



BELGIAN SENATE

6th Conference of the Parliamentary Committees for the Oversight of Intelligence and Security Services of the European Union Member States

Brussels, September 30th – October 1st 2010

Thursday, September 30th 2010

Oversight arrangements in the UK and the role of the Intelligence Services Commissioner

Rt. Hon. Sir Peter Gibson (UK),
Intelligence Services Commissioner

1. It is a great honour for me, not being a member of any Parliamentary Committee, to be invited to be here and to speak to you. But I must ask for your indulgence as I would be ill-qualified to speak on either of the two subjects referred to in the theme for this session, distinguishing characteristics of parliamentary oversight or complaint-handling mechanisms: neither of them comes within the scope of my functions in the performance by me of my role in the UK's scheme of providing independent oversight of the UK's intelligence services. I propose instead to give you an overview of that scheme.
2. The UK's intelligence services go back a long way. The Security Service, MI5, with its focus on the internal security of the UK, and the Secret Intelligence Service, MI6, with its focus on threats to the UK from abroad, celebrated their centenaries last year. The Government Communications Headquarters, GCHQ, with its focus on communications and ciphers, has to wait until 2019 to reach its 100th year. The UK was somewhat slow to acknowledge publicly even the existence of its intelligence services and even slower to accept the need for their public accountability, the tension between secrecy and accountability yielding to the former until quite recently. In the 1980s a case involving telephone tapping by the police, in which the European Court of Human Rights found the UK law deficient, led to a change for the intelligence services as well. Now there are Acts of Parliament which spell out, "There shall continue to be a Security Service", thereby acknowledging that MI5 did exist prior to the Security Service Act 1989 and similar statutory provisions relating to MI6 and GCHQ. With those Acts of Parliament came provisions putting on a statutory basis the functions of the intelligence services and stating the limits within which they must operate. Those and subsequent Acts also established the oversight mechanisms to which Parliament intended those agencies to be subject.

3. First, there is political oversight in that each of the agencies is expressed to be under the authority of a senior Government minister, the Secretary of State, and his personal approval and in general his signature to a warrant are required for the intrusive surveillance and interception of communications activities carried out by those agencies. Ministers set budgets for each agency, deciding how much is to be spent on security and intelligence, and are accountable to Parliament for what the agencies do or fail to do operationally.
4. Second, there is Parliamentary oversight of MI5, MI6 and GCHQ in the form of the Intelligence and Security Committee, comprising 9 Parliamentarians with cross-party membership drawn from both Houses of Parliament, but they are not a standing committee of Parliament. They are appointed by the Prime Minister after consultation with the leaders of the other parties. They cannot be serving Ministers though many are former Ministers. The Committee's statutory remit is to examine the expenditure, administration and policy of the three agencies and to report to the Prime Minister annually, the reports being laid before Parliament together with the Government's responses to them. They have access to secret information and have produced reports on a number of subjects relating to intelligence and security, such as rendition and the attacks in London on 7 July 2005.
5. Third, there is independent judicial oversight in that there are two Commissioners and a complaints tribunal. The Interception of Communications Commissioner and the Intelligence Services Commissioner keep under review exercises of certain statutory powers relating to the activities of the three agencies and of certain other bodies with intrusive powers such as the Ministry of Defence. Each Commissioner is required to be the holder or past holder of high judicial office. The thinking behind that requirement is no doubt first that the holder of high judicial office is independent of Government and likely to form his own disinterested judgment and second that by virtue of his judicial position he may be seen to carry authority. I am not aware of any Commissioner who has had previous experience of, or association with, the intelligence services: we have all come with fresh eyes to our jobs and we remain independent of the agencies. The tribunal, the Investigatory Powers Tribunal, has as its statutory function the investigation of complaints by individuals about the conduct of the agencies towards them or about the interception of their communications, and, if it upholds a complaint, the tribunal has the power to order such remedial action as it sees fit. This includes the award of damages. A Court of Appeal judge is the current President of the tribunal.
6. The Interception of Communications Commissioner reviews the issue and operation of warrants permitting the interception of mail and telecommunications and the acquisition of communications data by the three agencies, the Ministry of Defence and law enforcement agencies, and the arrangements for handling that material. Telephone tapping is therefore his preserve. He is required to report annually to the Prime Minister who lays the report before Parliament. The current Interception of Communications Commissioner is a retired Court of Appeal judge.

7. The other commissioner is the Intelligence Services Commissioner. That is the position I have held since 2006. I too am a retired Court of Appeal judge. I was appointed by the then Prime Minister initially for 3 years but my appointment has been renewed for a further 3 years. Among my statutory functions are the keeping under review of the exercise by the Secretary of State of his powers to issue, renew and cancel warrants for intrusive surveillance by entry on or interference with property or with wireless telegraphy in the UK and of his powers to give, renew and cancel authorisations for acts done outside the UK. I also have the function of reviewing certain other authorisations such as for non-intrusive surveillance and for the appointment of agents. These authorisations can be granted by designated officers of the agencies and the Ministry of Defence.
8. There are detailed criteria laid down in the governing Acts which must be fulfilled if a warrant or other authorisation is to be issued lawfully. Thus the Secretary of State can only authorise the placing of a surveillance device in someone's house or car if he believes such action is necessary in the interests of national security or for preventing or detecting serious crime or in the interests of the UK's economic well-being. He must also believe that the authorised surveillance is proportionate to what is sought to be achieved and he must have regard to whether the information sought to be obtained could reasonably be obtained by other means. Since the Human Rights Act came into force in the UK in 2000, account must be taken by the decision-maker of any adverse effect on human rights and in every case the safeguards of necessity and proportionality must be satisfied. Time limits are set for the currency of any warrant or authorisation but there are provisions for renewal and also for expedited procedures in the event of an emergency. The Commissioner in conducting his review looks for any failure to observe what is statutorily required. The grant of the warrant or authorisation protects from liability in a UK court the person performing the authorised action.
9. The Commissioner is required to report annually to the Prime Minister, and the report is laid before Parliament and published. The practice has been to put sensitive material in an annex which, if the Prime Minister so decides, after consultation with the Commissioner, is excluded from the report laid before Parliament and from publication.
10. You will note that in the area of the Intelligence Services Commissioner's functions the UK has opted for a system where Parliament has not required any judicial involvement prior to the warrant or other authorisation or decision but has given the Secretary of State or the other designated authoriser the function and responsibility of taking the relevant decision. Instead the Commissioner only has the function of retrospective review. There are wholly different procedures laid down, for example, for the police where prior authorisations must be obtained from other Commissioners, and again it is from the recently retired judiciary that those Commissioners have been appointed. Their work in general does not involve national security.

11. To assist the Intelligence Services Commissioner in his reviews a duty is imposed on every member of an agency, every member of the armed forces and every departmental official to disclose or provide to the Commissioner all such documents and information as he may require. The Commissioner can conduct his review by calling for the papers leading up to the warrant or other authorisation or other relevant decision and, if appropriate, seeing the case officers and talking to them about what has happened. The practice in each agency or department is to keep detailed documentary records relating to all the decisions taken. There is in effect an audit trail available to the reviewer, showing precisely how the relevant decision was reached and what considerations were taken into account. The Commissioner generally meets all the relevant Secretaries of State every year. He pays regular visits to each of the agencies and other relevant Government offices , and makes inspections overseas to visit personnel stationed abroad. Thus, for example, I have been twice to Afghanistan.
12. No doubt members of the British public, accustomed to be thrilled by the activities of the likes of James Bond or by the actors in the BBC TV programme, Spooks, are disappointed to find that the UK's intelligence services are only intelligence gatherers with no executive powers of arrest or detention and with their activities subject to the constraints of independent oversight. But that is the reality.

Rt. Hon. Sir Peter Gibson,
Intelligence Services Commissioner
