**Report:**

# Intelligence and security oversight in an independent Scotland

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Report on the fourth of six events in the seminar series:
**Security in Scotland, with or without constitutional change**

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On 1st September 2014 we held the fourth of six seminars to discuss the security implications of Scottish independence. Our aim was to consider intelligence and security oversight issues in the UK and an independent Scotland. The event was held under the Chatham House rule to facilitate frank discussion. This report is the lead project investigators' interpretation of the key points raised in the seminar discussions. Although we aim to accurately synthesise the views of the speakers who took part, the content of this report should not be attributed to any of the participants other than the project investigators.

**Summary**

Intelligence and security oversight would present three main challenges to an independent Scotland.

First, if kept unchanged after independence, the Scottish parliament may not be big enough to give intelligence and security oversight the attention it needs. With only 129 MSPs, the Scottish parliament already struggles to fill its committees. Independence would create many new areas of policy needing scrutiny and oversight, including intelligence and security. Simply put, there may not be enough MSPs to go around.

Second, current MSPs lack expertise in security and intelligence matters. Without some knowledge of the nature of intelligence work, and without the experience to ask the right questions and look in the right places, it may be difficult for MSPs to properly oversee the new single Scottish intelligence agency. Of course, there would be a learning process in any new area of policy responsibility, but experience at Westminster shows that it is particularly difficult for parliamentarians to acquire expertise in intelligence and security.

Third, an independent Scotland is likely to work closely with the UK's existing security and intelligence agencies (despite whatever the UK government has said about this in the referendum campaign). Given the difference in size and capability between a newly independent Scotland and the remaining UK, it may be difficult for Scottish MSPs to hold the intelligence agencies of the UK to account in their interactions with Scotland.

**The challenges of parliamentary intelligence and security oversight**

Parliamentary intelligence and security oversight presents particular problems compared to other policy areas. The need for secrecy makes it necessary to conduct oversight behind closed doors, although the legitimate extent of secrecy is open to debate. Secrecy presents a legitimacy problem for overseers, making it difficult for them to demonstrate the extent and effectiveness of their work, and raising the suspicion that they are too close to the agencies they oversee.

Membership of parliamentary oversight committees is a difficult issue. The selection of members favours those with security and intelligence experience, but that often means a choice of former ministers who have worked with the agencies rather than more independent minded backbenchers. The traditional executive monopoly over intelligence and security translates into implicit and explicit structures that favour the selection of government loyalists for oversight roles. Many MPs perceive committee members to be insiders. It is difficult for other

parliamentarians to acquire expertise in security and intelligence and there is little incentive for them to do so. There are few votes in it (unlike being a champion of health or education for example), detailed information about security and intelligence practices is not available to MPs other than through leaks or from the agencies themselves, and the discrete nature of oversight means that there are few opportunities for raising one's parliamentary profile or scoring political points. This mitigates against the emergence of critical and independent oversight, at least in a form that would be visible to the public.

The recent reforms of the Intelligence and Security Committee (ISC) have sought some remedy, but it is too early to tell how effective they have been. Issues over legitimacy and secrecy remain. For example, many consider that the chairman Sir Malcolm Rifkind has acted more as a defender of the agencies rather than their judge. There are calls for an opposition member to take the chair position in future. There is on-going tension between the ISC and other select committees. For example, the Home Affairs, Foreign Affairs and Northern Ireland committees are denied access to intelligence despite the crossover of their remit. The ISC remains understaffed and under resourced. Unlike other committees, it cannot draw upon the wider resources of parliament, such as the House of Commons library. With added pressure to respond to recent intelligence scandals, the ISC has been late in presenting its annual reports to parliament, denying MPs the opportunity to debate its work. ISC members commit a lot of time to their role, and there is evidence that they offer a challenging voice to the intelligence agencies behind closed doors, but the ISC has not been successful in communicating this to the public.

**Specific challenges for Scotland**

The Scottish government white paper (*Scotland's Future*) contains few details about intelligence and security oversight other than specifying the powers that it would have. These include being able to require witnesses to appear, and full access to intelligence documents and facilities, which is equivalent to the new powers of the ISC at Westminster. The white paper does not say whether a new committee or an existing one such as the justice committee would perform this role. However, our discussions suggest that it may be difficult for the Scottish parliament to overcome the problems of intelligence and security oversight faced by Westminster, and they may even be compounded.

There are many reasons to reach this conclusion. There is little culture of the Scottish parliament acting as a constitutional check and balance to the executive. Rather, it acts to enable and legitimise the Scottish government. The Scottish parliament committees rarely act against the government's interests. There is a stronger whip in the Scottish parliament than at Westminster and backbench rebellions are almost non-existent. The committees are smaller than Westminster committees. They are poorly resourced and understaffed. There are not enough MSPs to fill the places on all 17 existing committees, so many have to divide their attentions between two or even three. Committee turnover is high. All of this leaves little time for MSPs to build knowledge of a policy area. Party share decides committee composition and chair allocation, which means that the governing party or parties dominate the committees. The Scottish parliament follows the old Westminster model of holding ministers to account, but

unlike the Westminster committees that are increasingly calling civil servants and officials from public bodies to give evidence, the Scottish committees have struggled to persuade these groups to appear or provide information. Scottish ministers regularly withhold information from committees. There is no alternative career path offered through committee work, unlike at Westminster where the 'Wright reforms' have raised the profile and legitimacy of committee chairs. The combined legislative and oversight role of Scottish committees means that government legislation takes up most of their time, at the expense of undertaking their own independent inquiries. All these factors give some cause for concern. Scottish parliamentary oversight of intelligence and security risks offering the worst of both worlds: oversight that is too close to the executive, with committee members possessing insufficient knowledge, experience and authority on the topic.

Nevertheless, there may be advantages in a new Scottish system of intelligence and security oversight. Unlike UK oversight which was bolted on to an existing intelligence system from the mid 1990s, the relationship between Scotland's new agency and oversight arrangements would be there from the beginning. This could make for a positive and constructive relationship, although there is a potential trade-off between a close relationship and a healthy critical relationship. A single intelligence agency working with the police would be simpler to oversee than the agencies of the UK that report to different ministries. The Scottish agency would likely be small with limited capabilities, especially at first. Its activities are unlikely to sprawl and be difficult for oversight to encompass. The proposed Scottish justice, security and home affairs ministry would be the focal point of ministerial accountability. Compared to the UK, there would be less spillover into other policy areas. However, as the white paper suggests (rightly in our view), the existing UK intelligence and security apparatus is likely to take a close interest and proactive role in the development of an independent Scottish system. It would be in no one's interests for any gaps or weaknesses to appear in the intelligence and security capabilities of our shared island. Yet the UK intelligence agencies would not answer to a Scottish oversight committee, leaving it to rely on the assurances of Scottish ministers about the nature of intelligence and security cooperation between the two countries.

**Timing**

None of this is likely to be an issue until after May 2016, when the plan is for a new Scottish government to launch a constitutional convention tasked with writing a permanent constitution. There will be grey areas in the preceding interim period following independence day in March 2016, but not much could be done about permanent oversight arrangements in that phase. Policymakers have said little about the post-May 2016 constitutional process. There are some radical international precedents such as Iceland, British Columbia and Ontario. If it were like those, the Scottish version would feature strong popular and civil society input. This seems likely to be the case judging by the tone of the debate. In theory, any constitutional changes would be possible, including a total redesign of the Scottish political system. A heady post-independence atmosphere could create a strong desire to do something new. But so far in the independence campaign, there has been almost no discussion of any change to the current parliamentary system and little desire to increase the number of MSPs or create an upper chamber. The white paper says that the Scottish Parliament 'will continue to have 129 members'

(p. 45). Other than taking over more powers from Westminster, continuity seems to be the key theme. We noted a tension in the desire to increase popular democracy without boosting the institutions of representative democracy. But because of the particular challenges and sensitivities of this policy area, it is almost impossible to imagine alternative forms of local and participatory democratic oversight of intelligence and security.

**Conclusions**

If the people of Scotland vote for independence on September 18th, intelligence and security oversight is an issue that will require further attention in the move towards full independence and a new constitution. The parliamentary-based system of intelligence and security oversight proposed by the white paper, largely modelled on Westminster, may not be adequate to the task, or to the hopes of newly independent Scots. If unchanged, the current configuration of the Scottish parliament and its rather subservient relationship to the executive may compound the general difficulties posed by democratic oversight of secretive intelligence and security agencies.

While parliamentary systems of oversight are preferable for democratic legitimacy, an alternative oversight solution could be based on the Norwegian, Dutch or Belgian model of a committee of non-parliamentary experts. This could be appointed by parliament, serve parliament and be accountable to parliament. It should contain lawyers to assess the legality and propriety of intelligence and security practices, experienced investigators, and in particular, well-resourced information and communications technology experts. The latter in particular are lacking at the ISC, and this is something Scotland could do better in order to secure its own set of values. Given that there are a number of Scottish politicians at Westminster who are current and former members of the ISC, or who are former ministers with intelligence and security expertise, one idea would be that in the event of independence a number of those should be on the expert committee to boost its experience and authority.