

Section IV

The Role of Parliament

Chapter 14

The Case for Parliamentary Oversight

Oversight or scrutiny of the security sector cannot remain the preserve of the government alone without inviting potential abuse. It is commonplace, aside from their role in setting the legal framework, for Parliaments to take on the task of scrutinising governmental activity.

In a democracy no area of state activity should be a 'no-go' zone for parliament, including the security and intelligence sector. Parliamentary involvement gives legitimacy and democratic accountability. It can help to ensure that security and intelligence organisations are serving the state as a whole and protecting the constitution, rather than narrower political or sectional interests. Proper control ensures a stable, politically bi-partisan approach to security which is good for the state and the agencies themselves. The involvement of parliamentarians can help ensure that the use of public money in security and intelligence is properly authorised and accounted for.

There are dangers, however, in parliamentary scrutiny. The security sector may be drawn into party political controversy- an immature approach by parliamentarians may lead to sensationalism in public debate, and to wild accusations and conspiracy theories being aired under parliamentary privilege. As a consequence the press and public may form an inaccurate impression and there may develop a corresponding distrust of parliamentarians by security officials. Genuine attempts at openness or leaks of sensitive material to which legislators have been given privileged access may compromise the effectiveness of military or security operations.

Effective scrutiny of security is painstaking and unglamorous work for politicians, conducted almost entirely behind the scenes. Sensitive parliamentary investigations require in effect a parallel secure environment in parliament for witnesses and papers. The preservation of necessary secrecy may create a barrier between the number of parliamentarians involved and the remainder. Those within the ring of secrecy may be envied or distrusted by colleagues because of privileged access to secret material. It is therefore essential that a cross-section who can command widespread trust and public credibility are involved.

That parliamentary oversight of the security and intelligence services is an accepted phenomenon in democratic societies, is illustrated by Box No. 35. It gives an overview of structure and powers of parliamentary oversight of the services in seven selected democracies in the Americas, Europe, and Africa. Most of the elements of this box will be discussed in the following chapters.

Box No. 35: Comparison of the External and Parliamentary Oversight Bodies in Selected Countries					
(1) Country	(2) Mandate of Oversight Body	(3) Budget Control Powers of Oversight Body	(4) Type of oversight body; Membership, Clearance, Appointment of Oversight Body	(5) Subpoena powers	(6) Prior notification requests
(A) Argentina	Reviews legality and effectiveness of the services, including citizens' complaints.	Both scrutiny and authorisation powers.	Parliamentary oversight body of 14 MPs as member, appointed by parliament. There is no security vetting.	No.	Not regulated by the law.
(B) Canada	The SIRC checks legality and efficacy of the agency.	SIRC has no authorisation powers, yet can comment on CSIS's budget.	External independent expert oversight body of max. 5 experts as members, appointed by Prime Minister. Members are under oath.	Yes.	No prior notification required.
(C) Norway	The oversight focuses primarily on legality of the services, including human rights protection.	No budget oversight function.	External expert parliamentary oversight body; max. 7 members (non-MPs) but appointed by parliament.	Yes, all persons summoned to appear before the Committee are obliged to do so.	Agencies are forbidden from consulting with the Committee about future operations.
(D) Poland	Overviews, legality, policy, administration and international cooperation of services. Effectiveness is not checked.	Commission scrutinises the services' draft budget and its implementation.	Parliamentary oversight body; max. 9 MPs as members, appointed by parliament. All members undergo security vetting.	No.	No legal duty.
(E) South Africa	Its oversight purview includes legislation, activities, administration, financial management and expenditure of the services.	The committee does not oversee the intelligence services' budgets per se, but its purview includes financial management of the services.	Parliamentary oversight body; committee consists of 15 MPs, appointed by President. Members are vetted.	Yes	No legal duty.
(F) United Kingdom	Finance, administration and policy of MI5, MI6 and GCHQ with a view on efficiency. It does not check legality.	Committee scrutinises the finance together with the Chairman of the Public Accounts Committee but has no authorisation power.	Parliamentary oversight body of 9 members drawn from both Houses of Parliament, appointed by the Prime Minister.	No.	No legal duty.
(G) United States	Reviews all intelligence agencies. Approves top intelligence appointments. It checks both legality and effectiveness of the services.	Both oversight committees possess budget authorisation powers.	Two Congressional oversight committees, consisting of 20 (House) and 17 (Senate) Congressmen, appointed by House and Senate leaders.	Yes, on both committees.	Yes, except in times of acute emergency, in which the agencies can delay reporting for 2 days.
Source: Born, H., Johnson, L.K., Leigh, I. (eds.), <i>Who's watching the spies? Establishing Intelligence Service Accountability</i> (Dulles, VA: Potomac Books, Inc., 2005)					

Box No. 35 shows the current state of affairs in those seven selected democracies. It has to be emphasised that parliamentary oversight of the security and intelligence services is a recent phenomenon, even in established democracies.¹ The mid-1970s saw the beginning of exposures concerning abuses by security and intelligence agencies in liberal democratic systems which have proved to be a major catalyst for initiating parliamentary oversight across the globe.² Following the US, Australia and Canada legislated for intelligence oversight in 1979 and 1984.³ Having commenced in the Anglo-Saxon world (though reform did not reach the UK until 1989), a wave of reform spread to Europe in the 1980s and 1990s; with reforms in Denmark in 1988, Austria in 1991, Rumania in 1993, Greece in 1994, Norway in 1996, and Italy in 1997.⁴ These developments have attracted support from the Parliamentary Assemblies of the Council of Europe and of the Western European Union.⁵ Progress outside Europe has been slower, although there are exceptions, as demonstrated by the cases of Argentina and South Africa.

Chapter 15

The Mandate of Parliamentary Oversight Bodies

The international norm is for parliament to establish an oversight body for all the major security and intelligence agencies (a 'functional approach' to oversight), rather than having multiple oversight bodies for specific agencies (an 'institutional' approach). This 'functional' approach facilitates seamless oversight since in reality different parts of the intelligence machinery work closely with each other. There is a risk that an oversight body established on a purely 'institutional' basis may find that its investigations are hampered if they lead in the direction of information supplied by or to an agency outside the legal range of operation.

There are some significant divergences from this approach, however. In the US there are separate congressional intelligence committees in the House of Representatives and the Senate, each with legal oversight of the agencies. In the UK the Intelligence and Security Committee's (ISC) legal remit covers only part of the intelligence establishment (Defence Intelligence Staff, the Joint Intelligence Committee and National Criminal Intelligence Service are not included in the legal remit of the Committee). In practice, however, and with the cooperation of the government, the ISC has examined their work.

Broadly speaking, there are two ways in which a parliamentary oversight committee's role can be set out in law. The first is to give a wide remit and then to detail specific matters which may *not* be investigated; examples of this approach can be found in legislation from the UK and Australia.⁶ The second is to attempt a comprehensive list of functions, as in the example boxed overleaf (taken from United States Rules of the US Senate Select Committee on Intelligence):

A second, and critical, distinction concerns whether the oversight body is envisaged as able to examine operational detail or is limited to questions of policy and finance (see Box No. 37 overleaf). The German *Bundestag* mandated its Parliamentary Control Panel to scrutinise both policies and operations. Policies include the procedures which enable the intelligence service to operate and to fulfil its tasks. The German Parliamentary Control Panel is fully informed about both these procedures and the implementation thereof. In addition, the German Parliamentary Control Panel should be briefed about operations of the intelligence services as well as intelligence related aspects which received media coverage. Furthermore, the Control Panel should be fully informed about major decisions that alter the internal procedures of the agencies.⁷

Box No. 36:

A Comprehensive List of Tasks for a Parliamentary Oversight Body

Section 13 (edited)

(a) The select committee shall make a study with respect to the following matters:

1. the quality of the analytical capabilities of the United States foreign intelligence agencies and means for integrating more closely analytical intelligence and policy formulation;
2. the extent and nature of the authority of the departments and agencies of the executive branch to engage in intelligence activities and the desirability of developing charters for each intelligence agency or department;
3. the organisation of intelligence activities in the executive branch to maximise the effectiveness of the conduct, oversight and accountability of intelligence activities; to reduce duplication or overlap; and to improve the morale of the personnel of the foreign intelligence agencies;
4. the conduct of covert and clandestine activities and the procedures by which Congress is informed of such activities;
5. the desirability of changing any law, Senate rule or procedure, or any Executive order, rule, or regulation to improve the protection of intelligence secrets and provide for disclosure of information for which there is no compelling reason for secrecy;
6. the desirability of establishing a standing committee of the Senate on intelligence activities;
7. the desirability of establishing a joint committee of the Senate and the House of Representatives on intelligence activities;
8. the authorisation of funds for the intelligence activities.

Source: United States Rules of the US Senate Select Committee on Intelligence

Box No. 37:

Elements of Parliamentary Oversight (Germany)

Section 1(1) With respect to the activities of the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*), the Military Counter-Intelligence Service (*Militärischer Abschirmdienst*) and the Federal Intelligence Service (*Bundesnachrichtendienst*), the Federal Government shall be subject to the supervision of the Parliamentary Control Panel (*Parlamentarisches Kontrollgremium*).

Section 2: The Federal Government shall provide the Parliamentary Control Panel with comprehensive information regarding the general activities of the authorities referred to in Section 1 (1) above, as well as regarding operations of special significance. At the request of the Parliamentary Control Panel, the Federal Government must also report on other operations.

Section 2a: As part of its duty to provide information under Section 2 above, the Federal Government must, if so requested, allow the Parliamentary Control Panel to inspect the services' documents and files to speak to the employees of the services as well as arranging for the Panel to visit the services.

Source: Act governing the Parliamentary Control of Intelligence Activities by the German Federation. Parliamentary Control Panel Act (PKGrG), Germany, April 1978 (cited text includes amendments of 1992 and 1999), Section 2, 2a.

A parliamentary oversight body able to examine intelligence operations may have greater credibility and may be given greater powers (for example, to compel the production of evidence). However, it will face inevitable restrictions on how it conducts its investigations and on what can be reported to parliament or to the public. It will operate in effect within the ring of secrecy and that will create a barrier between it and the remainder of parliament. Provided it establishes a reputation for independence and apparent thoroughness this need not affect its legitimacy. However, parliament and the public will have to take it on trust to a certain degree that proper oversight of operational matters is taking place without the supporting evidence being available. A second danger is that an oversight body of this type gets too close to the agencies it is responsible for overseeing. For example, although a legal requirement that it be notified in advance of certain actions by the agency may appear to strengthen oversight, it could also inhibit the oversight body from later criticism of these operational matters.

The alternative approach is to limit the function of the parliamentary oversight body to matters of policy and finance. These are issues which can be more readily examined in the public arena with the need for far fewer restrictions in the national interest on what is disclosed (although the publication of precise budgetary details may be prejudicial to national security). The difficulty of this second approach, however, is that it detracts from one of key tasks of parliamentary scrutiny: to ensure that government policy in a given field is carried out effectively. Without access to *some* operational detail, an oversight body can have or give no assurance about the efficiency of the security and intelligence agency in implementing the published policy. The same applies to auditing issues of legality or the agencies' respect for fundamental rights – tasks which are given to parliamentary oversight bodies in some countries. Such exercises in parliamentary oversight may lack credibility unless founded on some clear evidence about the behaviour of the agency concerned.

It seems, then, that the ring or barrier of secrecy poses a dilemma for the design of parliamentary oversight; within the barrier oversight may be effective but cannot be shown to be so, outside the barrier it may operate in parallel to but never really touch the actions of the agencies concerned.

In practice several strategies can be adopted to overcome this conundrum. One is to create institutions or offices that can go behind the ring of secrecy on parliament's behalf and report to a parliamentary oversight body. In some countries Inspectors-General perform this role (although they also perform a different function of strengthening executive oversight – see Chapter 22).

A second method is to provide for *ad hoc* reference of operational matters to the parliamentary oversight body (as a body with recognised expertise in the field), either by the government or by parliament itself. The following box illustrates how this method is legislated for in Australia.

Box No. 38:

The Provision of *ad hoc* Reference of Operational Matters to the Parliamentary Oversight Body

Section 29 – Functions of the Committee

(1) The functions of the Committee are:

- b. to review any matter in relation to ASIO, ASIS or DSD referred to the Committee by:
 - (i) the responsible Minister, or
 - (ii) a resolution of either House of the Parliament.

Source: Intelligence Services Act 2001, Australia, Section 29

Ad hoc investigations are most likely to be used where the alleged actions of the agencies cause controversy. Where this happens, access to the necessary information is also likely to be given since the government and agencies will wish to be seen to cooperate. However the oversight body's negotiating position may be strengthened if it can decline to conduct such an *ad hoc* investigation unless assured that it will be given adequate access to information.

Another example of a more narrow mandate is given by the Norwegian parliamentary intelligence oversight committee. This committee, whose members are not parliamentarians but are appointed by and report to parliament, is mandated to scrutinise whether the services respect the rule of law and human rights (see Box No. 39). Within this focused mandate, the committee has far-reaching investigative powers, covering the entire Norwegian intelligence machinery. Its oversight, which is *ex post facto* oversight, might include operations, but only from the point of view of legality.

Box No. 39:

Parliamentary Oversight Focusing on the Rule of Law and Human Rights: The Example of Norway

'Section 2. The purpose of the monitoring is:

1. to ascertain and prevent any exercise of injustice against any person, and to ensure that the means of intervention employed do not exceed those required under the circumstances,
2. to ensure that the activities do not involve undue damage to civic life,
3. to ensure that the activities are kept within the framework of statute law, administrative or military directives and non-statutory law (...)

Source: The Act relating to the Monitoring of Intelligence, Surveillance and Security Services. Act No. 7 of 3 February 1995, Norway

Best Practice

- ✓ Horizontal scope of the mandate: the entire intelligence community, including all ancillary departments and officials, should be covered by the mandate of one or more parliamentary oversight bodies;
- ✓ Vertical scope of the mandate: the mandate of a parliamentary oversight body might include some or all of the following (a) legality, (b) efficacy, (c) efficiency, (d) budgeting and accounting; (e) conformity with relevant human rights Conventions (f) policy/administrative aspects of the intelligence services;
- ✓ All six aspects mentioned above should be covered by either the parliamentary oversight body or other independent bodies of the state, eg national audit office, inspectors-general, ombudsman or court. Overlap should be avoided;
- ✓ The bigger an intelligence community is and the more different intelligence services are involved, the greater is the need for specialised parliamentary oversight (sub)committees;
- ✓ The mandate of a parliamentary oversight body should be clear and specific;
- ✓ The recommendations and reports of the parliamentary oversight body should be (a) published; (b) debated in parliament; (c) monitored with regard to its implementation by the government and intelligence community;
- ✓ The resources and legal powers at the disposal of the parliamentary oversight body should match the scope of its mandate.

Chapter 16

The Composition of a Parliamentary Oversight Body

In order to enjoy legitimacy and command trust it is vital that parliamentary oversight bodies in this area have a broad mandate, are appointed by parliament itself and represent a cross-section of political parties. Although wherever possible members should have some relevant expertise (for example from previous ministerial service), in our view it is also essential that they be civilian – there must be clear demarcation between the oversight body and the agencies overseen in order for oversight to be effective. A particular difficulty arises in transition states – the presence of former members of the security agencies on the oversight body. Where the services were implicated in maintaining a repressive former regime this is bound to undermine confidence in the oversight process and is best avoided, if necessary by a legal prohibition.

Equally, to be effective a parliamentary committee must enjoy a relationship of trust with the agencies it oversees. This suggests that to be effective a relatively small committee (without, however, compromising the principle of cross-party membership) is best.

As the oversight of security and intelligence services requires expertise and time, some parliaments have chosen to set up a committee outside the parliament, whose members are not parliamentarians, but are appointed by parliament and report to parliament (eg Norway; Canada [proposed reforms]⁸).

Options for appointing the membership of parliamentary oversight bodies vary from countries where the head of government appoints (after consultation with the Leader of the Opposition, in the case of the UK)⁹, to where the executive nominates members but parliament itself appoints (as in Australia)¹⁰, to instances in which the legal responsibility for appointment rests solely with the legislature (as in Germany¹¹ and Norway¹²). The issue of appointment is plainly connected with that of vetting and security clearance (see Chapter 17): the executive may feel more relaxed about clearance where it has formal responsibility for appointment or has a monopoly over nominations.

The chairman of an oversight body will invariably have an important role in leading it and determining how it conducts its business as well as directing liaison with the services outside formal committee meetings. Traditions within parliamentary systems vary concerning the chairmanship of parliamentary committees. While being sensitive to different traditions, the legitimacy of a parliamentary oversight body will be strengthened if it is chaired by a member of the opposition, or if the chairmanship rotates between the opposition and the government party.

Box No. 40:

Appointing Members of Parliamentary Oversight Bodies: Examples from selected states

Germany:

'Section 4 (1) At the beginning of each electoral period the German *Bundestag* shall elect the members of the Parliamentary Control Panel from amongst its own members; ... (3) Those who obtain a majority of the votes of the members of the German *Bundestag* shall be elected.'

Source: German Federation Parliamentary Control Panel Act, 1978 amended (PKGrG)

United Kingdom:

'10(2) The Committee shall consist of nine members (a) who shall be drawn both from members of the House of Commons and from members of the House of Lords and (b) none of whom shall be a Minister of the Crown; (3) The members of the Committee shall be appointed by the Prime Minister after consultation with the Leader of the Opposition (...).'

Source: Intelligence Service Act, 1994.

The Netherlands:

'The [Parliamentary Oversight] Committee decided that the legitimacy of its functioning had become too limited and that, therefore, chairpersons of all parliamentary factions should have a seat on the Committee'.

Source: *Report of the Committee for Security and Intelligence Services on its Activities During the Last Five Months of 2003*, 2nd Chamber of Parliament, Session Period 2003-2004, 29 622, nr. 1, 3 June 2004

Argentina:

'The [bi-cameral legislative] Committee includes 14 legislators, seven appointed by the Chamber of Deputies and seven by the Senate. The president, the two vice-presidents and the secretary of the Joint Committee are chosen by simple vote of its members, with a term of office of two years, rotating between each one of the two chambers. (...) There is no special procedure to veto prospective members or to remove members of the Joint Committee other than not having or losing the political confidence of its faction members, particularly the president of the faction. All legislators are eligible to be members of the Joint Committee.'

Source: Estevez, E.

'Argentina's new century challenge: Overseeing the intelligence system' in:

Born, H., Johnson, L, Leigh, I. (eds.) *Who's Watching the Spies? Establishing Intelligence Service Accountability*, (Dulles, VA: Potomac Books, Inc., 2005).

Hungary:

'(...) At all times the Chairman of the Committee may only be a member of the Opposition.'

Source: Section 14, 1, Act nr. CXXV of 1995 on the National Security Services, Hungary.

The chairman should be chosen by the parliament or by the committee itself, rather than appointed by the government. Trust in the Chairmanship will be enhanced to the extent that it is seen to be independent of government. The only compelling case for a requirement that a government supporter chair the committee is where this applies to

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all other parliamentary committees also. Even in such circumstances it is preferable that the choice of chairman from among those eligible is within parliament or the committee itself and that the chairman holds office at the pleasure of the parliament or the committee.¹³

Best Practice

- ✓ Parliamentary oversight bodies should be clearly 'owned' by parliament;
- ✓ Parliament should be responsible for appointing and, where necessary, removing members of a body exercising the oversight function in its name;
- ✓ Representation on parliamentary oversight bodies should be cross-party, preferably in accordance with the strengths of the political parties in parliament;¹⁴
- ✓ Government ministers should be debarred from membership (and parliamentarians should be required to step down if they are appointed as ministers) or the independence of the committee will be compromised.¹⁵ The same applies to former members of agencies overseen;
- ✓ Committee members should have security of tenure at the pleasure of parliament itself, rather than the head of government;¹⁶
- ✓ The chairman should be chosen by the parliament or by the committee itself, rather than appointed by the government.

Chapter 17

Vetting and Clearance of the Oversight Body

Vetting is a process by which an individual's personal background and political affiliation is examined to assess his or her suitability for a position that may involve national security concerns. Whether it is necessary for members of a parliamentary committee to be subject to security vetting or clearance depends on several related factors.

If the appointment or nomination process is in the hands of the government there is likely to be an informal process of vetting in practice prior to nomination or appointment and people who are regarded as security risks are unlikely to be put forward in the first place. Equally the tasks and powers of the committee are relevant in discussing the need for vetting or security clearance. A committee whose task is confined to discussion of policy or which lacks the power to subpoena evidence or to receive sensitive evidence concerning intelligence operations or sources hardly needs to be vetted.

Constitutional differences are relevant also. Where the constitutional tradition is opposed to the vetting of the *ministers* responsible for the security and intelligence services, it would be inappropriate if parliamentarians involved in oversight were to be vetted.

On the other hand, where (as is preferable) the committee has wider functions and powers, it is important that members of the oversight body have adequate access to the information and documents. If members of the oversight body are not trusted with material of this kind (for example, where appropriate, by being given the highest security clearance) oversight will be incomplete at best. Therefore, some parliaments (eg Norway) have enacted legislation that allows members of the oversight body to (immediate) access to all information that is necessary for the proper execution of the tasks of the oversight body.

Box No. 41:

Clearance of the Norwegian Parliamentary Intelligence Oversight Committee

'Those elected [to the Parliamentary Oversight Committee] shall be cleared for the highest level of national security classification and according to treaties to which Norway is a signatory. After the election, authorisation shall be given in accordance with the clearance.'

Source: Instructions for Monitoring of Intelligence, Surveillance and Security Services (EOS), Norway, 1995, *Section 1, para. 2*:

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Vetting of members of a parliamentary oversight body raises an obvious dilemma: who is to be responsible for the vetting? There is a clear conflict of interest in the overseers being vetted by those they are responsible for overseeing. However, this is to some degree unavoidable. The suspicion that the criteria for vetting may screen out those likely to be hostile to the security and intelligence agencies is best countered by clear public criteria for vetting and the possibility of a challenge being brought to a refusal of clearance. The criteria and the process for vetting should be sufficiently clear, consistent and robust to withstand democratic scrutiny. It should be borne in mind, however, that in many countries the outcome of vetting is merely advisory – in these cases it may be sufficient to merely affirm the ability of the appointing body to continue with the appointment, notwithstanding an adverse report (see Box 42 below).

Box No. 42:

Dealing with Denial of Security Clearances for Members of Parliament of Bosnia and Herzegovina

‘(...) In cases where the Agency denies issuance of a security clearance to a nominee, the Collegium of the Parliamentary Assembly may request that the Agency reconsider such denial if it has justified concerns as to its legitimacy. Should the Agency reaffirm the original denial, the Collegium shall either put forward the name of another candidate or confirm its initial proposal (...).’

Source: Art. 18 Law on Intelligence and Security Agencies of Bosnia and Herzegovina, 2004

It is better that vetting of members of a committee takes place formally, rather than through informal processes. This is fairer to the parliamentarians concerned (who will then be aware that vetting is taking place) and allows for proper processes by which an adverse decision can be justified and challenged.

Procedures for challenging vetting refusals are a difficult area since there is a balance to be maintained between fair procedure, national security and the protection of individual privacy. In principle it is best if cases involving parliamentarians can be handled using the normal machinery available to state officials and others denied clearance, so that they do not become matters of public discussion and parliamentary debate.

Members of parliamentary oversight committees should only be vetted where, because of the remit or powers of the committee, they are likely to come into contact with operationally sensitive material. Where vetting is necessary it should be formal: the parliamentarian should be aware that it is taking place, the criteria and process involved should be published, the outcome should be made available both to the appointing body (in a way that respects the privacy of the individual concerned so far as possible) and to the parliamentarian, and there should be an opportunity to challenge the outcome before an independent body.

Best Practice

- ✓ Members of parliament should only be vetted if the committee's mandate includes dealing with operationally sensitive material;
- ✓ Where clearance is denied to members of parliament by the security and intelligence services, procedures should be established to deal with disputes authoritatively, giving the final decision to the parliament or its presidium;
- ✓ The criteria for vetting should be clear, public, consistent and robust in order to withstand democratic scrutiny.

Chapter 18

Parliamentary Powers to Obtain Information and Documents

The parliament, and particularly the oversight body, needs to have sufficient power to obtain information and documents from the government and intelligence services. The precise extent that a parliamentary oversight body requires access to security and intelligence information and the type of information concerned depends on the specific role that it is asked to play. An oversight body whose functions include reviewing questions of legality, effectiveness and respect for human rights will require access to more specific information than one whose remit is solely policy. Similarly, it will have a stronger case for a right of access to documents (rather than information or testimony from identified witnesses).¹⁷ Clearly, however, an oversight body should have unlimited access to the necessary information in order to discharge its duties.

Box No. 43:

The Argentinean Joint Committee's Right to Information

Art. 32

The Joint Committee [for the Oversight of Intelligence Services and Activities] shall have full authority to control and investigate by its own. Upon its request, and in accordance with the provisions established by article 16, the agencies of the National Intelligence System shall submit the information or documentation that the Committee requests.

Source: National Intelligence Law, No. 25520 of 2001, Art. 32.

The differences in role explain some of the variations in the extent to which oversight bodies are given access to operational detail in different constitutional systems. Some countries, e.g. the US, provide that the executive has the responsibility to keep the oversight body informed.

Box No. 44:

Duty to keep the Congressional Committees Fully and Currently Informed about Intelligence Activities (US)

1. The President shall ensure that the intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this subchapter (...).
- (b) Reports concerning illegal intelligence activities. The President shall ensure that any illegal intelligence activity is reported promptly to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity.

Source: United States Code, Title 50, Section 413 (a)

Additionally, the US Congressional Oversight Provisions demand that the President keeps the Congressional intelligence committees informed about covert operations (see Chapter 11). The box below illustrates executive duties in this respect.

Box No. 45:

Reporting of Covert Action to the US Congressional Intelligence Committees

‘(...) (b) Reports to intelligence committees; production of information

To the extent consistent with due regard for the protection from unauthorised disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a covert action:

1. shall keep the intelligence committees fully and currently informed of all covert actions which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures; and
2. shall furnish to the intelligence committees any information or material concerning covert actions which is in the possession, custody, or control of any department, agency, or entity of the United States Government and which is requested by either of the intelligence committees in order to carry out its authorised responsibilities.

(c) Timing of reports; access to finding

1. The President shall ensure that any finding approved pursuant to subsection (a) of this section shall be reported to the intelligence committees as soon as possible after such approval and before the initiation of the covert action authorised by the finding, except as otherwise provided in paragraph (2) and paragraph (3).’

Source: United States Code, Title 50, Section 413b.

Systems vary in how they handle reporting of sensitive material. In the US, the onus of *being informed* not only rests with the oversight body, but with the executive as well. In Australia, on the other hand, the Parliamentary Committee is forbidden from requiring ‘operationally sensitive information’ from being disclosed;¹⁸ requests for documents cannot be made by the Committee to agency heads or staff members or to the Inspector-General, and ministers may veto evidence from being given.¹⁹ A power of veto of this kind effectively returns disputes over access to information to the political arena. What is important is that powers to obtain information match the parliamentary oversight body’s mandate.

Various countries have stipulated that the oversight body is also entitled to obtain information and documents from experts of both the services as well as civil society, eg think tanks or universities. Such a provision guarantees that the parliament is able to receive alternative viewpoints, in addition to the position of the government. These provisions will be more powerful if the oversight body is able to subpoena witnesses and to receive testimony under oath.

Box No. 46:

Consulting External Expertise (Luxembourg)

'When the [parliamentary] control concerns a field that requires special knowledge, the [Parliamentary Control] Committee can decide, with two-thirds majority vote and after having consulted the Director of the Intelligence Service, to be assisted by an expert.'

Source: Art. 14 (4), Loi du 15 Juin portant organisation du Service de Renseignement de l'Etat, Memorial-Journal Officiel du Grand-Duché de Luxembourg, 2004, A-No. 113 (unofficial translation)

However, as often the information and documents are related to sensitive issues (about persons) and/or about national security, oversight bodies of various countries have made great efforts to protect information from unauthorised disclosure. There is a case for clear prohibitions governing the unauthorised disclosure by members of the parliamentary oversight body or their support staff. Unauthorised disclosure of information may not only harm national security interests, but may also harm the trust which is necessary for an effective relationship between the oversight body and the services. This is partly a matter of legislation (see the US²⁰ and in Norway²¹), and partly a matter of proper behaviour of the members of the oversight body to deal with classified information with care and attention.

Best Practice

- ✓ The oversight body should have the legal power to initiate investigations;
- ✓ Members of oversight bodies should have unrestricted access to all information which is necessary for executing their oversight tasks;
- ✓ The oversight body should have power to subpoena witnesses and to receive testimony under oath;
- ✓ Where relevant to the oversight body's remit, the executive should have responsibility for keeping the oversight body informed;
- ✓ The oversight body should take appropriate measures and steps in order to protect information from unauthorised disclosure;
- ✓ Disputes over access to information between the agencies and the oversight body should be referred in the last analysis to the Parliament itself.

Chapter 19

Reporting to Parliament

Reports from parliamentary committees are the main process by which public confidence in the process of parliamentary oversight is instilled. In some countries the committee may report to the entire parliament, to a group of deputies representing the various political parties, or to the presidium, without this report being published. Other countries have the tradition that all reports to parliament are public documents.

Inevitably, in order to protect security, there is a limit to what can or should be reported publicly. Nevertheless, unless the committee itself is responsible for such decisions the oversight system will lack credibility and will be capable of being abused in order to cover inefficiency or malpractice.

There should be a legal duty on a parliamentary oversight committee to report at least annually (see Box No. 47 below). Primary responsibility for the timing and a form of a parliamentary committee's report and any decision to publish evidence should lie with the committee itself. It is best if a parliamentary oversight body reports directly to parliament rather than through the government since this enhances the parliamentary 'ownership' of the committee. It is good practice, however, to give sufficient advance notice of a final report to the government so that it can make a response on publication. Where reporting takes place through the government there should be clear legal duty on government ministers to lay the report in full before parliament within a stipulated time.

Box No. 47:

Informing Legislature and Executive about Committee's Activities and Recommendations (South Africa)

1. The Committee shall, within five months after its first appointment, and thereafter within two months after 31 March in each year, table in parliament a report on the activities of the Committee during the preceding year, together with the findings made by it and the recommendations it deems appropriate, and provide a copy thereof to the president and the minister responsible for each service.
2. The Committee may at the request of parliament, the president or the minister responsible for each service or at any other time which the Committee deems necessary, furnish parliament, the president or such minister with a special report concerning any matter relating to the performance of its functions; and shall table a copy of such report in parliament or furnish the president and the minister concerned with copies, as the case may be.

Source: Intelligence Services Control Act 1994 (2002)

Concerns over disclosure of sensitive information by the committee can be met by imposing a legal duty to consult the agencies over material derived from them that is

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included in reports or evidence (which is good practice in any event), or by prohibiting very limited categories of information from being published (for instance, the identity of intelligence operatives), but the government or the agencies should not enjoy a veto.

Box No. 48:

Restrictions on Disclosure to Parliament (Australia)

The Committee must not disclose in a report to a House of the Parliament:

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

Source: Intelligence Services Act, 2001, Schedule 1, Part 1, Clause 7,1

Absence of a government veto on publication is the better practice. In states that do incorporate a veto, however, the government or agencies should, nevertheless, be required by law to state in general what is omitted from the published report and the reason for omission. This enables political scrutiny of such decisions to take place through the normal parliamentary process.

Best Practice

- ✓ Primary responsibility for the timing and form of the Parliamentary Committee's Report and any decision to publish evidence should lie within the committee itself;
- ✓ The committee should report to parliament at least yearly or as often as it deems necessary;
- ✓ The parliamentary oversight body should have the final word on whether it is necessary to remove material from a public report for security reasons;
- ✓ The government and the agencies should be given prior sight of the draft report so that representations about necessary security deletions can be made.

Chapter 20

Budget Control

Budget control is at the heart of parliamentary control. Most countries have developed or are developing a systematic approach to the evaluation and approval of budget proposals. In every country, parliament fulfils a different role in the budgeting and accounting procedures for the security and intelligence services, for example, in terms of the scope of budget control, the power to amend budgets, the power to approve supplementary budget requests, access to classified information (see Chapter 18) and the disposition of independent financial auditors (see Chapter 23). The greater the parliament's powers in these areas the more effective it will be in debates with the government. Concerning the power of the purse, three types of parliaments exist, in descending order of influence:

- *Budget-making parliaments:* parliament has the capacity to amend or to reject the budget proposal for the security and intelligence services as well as the capacity to formulate its own alternative budget proposal;
- *Budget-influencing parliaments:* parliament can amend or reject the budget, but lacks the capacity to put forward its own proposals;
- *Parliaments with little or no effect on budget formulation:* parliament lacks the capacity either to amend or to reject the budget or to come forward with its own proposals. At best, they limit their role to assenting to the budget as proposed by the government.²²

In any case, it is a minimum requirement that parliament has a say in budget issues as the security and intelligence services are financed with taxpayers' money. From this point of view, parliaments around the world have claimed a role in the budgeting and accounting process of the security and intelligence services.

The power of the purse as exercised by parliament has to be seen within a dual context – that of the entire budget process, as well as the mandate of the parliamentary body charged with oversight of these specific activities of government.

The Budget Process

Parliament can be attentive to issues related to the security and intelligence services in all phases of the budget cycle for which most countries have adopted a planning, programming and budgeting system:²³

Budget-preparation: generally speaking, this phase is for the executive to propose allocations of money for several purposes but parliament and its members can contribute to the process through different formal and informal mechanisms.

Budget-approval: in this phase the parliament should be able to study and determine the public interest and suitability of the money allocation and may in certain contexts complement security-related appropriations with specific guidelines. An example of specific guidelines can be found in the case of the US Congress where the Congress designates the financial ceiling (including the budget from research and development to operations) and sets personnel ceilings for the maximum number of officials to be hired by the services in the upcoming fiscal year.²⁴

Execution or spending: in this phase, parliament reviews and monitors government spending and may strive to enhance transparency and accountability (see corresponding section below). In the case of supplementary budget requests, parliament monitors and scrutinises these demands to prevent cost overruns. In some countries, for example in the US, the relevant intelligence oversight committees of the US Congress and the relevant subcommittees of the Appropriations Committee must be informed if elements of the intelligence community shift money from one account to another.²⁵

Audit or review: in this phase, parliament determines whether there was misuse of the money allocated by the government. Additionally, parliament periodically evaluates the entire budget and audit process to ensure accountability, efficiency and accuracy. The role of audit offices is discussed in Chapter 23.

Budget Control and the Mandate of the Parliamentary Oversight Body

Budget control has also to be understood in the context of the mandate of the parliamentary intelligence oversight body. In some countries, this body clearly has the power of the purse as the embodiment of the people's voice. In other countries, for example in Norway, parliament has chosen not to give the power of purse to the (independent expert) oversight committee, but kept that power for the plenary or the parliamentary budget committee. The reason behind this practice is that budget control would make the oversight committee co-responsible for government policy. Therefore in Norway the parliamentary intelligence oversight committee focuses on whether the services comply with the rule of law and respect human rights only and leave budget oversight to other bodies of the parliament. In doing so, the intelligence committee can maintain independence in scrutinising the services.

In other parliaments, however, such as in Argentina, the Netherlands, Germany or the US, the parliamentary oversight committee has the power of the purse, giving those parliaments better insights about how money is spent by the services. To be more precise, in the US, as well as, for example, in Germany, the power of the purse is often divided between the budget committee and the intelligence oversight committee. The former committee focuses on appropriations; the latter committee focuses on the policy aspects of the services and authorises funds.

Box No. 49 overleaf illustrates the practice in Germany.

Box No. 49:

Financial Auditing by the German Parliamentary Control Panel

Section 2e

1. The Chairman, his deputy and an authorised member may take part, in an advisory capacity, in the meetings of the Confidential Committee (*Vertrauensgremium*, whose members also sit on the *Bundestag's* Budgetary Select Committee), which acts pursuant to Section 10a of the Federal Budget Code (*Bundeshaushaltsordnung*). Equally the Chairman of the Confidential Committee, his deputy and an authorised member, may also take part in the meetings of the Parliamentary Control Panel in an advisory capacity.

2. Draft copies of the annual economic plans of the services shall be transmitted to the Parliamentary Control Panel for co-deliberation. The Federal Government shall provide the Panel with information regarding the implementation of economic plans during the budgetary year. During discussions relating to the services' economic plans and their implementation, the members of both authorities may take part in each other's meetings in an advisory capacity.

Source: Act governing the Parliamentary Control of Intelligence Activities, Germany, April 1978 (amended in 1992 and 1999)

In accordance with section 2(e) para. 2 of the law on German Parliamentary Control Panel (PKGr), the services' draft annual budgets are forwarded to the PKGr for consultation. However, the consultation does not mean that the PKGr scrutinises these draft budgets in the manner of a budget committee. Instead, PKGr subjects the overall activities of the intelligence services to a political analysis on the basis of the budgets and the extensive data these contain – with respect to the structure, the personnel, the projects and the activities of the services. After the consultations have been completed, an assessment is forwarded to the German Bundestag's Confidential Forum of the Budgetary Select Committee, which is actually in charge of reviewing the draft budgets. The federal government also keeps the PKGr informed about the execution of the budgets during the budget year.²⁶

Transparency and Accountability

Accountability and transparency are essential conditions for effective budgeting. The best way to realise accountability is through a transparent process of budget-making. Proper accountability and transparency can be developed from the following principles of effective budgeting:²⁷

Prior authorisation – The parliament should authorise the executive to carry out expenditure.

Unity – All expenditure and revenue should be presented to parliament in one single consolidated budget document.

Regularity – The executive is expected to respect a regular time-frame to present the budget every year to the parliament (instead of, for example, every five years).

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Regularity also involves the need for specifying the time-frame during which the money allocations will be spent.

Specificity – The number and descriptions of every budget item should result in a clear overview of the government's expenditure. Therefore the description of the budget items should not be vague and the funds related to a budget item should not be too large. Giving the parliament only the grand totals of the yearly budget for the security and intelligence services would clearly violate the principle of specificity.

Legality – All expenditures and activities should be in keeping with the law. In this context, the services are not allowed to acquire funds outside the state budget (for example, through commercial activities).

Accessibility – The executive is expected to acquaint the parliament with a plan of estimated expenditure that is manageable and understandable to the wide and diverse audience that is usually present in parliament.

Comprehensiveness – The state budget concerning the different aspects of the security sector has to be all-inclusive and complete. No expenditure should go unaccounted for. In this context, 'black' programmes or secret budgets – inaccessible for members of the parliamentary intelligence oversight committee – would be clearly in violation of this principle. Parliamentarians of the intelligence oversight committee and the budget committee should have access to all classified information. Section 14, para. 4.9 of the Hungarian Law illustrates how the comprehensiveness of budget control can be legislated.

Box No. 50:

Comprehensive Budget Control by Parliament (Hungary)

'While exercising parliamentary control, the committee (...) shall give its opinion on the detailed draft budget of the national security services, the items of the budget of other organisations entitled to gather intelligence related to such activities, and the draft of the detailed report on the execution of the Act on the Budget of the year, and shall make a proposal during the debate on the bills to Parliament to adopt the bill in question(...).'

Source: Article 14, 4g of the 1995 Act on the National Security Services of Hungary.

Consistency – Clear links should be established between policies, plans, budget inputs and performance outputs.

Effectiveness – The budget explanation should be able to communicate clear understandings of the aims of the budget in terms of a) resource inputs; b) performance or capacity objectives to be achieved, and c) measurable results on plans. A flexible budget should allow changes in any of these three parameters.

These principles may in fact be considered to be quality criteria for proper modern budgeting. They imply that the normal principles of good governance (see Introduction) which govern other activities of government, should also apply to the

security and intelligence services. Exceptions in terms of, for example, secrecy, should be legally limited.

Where parliamentarians lack appropriate information on the security sector, they are unable to raise issues concerning the budget of the services. As in other branches of the state, safeguards can be put into place in order to avoid improper disclosure of classified information. This issue is discussed in Chapter 18 on access to classified information by parliamentarians. Concerning public access to budget information, in some countries the grand totals of the security and intelligence services' budget are available to the public. This is the case, for example, in the United Kingdom.²⁸

Best Practice

- ✓ The oversight body should have access to all relevant budget documents, provided that safeguards are in place to avoid leaking of classified information;
- ✓ The oversight of the budget of the security and intelligence services should be governed by the same principles of good governance which regulate other activities of government. Exceptions should be regulated by law. From this point of view, the oversight of the budget should be a shared power between the appropriations committee and the intelligence oversight committee;
- ✓ Powerful parliaments should have the right to authorise the budget;
- ✓ Intelligence Agencies should only use funds for activities if those funds were specifically authorised by the legislative branch for that purpose;
- ✓ The intelligence services should not be allowed to transfer funds outside the agency without the authorisation of the legislature.

Endnotes Section IV – The Role of Parliament

1. The following text is based on Leigh, I., 'Three Decades of Oversight', in Born, H Johnson, L., Leigh, I. (eds.), *Who's Watching the Spies? Establishing Intelligence Service Accountability*, (Dulles, VA: Potomac Books, Inc., 2005).
2. Some countries have institutionalised and legalised parliamentary oversight before the mid 1970s, such as the US, Germany and the Netherlands.
3. Australian Security Intelligence Organisation Act 1979 (Cth) and Canadian Security Intelligence Service Act 1984, respectively. Lustgarten, L, Leigh, I., *In from the Cold: National Security and Parliamentary Democracy* (Oxford: Clarendon Press, 1994).
4. For other comparative reviews see: Brodeur, J-P., Gill, P., Töllborg, D., *Democracy, Law and Security: Internal Security Services in Contemporary Europe* (Aldershot: Ashgate, 2003); Assembly of the WEU, *Parliamentary oversight of the intelligence services in the WEU countries – current situation and prospects for reform* (Document A/1801, 4 December 2002); <http://assemblyweu.itnetwork.fr/en/documents/sessions_ordinaires/rpt/2002/1801.html>
5. Council of Europe, Parliamentary Assembly, *Recommendation 1402/1999*, Western European Union Assembly, *Resolution 113*, adopted on 4 December 2002 (9th sitting).
6. Intelligence Services Act 2001 No. 152, 2001, Sections 28 and 29 (Committee on ASIO, ASIS and DSD). Note in particular: Section 30.
 3. The functions of the Committee do not include:
 - (a) reviewing the intelligence gathering priorities of ASIO, ASIS or DSD; or
 - (b) reviewing the sources of information, other operational assistance or operational methods available to ASIO, ASIS or DSD; or
 - (c) reviewing particular operations that have been, are being or are proposed to be undertaken by ASIO, ASIS or DSD; or
 - (d) reviewing information provided by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information; or
 - (e) reviewing an aspect of the activities of ASIO, ASIS or DSD that does not affect an Australian person; or
 - (f) reviewing the rules made under section 15 of this Act; or
 - (g) conducting inquiries into individual complaints about the activities of ASIO, ASIS or DSD.
- Intelligence Services Act 1994, s. 10 (UK) establishing the Intelligence and Security Committee with jurisdiction to investigate the policy, administration and finance of the Security service (MI5), the Secret Intelligence Service (MI6) and GCHQ.
7. German *Bundestag*, Secretariat of the Parliamentary Control Commission, *Parliamentary Control of the Intelligence Services in Germany*. (Berlin: Bundespresseamt, 2001)
8. Until 2004 there was no oversight committee in the Canadian Parliament although the Security Intelligence Review Committee (a statutory body composed of Privy Counsellors) was established under the Canadian Security Intelligence Service Act 1984. A parliamentary oversight committee is soon to be established: see Farson, S., 'The Delicate Balance Revisited: Parliamentary Democracy, Intelligence, and the War against Terrorism in Canada', in: Born, H. et al, *Who's Watching*.
9. Intelligence Services Act 1994, s. 10.
10. Intelligence Services Act 2001, s. 14. The Prime Minister is required to consult the leaders of all other parliamentary parties before making the nominations: s. 14(2).
11. Law on the Parliamentary Control of Activities of the Federal Intelligence Services (PKGrG) (1978; 1992, 1999 and 2001 amended version). The PKGrG stipulates that at the beginning of each legislative period the German *Bundestag* shall elect the members of the PKGr from amongst its midst (§4 para 1 PKGrG), and that the number of the PKGr's

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- members, its composition and its working practices shall be laid down in a resolution of establishment (§4 para 2).
- Composition: The amendment of the Parliamentary Commission Regulation Act (1995) increased the number of members to nine. To get elected, each member of the PKGr needs the support of a majority of members of the Bundestag (§4 para 3 PKGrG).
12. Instructions for Monitoring of Intelligence, Surveillance and Security Services (EOS), 1995, Section 1.
- ‘The Committee shall have seven members including the chairman and vice-chairman, all elected by the Storting, *on the recommendation of Presidium of the Storting*, for a period of a maximum of five years. Steps should be taken to avoid replacing more than four members at the same time.’
13. For example, see Intelligence Services Act 2001, s. 16 (Australia).
14. Intelligence Services Act 2001, s. 14(5) (Australia);
15. For examples see Intelligence Services Act 2001, s. 14(6) (Australia);
16. See for example Intelligence Services Act 2001, s. 15(1) (Australia);
17. For examples of powers to obtain documents see Intelligence Services Act 2001, s. 30.2; (4) (Australia).
18. Intelligence Services Act 2001, s. 30 (Australia); nor must it require to be disclosed ‘information that would or might prejudice Australia’s national security or the conduct of Australia’s foreign relations’.
- Under Section 29 of same Act: ‘operationally sensitive information’ means information:
- (a) about sources of information, other operational assistance or operational methods available to ASIO, ASIS or DSD; or
- (b) about particular operations that have been, are being or are proposed to be undertaken by ASIO, ASIS or DSD; or
- (c) provided by, or by an agency of, a foreign government where that government does not consent to the public disclosure of the information.
- ‘responsible minister’, in relation to the review of a matter, means the minister responsible for the agency concerned in relation to that matter.
19. Intelligence Services Act 2001, s. 32 (Australia). These certificates cannot be challenged in court but must be deposited in Parliament. Although this restricts the powers of the oversight body it also places the refusal of information firmly into the political arena, where it can be justified or challenged.
20. United States Code Section 413. General Congressional Oversight Provisions, (d).
21. The Act relating to the Monitoring of Intelligence, Surveillance and Security Services, 1995, *Section 9*, (Norway) requiring the Committee and its secretariat to observe a duty of secrecy and comply with regulations for the handling of documents.
22. Adapted from Norton, P., *Does Parliament Matter?*, (New York: Harvester Wheatsheaf, 1993)
23. Born, H., Fluri, Ph., Johnsson, A. (eds.), *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices (Handbook Nr. 5 for Parliamentarians)*, (Geneva: IPU-DCAF), p. 130.
24. Intelligence Authorisation Act for Fiscal Year 2004, Sec. 102.
25. See eg section 414 and 415 of the US Code.
26. German *Bundestag*, Secretariat of the Parliamentary Control Commission (PKGr), *Parliamentary Control of the Intelligence Services in Germany*, July 2001.
27. Born, H. et al., *Parliamentary Oversight*, pp. 131-132.
28. Appropriation Act 2004, Chapter 9, Schedule 2, Part 48 ‘Security and Intelligence Agencies’, available at: <<http://www.legislation.hmso.gov.uk/acts/acts2004/40009-az.htm#sch2pt48>>