security in a Small Nation Scotland, Democracy, Politics

EDITED BY ANDREW W. NEAL

# Security in a Small Nation

Scotland, Democracy, Politics

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# 4. Parliamentary Oversight of Intelligence Agencies: Lessons from Westminster

*Hugh Bochel and Andrew Defty*

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While oversight of intelligence agencies can take a number of forms, legislative oversight is often seen as particularly important as it can help ensure agencies' independence from the executive, maintain public confidence and provide legitimacy for the agencies and their actions. This chapter draws on research on oversight of the intelligence and security agencies by the United Kingdom Parliament to consider possible lessons for legislative oversight in emerging states, and in particular, a potentially independent Scotland. It suggests that the challenges associated with such a development have been largely overlooked, and that careful consideration would need to be given to a number of issues, including the capacity and expertise required for intelligence oversight, in addition to the powers of any oversight body and indeed of Parliament as a whole.

As noted elsewhere in this volume (Chapters 5, 6 and 7 in particular), while the Scottish independence referendum of 2014 provided an opportunity for discussion of the role and scrutiny of intelligence agencies in a post-independence Scotland, plans in this area were relatively undeveloped. Moreover, while there was at least some debate about the development of an independent Scottish security and intelligence agency, plans for oversight of the new agency were minimal. The UK Government's analysis, which emphasised the challenges involved in establishing a new intelligence agency, assumed that when it came to oversight, Scotland would simply seek to replicate the mechanisms currently in place in the rest of the UK.<sup>1</sup> Similarly, the Scottish Government's White Paper on independence, which did include consideration of the role of a new Scottish security and intelligence agency, said little about intelligence oversight. It noted that early legislation would set out the 'purpose, duties and powers' and 'the controls that will exist on the use of those powers'. However, aside from asserting that the new agency would be accountable to Scottish ministers and to the Scottish Parliament, there was no discussion as to what form that accountability would take, or, for example, how it might follow or differ from the system currently in operation at Westminster.<sup>2</sup>

This chapter seeks to offer some perspective on the potential approaches and pitfalls in establishing intelligence oversight by drawing on research on the current arrangements for the oversight of the intelligence and security agencies by the United Kingdom Parliament.<sup>3</sup> It provides a brief introduction to the nature of legislative oversight of intelligence, and draws out some of the key findings of the research with regard to the various mechanisms through which parliamentarians have sought to scrutinise the UK intelligence and security agencies. It concludes by considering the implications and possible lessons for oversight, including for emerging states, such as a potentially independent Scotland.

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- 1 HM Government, *Scotland Analysis: Cm. 8741: Security* (London: HMSO, 2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/253500/Scotland\\_analysis\\_security.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253500/Scotland_analysis_security.pdf)
  - 2 Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland* (Edinburgh: Scottish Government, 2013), <http://www.gov.scot/resource/0043/00439021.pdf>, p. 266.
  - 3 H. Bochel, A. Defty, and J. Kirkpatrick, *Watching the Watchers: Parliament and the Intelligence Services* (Basingstoke: Palgrave Macmillan, 2014).

## Legislative oversight of intelligence agencies

Intelligence oversight can be seen as having a number of functions: ensuring that intelligence agencies do not break the law or abuse the rights of individuals at home or abroad; ensuring that agencies are managed effectively, and that money is spent appropriately and efficiently; and helping to provide legitimacy for the work of the agencies and the use of intelligence gathered by them. Oversight methods vary considerably across states, and may be influenced by history, constitutional and legal systems, and political culture. Born and Leigh have argued that oversight can typically be seen as taking place at several different levels:

The executive controls the services by giving direction to them, including tasking, prioritising and making resources available. Additionally, the parliament focuses on oversight, which is limited to more general issues and authorisation of the budget. The parliament is more reactive when setting up committees of inquiry to investigate scandals. The judiciary is tasked with monitoring the use of special powers (next to adjudicating wrong-doings). Civil society, think tanks and citizens may restrain the functioning of the services by giving an alternative view (think-tanks), disclosing scandals and crises (media), or by raising complaints concerning wrong-doing (citizens).<sup>4</sup>

It is therefore possible to identify a range of institutions and actors with a role in the oversight of intelligence and the different levels at which oversight can take place. Building on such ideas, Caparini developed a framework for the accountability of intelligence and security agencies based upon three different types of accountability:

- horizontal — the restraint of state institutions by other state institutions, which might therefore include executive, legislative and judicial oversight of agencies;
- vertical — reflecting hierarchical relationships and levels of access and control, and including non-state actors and the public. This enables differentiation between, for example, executive and legislative oversight.

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4 H. Born and I. Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies* (Oslo: Parliament of Norway, 2005), p. 15, <http://www.dcaf.ch/content/download/35100/525417/file/making-intelligence.pdf>

- the 'third dimension' — the role of international actors, such as foreign governments and intergovernmental and nongovernmental organisations.<sup>5</sup>

Scrutiny by the legislature, the focus of this chapter, is only one of a number of possible mechanisms for oversight of intelligence agencies. Nevertheless, it is generally viewed as central, since it provides democratic legitimacy and accountability, and some form of legislative oversight has become the norm in most democratic states.<sup>6</sup> It typically ensures that, at a minimum, legislation concerning the agencies and their activities has been subject to parliamentary debate, that they are placed within an existing constitutional framework, and that the agencies are subject to the law. It can also provide for ongoing scrutiny, as with other areas of public policy. While it might be claimed that executive oversight also provides scrutiny by democratically elected politicians, legislative oversight generally involves individuals who are not involved in the process of tasking the intelligence agencies, and who are not the immediate consumers of their work. It should therefore help ensure the independence of the agencies from political pressure. Legislative oversight is also important in maintaining public confidence in the agencies, including by demonstrating more open and accessible oversight than through internal or executive mechanisms, and reassuring the public that the agencies or the government are not abusing their powers.

However, legislative oversight of intelligence does pose a number of distinctive challenges. Gaining the trust of intelligence agencies can be a significant task for legislative oversight bodies. There are risks that parliamentarians might seek to manipulate the oversight process for political advantage, or that they might leak information, accidentally or intentionally. There are also challenges for those involved in the process, which, while not necessarily unique to intelligence issues, are perhaps made greater by the nature of the subject matter. These include: the lack of experience or expertise in intelligence among most parliamentarians; the risk of being misled or diverted from asking difficult questions; and

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5 M. Caparini, 'Controlling and Overseeing Intelligence Services in Democratic States', in *Democratic Control of Intelligence Services: Containing Rogue Elephants*, ed. by H. Born and M. Caparini (Aldershot: Ashgate, 2007), pp. 3–24.

6 Born and Leigh (2005).

the dangers of becoming seduced by privileged access and ‘captured’ by the interests that they are supposed to be scrutinising.

Moreover, the degrees of separation between the various levels of oversight may not be as clear as is often implied. In parliamentary systems, where the executive is drawn from the legislature, there is considerable potential for the same individuals to be involved in oversight at different levels, even simultaneously. In some states the membership of legislative intelligence oversight committees may include government ministers. Although this has not been the case in the UK, the membership of the Intelligence and Security Committee has been dominated by parliamentarians who have previously served as ministers with briefs which included the intelligence and security agencies. There has also been considerable movement of personnel between the various institutions involved in oversight, with the House of Lords, in particular, having a number of appointees who have been involved in other forms of oversight as government ministers, judicial commissioners, or former senior members of the intelligence community. While the overlap between different levels of intelligence oversight may be a natural consequence of parliamentary systems which do not entrench a separation of powers, it may also be a result of the relatively small number of individuals with expertise in this area. This may be more acute in small or emerging states in which the pool of individuals with experience or expertise in field of intelligence and national security may be very small.

## Parliamentary oversight of intelligence in the UK

Parliamentary oversight of the intelligence and security agencies in the UK is a relatively recent phenomenon. For most of the agencies’ one-hundred-year history, oversight was overwhelmingly undertaken by the executive. Legislation during the 1980s and 1990s placed the agencies on a statutory footing, and also established a number of oversight mechanisms, including judicial commissioners to oversee the issue of warrants to intercept communications, and a committee of parliamentarians, the Intelligence and Security Committee (ISC), to oversee the agencies.

The ISC is a statutory committee of parliamentarians established by the Intelligence Services Act 1994. The creation of the ISC represented

a significant step forward in the oversight of the UK intelligence and security agencies. The Committee has a membership of nine, drawn primarily from the House of Commons, initially with one member, increased to two from 2010, from the House of Lords. The Committee sets its own agenda, but has on occasion been asked by the government to carry out investigations. Although the ISC's remit was, until recently, confined to the administration, policy and expenditure of the three intelligence and security agencies, it is widely seen as having expanded its mandate, both functionally, to encompass operational matters, and organisationally, to scrutinise other parts of the intelligence community including defence intelligence and the Joint Intelligence Committee.<sup>7</sup> The Committee works almost entirely in secret, but is required by law to publish an annual report on its work. It has also published a number of additional reports covering its inquiries into a wide range of subjects, including intelligence on Iraqi weapons of mass destruction, the handling of detainees by UK intelligence personnel, the murder of Fusilier Lee Rigby, and the role of women in the intelligence community.

In addition to the publication of reports, since 1998 there has been an annual House of Commons debate on the Committee's work. This presented a new and potentially significant opportunity for Parliament to debate intelligence and to scrutinise the Committee. However, the debates have often been squeezed out of the parliamentary timetable, and have typically had fairly low levels of participation, with normally between fifteen and twenty-six speakers, and an average of nineteen, in each debate; perhaps unsurprisingly, current and former ISC members have tended to constitute a significant proportion of those taking part. Moreover, on many occasions debates have been dominated by discussion of the status of the ISC and the relative merits of replacing it with a select committee. While this perhaps reflected the parliamentary appetite for reform of the ISC, it has also displaced time for debate on the content of its reports and more substantive discussion of the work of the agencies. There have also been frequent delays between the publication of ISC reports and the timetabling of debates, and, perhaps more worryingly, the annual debates appear to have fallen into abeyance

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7 P. Gill and M. Phythian, *Intelligence in an Insecure World* (Cambridge: Polity, 2006); Mark Phythian, 'The British Experience with Intelligence Accountability', *Intelligence and National Security*, 22 (2007), 75–99, <http://dx.doi.org/10.1080/02684520701200822>

in recent years. The last substantive House of Commons debate on the work of the ISC took place in 2011, and while House of Lords debates on the Committee's work were introduced in 2009, there have, at the time of writing, only been two debates in the Upper House.

The apparent lack of parliamentary interest in the work of the ISC perhaps reflects the Committee's struggle to establish credibility. There have been a number of significant criticisms of the ISC from Parliament and beyond. The ISC's anomalous status as a statutory committee of parliamentarians appointed by and reporting to the Prime Minister, and staffed and funded by the Cabinet Office, led to the criticism that it is too close to those it is responsible for scrutinising.<sup>8</sup> These concerns have perhaps been exacerbated by disquiet about the kind of parliamentarians selected to serve on the Committee. There has been a tendency towards seniority in appointments to the ISC, with more than two thirds of members having previously held Ministerial office, primarily in the fields of security, defence, and foreign affairs, while all but one of the chairs of the Committee have been former cabinet ministers. This has led to an unfortunate perception that membership of the Committee is a compensation for the loss of high office, and that members are less likely to ask difficult questions of the agencies or the Government.<sup>9</sup> These have been reinforced by evidence that the agencies have not always been entirely open with the ISC in relation to the provision of documents, for example on Iraqi weapons of mass destruction and also the 7/7 London bombing.<sup>10</sup>

In recent years a number of reforms have served to increase the powers of the ISC and also sought to enhance its credibility. The reforms reflected an acceptance on the part of successive governments, and some members of the ISC, that the Committee has not always enjoyed the confidence of Parliament. The Justice and Security Act 2013 reconstituted

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8 Peter Gill, 'Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the "War on Terror"', *Intelligence and National Security*, 22 (2007), 14–37, <http://dx.doi.org/10.1080/02684520701200756>; J. Wadham, 'The Intelligence Services Act 1994', *Modern Law Review*, 57, 6 (1994), 916–27.

9 Bochel, Defty, and Kirkpatrick (2014).

10 Intelligence and Security Committee, *Annual Report 2003–2004* (London: HMSO, 2004), [https://b1cba9b3-a-5e6631fd-s-sites.googlegroups.com/a/independent.gov.uk/isc/files/2003-2004\\_ISC\\_AR.pdf](https://b1cba9b3-a-5e6631fd-s-sites.googlegroups.com/a/independent.gov.uk/isc/files/2003-2004_ISC_AR.pdf); Intelligence and Security Committee, *Could 7/7 Have Been Prevented: Review of the Intelligence on the London Terrorist Attacks on 7 July 2005* (London: HMSO, 2009), <https://fas.org/irp/world/uk/july7review.pdf>

the ISC as a committee of Parliament, provided it with greater powers, and expanded its remit to include oversight of operational activity and the wider intelligence community. As a committee of Parliament, members of the ISC are now appointed by Parliament, albeit following nomination by the Prime Minister, in consultation with opposition leaders. The Committee also now reports to Parliament, although it retains the capacity to report directly to the Prime Minister on matters of particular sensitivity. A number of other changes not included in the legislation have also altered the way the ISC operates. The Committee enjoyed a significant increase in resources from 2013, with a doubling of the budget and the number of staff available to it. The Committee also sought to make itself more transparent, including through holding public evidence sessions. Although this has the potential to enhance the profile of the ISC in Parliament and beyond, the unchallenging nature of the Committee's first public cross-examination of intelligence agency heads in November 2013 provided little reassurance that it was capable of rigorous scrutiny.<sup>11</sup>

Most research on legislative oversight in the UK has understandably focused on the ISC,<sup>12</sup> nevertheless, there is evidence of a growth in parliamentary interest in intelligence issues beyond the ISC. This has been prompted in part by the Labour government's use of intelligence to make the case for war in Iraq, the responses of successive governments to the terrorist threat within the UK, and more recently the introduction of legislation designed to enhance the interception powers of the UK intelligence agencies. It is also apparent that wider parliamentary

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11 Intelligence and Security Committee of Parliament, 'Uncorrected Transcript of Evidence Given by Sir Iain Lobban, Director, Government Communication Headquarters; Mr Andrew Parker, Director General, Security Service; Sir John Sawers, Chief, Secret Intelligence Service' (London, 7 November 2013), <http://isc.independent.gov.uk/public-evidence/7november2013>; Andrew Defty, 'Having Security Chiefs Give Evidence to Parliament Is Progress, but Future Sessions Must Dig Deeper' (Democratic Audit UK, 15 November 2013), <http://www.democraticaudit.com/2013/11/15/having-security-chiefs-give-evidence-to-parliament-is-progress-but-future-sessions-must-dig-deeper/>

12 A. Glees, P. H. J. Davies, and J. N. L. Morrison, *The Open Side of Secrecy* (London: Social Affairs Unit, 2006); Gill (2007); I. Leigh, 'The UK's Intelligence and Security Committee', in Born and Caparini (2007), pp. 177–94; M. Phythian, "'A Very British Institution": The Intelligence and Security Committee and Intelligence Accountability in the United Kingdom', in *The Oxford Handbook of National Security Intelligence*, ed. by L. Johnson (Oxford: Oxford University Press, 2010), pp. 699–718; Leigh (2012).

interest is partly the result of long-term dissatisfaction with the work of the ISC, which has prompted the development of a range of alternative mechanisms to scrutinise the intelligence agencies and the Government's use of intelligence, including through parliamentary questions and debates, the work of all-party parliamentary groups, and most notably, the work of parliamentary select committees.

A number of select committees, particularly the Home and Foreign Affairs committees and the Joint Committee on Human Rights, have sought access to intelligence material and called for greater parliamentary scrutiny of the intelligence and security agencies. The interest of some select committees in intelligence issues pre-dates the creation of the ISC in 1994. For example, in 1985 the Foreign Affairs Committee was granted access to intelligence material in relation to its investigation into the sinking of the Argentine battleship, *General Belgrano*, during the Falklands conflict. Under the 'crown jewels' procedure the Committee was shown intelligence material under supervision in the Foreign Office, with the proviso that they could not take notes.<sup>13</sup> The Home Affairs Committee was at the forefront of calls for greater parliamentary oversight of the intelligence agencies. In 1989 it persuaded the Director General of the Security Service, Stella Rimington, to meet it,<sup>14</sup> and in 1992 recommended that it would be appropriate for the departmental select committees to oversee the work of the agencies, as well as the departments responsible for them.<sup>15</sup>

However, the existence of the ISC has to some extent complicated the work of select committees on intelligence issues and their relationships with the agencies.<sup>16</sup> Requests from several select committees for access to intelligence agency staff and documents have been denied on the grounds that the ISC is the only body responsible and qualified to be allowed access to intelligence material. For example, when the Foreign Affairs Committee invoked the 'crown jewels' procedure in seeking

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13 Liaison Committee, *First Report — The Work of Select Committees HC323-I* (London: HMSO, 1997), appendix 6, paras 35–38.

14 S. Rimington, *Open Secret: The Autobiography of the Former Director-General of MI5* (London: Hutchinson, 2001), pp. 158–59.

15 Home Affairs Committee, *Accountability of the Security Service, First Report of Session 1992–93, HC 265* (London: HMSO, 1992).

16 See H. Bochel, A. Defty, and J. Kirkpatrick, "New Mechanisms of Independent Accountability": Select Committees and Parliamentary Scrutiny of the Intelligence Services', *Parliamentary Affairs*, 68 (2015), 314–31.

access to intelligence on the decision to go to war in Iraq, their requests were declined on the grounds that this was now the responsibility of the ISC.<sup>17</sup> Similar requests have been denied to the Northern Ireland Affairs Committee in relation to intelligence on the Omagh bombing, and the Joint Committee on Human Rights in relation to the interrogation of terrorist suspects.<sup>18</sup> The withdrawal of access to intelligence material from select committees, coupled with the anomalous status of the ISC, prompted a number of select committees to question the role of the ISC and call for it to be reconstituted as a parliamentary select committee.<sup>19</sup>

Interestingly, while successive governments and the ISC have resisted closer cooperation with the select committees, there is evidence of developing engagement between some select committees and the agencies themselves. The Foreign Affairs Committee and the Home Affairs Committee have received briefings from MI6 and MI5, although these are informal and are not recorded as evidence in committee reports.<sup>20</sup> While this may suggest an appreciation that the ISC does not have a monopoly over access to the agencies, these briefings are offered by the agencies and can be withdrawn by them. Moreover, while some committees have been willing to accept off-the-record briefings, others have not. The Joint Committee on Human Rights has declined such offers from the Security Service, arguing that democratic accountability and public confidence 'cannot be achieved by off the record, secret

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17 Foreign Affairs Committee, *The Decision to Go to War in Iraq, Ninth Report of Session 2002–03, HC 813-I* (London: HMSO, 2003), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272087/6062.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272087/6062.pdf)

18 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back in, Sixteenth Report of Session 2009–10, HI Paper 86, HC 111* (London: HMSO, 2010), <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/86/86.pdf>; Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention, Twenty-Fourth Report of Session 2005–06* (London: HMSO, 2006), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272344/6920.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272344/6920.pdf); Northern Ireland Affairs Committee, *The Omagh Bombing: Access to Intelligence* (London: HMSO, 2009), <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmniaf/873/87303.htm>

19 For example, Home Affairs Committee, *Accountability of the Security Service, Third Report of Session 1998–99, HC 291* (London: HMSO, 1999); Foreign Affairs Committee, *Implications for the Work of the House and Its Committees of the Government's Lack of Co-Operation with the Foreign Affairs Committee's Inquiry into the Decision to Go to War in Iraq* (London: HMSO, 2004), <https://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaif/440/440.pdf>

20 Bochel, Defty, and Kirkpatrick (2015).

briefings'.<sup>21</sup> While the reconstitution of the ISC as a parliamentary committee, although not a select committee, may serve to ameliorate select committee demands, unless the ISC is also prepared to work with the select committees this seems unlikely to address their concerns in full.

There are, then, a range of mechanisms through which the Westminster Parliament and its members have sought to scrutinise the UK intelligence and security agencies. While the ISC is the most important of these, it is not without its flaws and its critics. Partly as a result of this a number of other parliamentary bodies, as well as several enterprising individual parliamentarians, have sought to exert pressure for greater openness and reform in relation both to the work of the agencies, and the operation of the formal oversight mechanisms. After a prolonged period of opposition to further scrutiny, in recent years the UK government has accepted some measure of reform of the oversight mechanisms and the ISC in particular. While the impact of these reforms is not yet clear, the notion that Parliament has a legitimate interest in scrutinising the work of the intelligence agencies and the Government's use of intelligence is now firmly entrenched.

### Establishing legislative oversight of intelligence: lessons from the UK Parliament

Clearly, in the event of independence, or even some sharing of responsibility for oversight of the UK intelligence agencies, Scotland would have to consider what form of legislative oversight would be appropriate. The UK's oversight mechanisms, as outlined above, provide one possible model. The establishment of the Intelligence and Security Committee represented a significant step forward in intelligence agency accountability in the UK. It has allowed a small number of parliamentarians wide-ranging access to the intelligence and security agencies, their documents and staff. Moreover, it has expanded its mandate both organisationally and functionally, and recent reforms have considerably enhanced the powers and resources of the Committee. However, the Westminster experience also highlights some of the

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<sup>21</sup> Joint Committee on Human Rights (2010).

challenges involved in establishing intelligence agency accountability, most notably in relation to whether Parliament has sufficient powers and capacity to conduct effective scrutiny in this area.

As a reserved power, the Scottish Parliament has no experience of scrutiny of issues of intelligence and national security. In developing legislative oversight of intelligence it would, therefore, be starting from a very low base. There have been a small number of intelligence-related questions and motions in the Scottish Parliament, primarily in relation to the interception of MSPs' communications, the opening of an MI5 office in Scotland, and the use of Scottish airports in rendition flights (although the latter related mainly to the CIA). However, intelligence-related questions and motions have originated from a relatively small number of members, six MSPs, of whom four came from the SNP and one each from the Scottish Green Party and the Scottish Liberal Democrats. Moreover, the Scottish Government's response to such questions has been to emphasise that as national security is a reserved power it would not be appropriate to comment. The current absence of powers, coupled with the lack of opportunities to ask questions in this area, means there may be very little interest in intelligence issues in the Scottish Parliament, and almost certainly very little expertise.

The Scottish Parliament's involvement in scrutiny in this area is not, however, very different from that of the Westminster Parliament prior to the establishment of the ISC in 1994. When the ISC was established in 1994, the UK intelligence and security agencies had operated for over eighty years with very little external scrutiny, either from Parliament or even the executive. Not only was there no formal mechanism for legislative oversight, for much of their history successive governments refused to avow the existence of the intelligence and security agencies and MPs were prevented from asking questions about them.<sup>22</sup> Indeed, in one important respect a new Scottish oversight body could find itself in a stronger position than the embryonic ISC. Intelligence and security agencies are now an avowed and accepted part of the machinery of state, and legislative oversight bodies to hold them to account exist in most democratic states. As a result, intelligence oversight bodies in newly independent states may need to spend less time seeking to

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22 Bochel, Defty, and Kirkpatrick (2014).

establish their legitimacy or building a relationship with intelligence agencies. While ISC members claim that the early committees spent a considerable amount of time seeking to gain the trust of the UK intelligence and security agencies, in a newly independent Scotland it is likely that legislative oversight would be established alongside the creation of intelligence and security agencies. While there would still be a need to build trust between the agencies and their overseers, oversight bodies would perhaps be less likely to be viewed as a new and potentially threatening development.

The need to build trust, particularly in states where intelligence agencies are already well established, has also meant that legislative intelligence oversight committees have often started with relatively modest powers, designed to reassure intelligence agencies that parliamentary bodies can be trusted in such a role, and have evolved over time, acquiring extra powers and new roles. As noted above, the ISC, for example, was created with a mandate limited to scrutiny of the administration, expenditure and policy of the three intelligence agencies, and has only recently expanded this to include operational matters and the wider intelligence community. One obvious solution to this is to provide oversight bodies with a more powerful mandate from the outset. A committee modelled on the current ISC would, for example, be considerably more powerful than one which mirrored the powers exercised by the ISC when it was first established. This also emphasises the need to allow for evolution in intelligence oversight mechanisms. Although this has happened in the UK, the pace of intelligence oversight reform has been slow. Indeed there may be real benefits in establishing oversight mechanisms at the same time as intelligence agencies, in that the two processes could inform each other. In this way, executive and legislative oversight bodies, and indeed also civil society, could play a role in ensuring that effective internal procedures are put in place regarding what is and what is not acceptable for intelligence agencies to do, and what powers should be wielded by the different oversight bodies.

Even if a relatively powerful legislative intelligence oversight committee were established, the lack of experience in this area would perhaps still be the most significant challenge involved in establishing legislative oversight of intelligence in a newly independent Scotland. Our research on parliamentary oversight at Westminster found that in

addition to the form and powers of legislative intelligence oversight bodies, another crucial factor in their effectiveness is the level of expertise of those involved in oversight. In its first report, published in 1995, the ISC stressed that the Committee was taking a considerable time to 'learn' about its subject, observing that 'the intelligence and security field is a specialist and complex one, about which relatively little is reliably known from the outside'.<sup>23</sup> One possible, although far from ideal, response to this challenge, which has been adopted at Westminster, has been the tendency to appoint ISC members, and particularly committee chairs, with previous ministerial experience in departments involved in the work of the intelligence agencies. Such an approach has its drawbacks. Although this has allowed the ISC to establish a reputation as a well-informed and senior committee, as noted above, it has also led to accusations that ISC members have been too reluctant to criticise the agencies.

Not only is the Scottish Parliament much smaller than the Westminster Parliament, providing a much reduced pool of potential expertise on which to draw, but as national security is at present a reserved power, the number of former ministers with experience in this area is likely to be extremely limited or possibly even non-existent. The possible solution of allowing serving ministers to sit on an intelligence oversight committee, something which is forbidden at Westminster but does take place in other systems, would undermine the independence and credibility of any oversight committee and would be best avoided. While there are likely to be few MSPs with any experience of the UK intelligence agencies, one potentially significant development in this respect was the appointment of an SNP MP, Angus Robertson, to the ISC following the 2015 General Election. Research indicates that ISC members have played an advisory role within their parties by providing informal briefings on intelligence issues for party leaders and frontbench spokespeople.<sup>24</sup> The emergence of a body of MSPs with experience of intelligence oversight at Westminster might therefore be an alternative means of building capacity in the Scottish Parliament.

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23 Intelligence and Security Committee, *Interim Report of the Intelligence and Security Committee*, Cm. 2873 (London: HMSO, 1995).

24 Defty (2008).

Another means of building capacity in intelligence matters at Westminster, both within the ISC and in Parliament as a whole, has been to use the House of Lords as a reservoir of expertise. As a joint committee, the ISC membership has included a number of members of the House of Lords with experience of working with the intelligence community, including former Ministers, senior civil servants, and a former member of the Secret Intelligence Service, Baroness Ramsay of Cartvale. A high proportion of former members of the ISC have also remained in Parliament through appointment to the House of Lords, while in recent years a number of retired senior members of the intelligence community have been appointed as crossbench peers, including former Directors-General of the Security Service. While this has provided a significant body of experience on intelligence issues in the Upper House, it can also lead to questions about the level of independence of parliamentary scrutiny in this area. Moreover, as a unicameral and entirely elected system these options are not available to the Scottish Parliament, and consideration would therefore have to be given to alternative means of building capacity in intelligence expertise within the chamber. This could include, for example: allowing all MSPs greater access to intelligence and security agencies, such as through regular intelligence agency briefings for other parliamentary committees with an interest in this area, like those now provided for select committees at Westminster; public evidence sessions; and opportunities for parliamentarians to visit the agencies.

Opportunities for wider parliamentary debate on intelligence issues, or at least on the work of an oversight committee, are also important both in terms of providing democratic accountability and in building capacity. As noted above, there has been a tendency on the part of British governments to view intelligence as the sole preserve of the ISC, and to use the Committee's existence to prevent wider parliamentary scrutiny of intelligence. However, the experience at Westminster indicates that the existence of a dedicated intelligence oversight committee is unlikely to discourage other parliamentary committees or individual parliamentarians from taking an interest in this area. It is important that legislative intelligence oversight committees are seen as part of Parliament and not as a proxy for wider parliamentary scrutiny. In recent years, the UK government has recognised an overlapping agenda

between the ISC and a number of other parliamentary committees, while the appointment of former ISC members to other select committees has facilitated greater cooperation between the ISC and the rest of Parliament. The introduction of annual debates on the work of the ISC is another potentially important development. Although these have been poorly attended at Westminster, and indeed have fallen into abeyance in recent years, they could be a useful means of enhancing the credibility of a committee which operates largely behind closed doors.

Another significant factor in building capacity, particularly in relation to the work of a legislative oversight committee, is the resources available. Unlike other parliamentary committees, the ISC is funded by central government rather than Parliament. Although this naturally raises questions about the Committee's independence, it has also meant that it has been a well-resourced committee, particularly when compared to other parliamentary committees. Given the nature of the subject matter, and the relative lack of expertise of Committee members on appointment, the Committee has relied considerably on building up an independent investigative capacity with staff who are able to go into the agencies and ask questions on the Committee's behalf. In contrast, the Scottish Parliament has been criticised for not having a sufficiently large and well-trained staff, and Scottish parliamentary committees in particular for being under-resourced.<sup>25</sup> The creation of new committees within the Scottish Parliament to cover additional responsibilities would be likely to place extra strain on resources, while finding committee staff with the necessary expertise in this area is also likely to prove challenging.

As noted above, issues of funding and expertise have led to questions about the independence of the ISC. There is clearly a careful balance to be maintained between the desire to provide a well-supported and experienced committee and the need to ensure sufficient distance between it and those it is responsible for overseeing, including the Government. This may be particularly acute in the field of intelligence,

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25 P. Cairney, 'How Can the Scottish Parliament Be Improved as a Legislature?', *Scottish Parliamentary Review*, 1, 1 (2013), <http://www.scottishparliamentaryreview.org/>; P. Cairney, 'The Analysis of Scottish Parliament Committees: Beyond Capacity and Structure in Comparing West European Legislatures', *European Journal of Political Research*, 45, 2 (2006), 181–208.

where the monopoly on expertise lies largely with the executive. However, it is crucial that legislative oversight bodies have credibility. It is not sufficient simply to claim to exercise considerable power, particularly if most oversight activities take place behind closed doors. In 2010, the incoming Chair of the ISC, Sir Malcolm Rifkind, observed that the Committee must 'not just be entirely independent in law and in the eyes of its own members. That independence must in practice, be fully respected by all government departments and the ISC perceived to be fully independent, both by Parliament and by the public'.<sup>26</sup> As Rifkind acknowledged, for much of its existence the ISC struggled to establish its credibility. This is, in part, because the Committee itself has paid little attention to its wider public and parliamentary profile and has been somewhat dismissive of attempts at scrutiny by other actors. In a newly emergent state, particularly where one party might be dominant, it would be important, both within Parliament and for the wider public, to ensure that an oversight committee were clearly independent of the executive and the agencies.

Finally, some consideration may need to be given to the question of what protections might be extended to parliamentarians to shield them from scrutiny by the intelligence agencies. Since 1964, UK intelligence agencies have been prevented from intercepting the communications of parliamentarians at Westminster under a convention known as the Wilson doctrine.<sup>27</sup> While there are some limitations to this convention, and it has come under pressure in recent years, it is clearly something that parliamentarians value, and under the Investigatory Powers Act 2016 it will be enshrined in legislation. That legislation will also see the principle extended to members of the devolved assemblies and to UK members of the European Parliament. While this would clearly not protect members of an independent Scottish Parliament from the attentions of UK intelligence agencies, retaining the principle in relation to any new Scottish agency might be important in helping establish trust

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26 M. Rifkind, 'Intelligence Oversight in the UK: The Intelligence and Security Committee', London: speech delivered at the Royal United Services Institute, 16 November 2010.

27 A. Defty, H. Bochel, and J. Kirkpatrick, 'Tapping the Telephones of Members of Parliament: The 'Wilson Doctrine' and Parliamentary Privilege', *Intelligence and National Security*, 29 (2014), 675–97.

between Parliament and the intelligence agencies in an independent Scotland.

There would, then, be significant challenges involved in establishing legislative oversight of intelligence in an independent Scotland. Some of these challenges are presaged by the experiences at Westminster, but others are likely to be new, or at least more acute, in a newly independent state seeking to establish intelligence agencies and legislative oversight from scratch. Moreover, it is important to note that while the tendency may be to mirror the oversight mechanisms at Westminster, this is not the only possible template for legislative oversight in Scotland. Other states provide a number of alternative models on which to draw, and civil society organisations have also established some notions of best practice in this area.<sup>28</sup> The Parliamentary Intelligence and Security Committee has evolved over time and has recently acquired new powers, but it has not been the most powerful or effective of oversight bodies, and Scotland may want to look to examples from other states, including the Nordic countries or the Netherlands.<sup>29</sup> However, it is also important to note that powerful oversight structures do not always make for more detailed or effective scrutiny. The US has some of the most powerful legislative intelligence oversight committees, but much of the current debate about intelligence agency powers in the US has revolved around whether members of Congressional oversight committees have been willing to wield that power. In establishing legislative oversight of intelligence in a newly-independent Scotland, as much attention should be paid to the composition and capacity of an intelligence oversight body as to its form and powers.

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28 Born and Leigh (2005).

29 L. Mevik and H. Huus-Hansen, 'Parliamentary Oversight of the Norwegian Secret and Intelligence Services', in Born and Caparini (2007), pp. 143–62; C. Hijzen, 'More Than a Ritual Dance: The Dutch Practice of Parliamentary Oversight and Control of the Intelligence Community', *Security and Human Rights*, 24, 3–4 (2014), 227–38.

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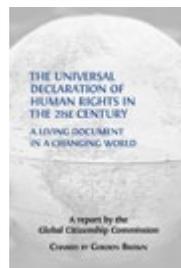
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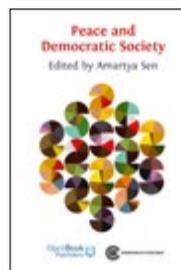
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# Security in a Small Nation

## Scotland, Democracy, Politics

Andrew W. Neal (ed.)

The 2014 Referendum on Scottish independence sparked debate on every dimension of modern statehood. Levels of public interest and engagement were unprecedented, as demonstrated by record-breaking voter turnout. Yet aside from Trident, the issue of security was relatively neglected in the campaigns, and there remains a lack of literature on the topic. In this volume Andrew Neal has collated a variety of interdisciplinary perspectives on security and constitutional change in Scotland and the UK, including writing from experts in foreign policy analysis, intelligence studies, parliamentary studies, and journalism.

*Security in a Small Nation* provides an illuminating analysis of the politics of security. Its authors reflect on a number of related issues including international comparisons, alliances, regional cooperation, terrorism, intelligence sharing, democratic oversight, and media coverage. It has a particular focus on what security means for small states and democratic politics.

The book draws on current debates about the extent of intelligence powers and their implications for accountability, privacy, and human rights. It examines the foreign and security policy of other small states through the prism of Scottish independence, providing unique insight into the bureaucratic and political processes associated with multi-level security governance. These contributions provide a detailed picture of the changing landscape of security, including the role of diverse and decentralised agencies, and new security interdependencies within and between states.

The analysis presented in this book will inform ongoing constitutional debates in the UK and the study of other secessionist movements around the world. *Security in a Small Nation* is essential reading for any follower of UK and Scottish politics, and those with an interest in security and nationhood on a global scale.

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