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Justice Committee

Investigatory Powers Bill LCM



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Justice Committee

Remit: To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice.



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Background

1. The Investigatory Powers Bill¹ (“the Bill”) was introduced in the House of Commons on 1 March 2016. The Bill was carried over from the 2015-16 session to the 2016-17 by the UK Parliament and received a second 1st reading in the House of Commons on 19 May 2016.
2. The Bill makes provision for matters which are within the legislative competence of the Scottish Parliament. It also makes provision to alter the executive competence of the Scottish Ministers. As such, it is a “relevant Bill” under Chapter 9B of the Standing Orders of the Scottish Parliament and consequently one requiring the consent of the Scottish Parliament in relation to those provisions.
3. Accordingly the Cabinet Secretary for Justice, under Rule 9B.3.1(a) of the Parliament’s Standing Orders, lodged a Legislative Consent Memorandum² (LCM) on the Bill on 23 June 2016. Although the Scottish Government has expressed some reservations about aspects of the UK Bill, as have some Members of the Committee, it is the Scottish Government’s position that the Scottish Parliament should consent to the UK Parliament legislating in respect of the relevant provisions in the Bill. The draft of a motion to this effect (a “legislative consent motion”, in terms of rule 9.B.2 of Standing Orders) was therefore included in the LCM.

Introduction of LCM

4. Under Standing Orders, an LCM should “normally” be lodged within 2 weeks of the relevant Bill being introduced into the UK Parliament. On this occasion, there was a significant lapse of time before lodging, as the Investigatory Powers Bill was introduced in the House of Commons on 1 March 2016 and most of the relevant provisions in the Bill have been there since introduction. The Committee acknowledges that the Minister for Parliamentary Business wrote in March to the then Presiding Officer seeking to explain the factors that were causing this delay, a copy of the letter can be found in Annexe A. The Scottish election in May also understandably contributed to the delay.
5. It is important that LCMs are introduced as soon as possible, and preferably within the two-week limit mentioned in Standing Orders, in order that the Scottish Parliament has adequate time for scrutiny. It is the Justice Committee’s view that, on this occasion, the late lodging of the LCM has had no significant detriment in terms of carrying out sufficient scrutiny.

Recent Scottish Government updates

6. The Cabinet Secretary wrote³ to the Committee on 21 September 2016 providing an update on recent amendments made to the Bill during its consideration by the

House of Lords which, amongst other things, affected the numbering of sections mentioned in the LCM as relevant provisions.

7. On the 26 September 2016 the Cabinet Secretary wrote⁴ to the Committee again, this time regarding the UK Government's intentions to make further amendments to give effect to the establishment of a Technology Advisory Panel to advise the Investigatory Powers Commissioner. The Scottish Government is of the view that the Scottish Ministers should be empowered to request advice from the new panel, and explained that the Scottish and UK Governments were in discussions on this matter that (it was hoped) would lead to an amendment to this effect being tabled imminently at Westminster. In anticipation of the amendment being tabled, the letter included a revised draft legislative consent motion taking account of this change. The text of the revised draft LCM can be found at Annexe B.

Outline of the UK Bill

8. The explanatory notes⁵ accompanying the UK Bill explain that:

” The Investigatory Powers Bill provides an updated framework for the use (by the security and intelligence agencies, law enforcement and other public authorities) of investigatory powers to obtain communications and communications data. These powers cover the interception of communications, the retention and acquisition of communications data, and equipment interference for obtaining communications and other data. It will not be lawful to exercise such powers other than as provided for by the Bill. The Bill also makes provision relating to the security and intelligence agencies' retention and examination of bulk personal datasets.

” Section 7 of the Data Retention and Investigatory Powers Act 2014 required David Anderson QC, in his capacity as the Independent Reviewer of Terrorism Legislation, to conduct a review of existing laws relating to investigatory powers. David Anderson published his review in June 2015. This Bill responds to the recommendations made in that review and those of the reviews undertaken by the Intelligence and Security Committee of Parliament (ISC) and the Panel of the Independent Surveillance Review convened by the Royal United Services Institute (RUSI). All three reviews agreed that investigatory powers remain essential in tackling the current and evolving threats to the United Kingdom.

Relevant provisions in the Bill

9. The Bill is in nine parts, five of which contain provisions which require the legislative consent of the Scottish Parliament. An outline of how these five parts apply to Scotland is set out below. This outline draws mainly on information taken from the LCM. More detail on the relevant provisions in the Bill can be found in the LCM.

Part 1

10. The subject matter of Part 1 of the Act is Part III of the Police Act 1997 (authorisation to interfere with property) which falls within the competence of the Scottish Parliament. The overarching privacy conditions place obligations on those exercising functions under the Bill, including Scottish Ministers and this alters the executive competence of the Scottish Ministers.

Part 2

11. Interception of communications is reserved under schedule 5 of the Scotland Act 1998; however there are exceptions to this reservation including the interception of communications to or by those in a place of detention. These exceptions are legislated for in the Bill. Additionally, Part 2 imposes a limitation on the executive competence of Scottish Ministers with the proposed introduction of judicial oversight on decisions to authorise interceptions.

Part 5

12. The subject matter of Part III of the Police Act 1997 (property interference) is devolved. This part of the Bill seeks to provide a new equipment interference regime which can keep pace with the development of modern technology and evolving methods of communication and that is consistent throughout the UK. Additionally, the proposed new warranted authorisation regime for equipment interference is subject to approval by a Judicial Commissioner and would alter the executive competence of Scottish Ministers.

Part 8

13. This part of the Bill provides oversight arrangements for devolved authorities and bodies and seeks to replace the Intelligence Services Commissioner, the Interception of Communications Commissioner and the Chief Surveillance Commissioner with a single new commissioner the Investigatory Powers Commissioner (IPC) who will be supported by Judicial Commissioners. In addition, this part will alter the executive competence of Scottish Ministers as it removes their power to appoint a Scottish Surveillance Commissioner and gives regulation making powers to the Secretary for State to modify devolved matters in connection with the functions of the new IPC.

Part 9

14. Part 9 introduces schedules 8 and 10. Schedule 8 seeks to alter the executive competence of the Scottish Ministers by conferring on them a new power to issue combination warrants while schedule 10 makes minor and consequential amendments, including amendments to the Regulation of Investigatory Powers (Scotland) Act 2000.

Overall Scottish Government view of relevant provisions

15. The Scottish Government explains at paragraphs 55 to 57 of the LCM that it supports the UK Parliament legislating in relation to the relevant provisions in the Bill, as they should help reduce the harm caused by serious organised crime. The “most contentious”⁶ parts of the Bill relate to reserved matters, including bulk collection warrants for the security and intelligence services and internet connection records. The Cabinet Secretary summarised the Scottish Government’s support for a legislative consent motion in respect of the relevant provisions as follows—

” The areas of the Bill that are subject to the LCM are about maintaining the status quo, clarifying the existing law and putting in place an enhanced oversight regime in the form of an investigatory powers commissioner, supported by a number of judicial commissioners, who will all be serving or retired senior judges.

UK Government Consultation

16. The LCM provides information on the consultation undertaken in relation to the Bill. The Bill was drafted by the Home Office and built on three reviews undertaken throughout 2014/15. Those reviews were carried out by David Anderson QC, the independent reviewer of national security legislation, who produced the report, ‘A Question of Trust’; a report by the Intelligence and Security Committee of the UK Parliament; and a panel convened by the RUSI.
17. The UK Government published the draft Investigatory Powers Bill for pre-legislative scrutiny in November 2015. The draft Bill was considered by the House of Commons Science and Technology Committee, the Intelligence and Security Committee, and by a Joint Committee of both Houses of Parliament convened to scrutinise the draft Bill.
18. The LCM states that Scottish Government officials considered the legal and policy implications of all aspects of the Bill, and liaised with policy and legal officials at the Home Office and Scotland Office.

Financial resource implications

19. The LCM sets out that no significant additional costs to the Scottish Government or any significant additional direct costs to the Scottish Criminal Justice Sector are envisaged as a result of the provisions within the Bill.
20. This is explained in the LCM in that the Scottish Government currently operates a small budget of £100k which is used to pay costs and expenses of two of the surveillance commissioners (currently Lords Bonython and MacLean). As discussed above, the Bill replaces three existing Commissions with a single Investigatory Powers Commissioner who will be supported by a number of Judicial Commissioners. The payments made to the surveillance commissioners are in

recognition of the work undertaken with regards to authorisations made under the Regulation of Investigatory Powers (Scotland) Act 2000. The Scottish Government makes no payments in relation to the Interception of Communications Commissioner or the Intelligence Services Commissioner. The Scottish Government stated that in its view⁷ it is not anticipated that this basic financial arrangement will change in relation to the new oversight regime.

Committee Scrutiny

21. On 28 June 2016 the Committee issued a call for evidence on the LCM and two written responses were received from the Faculty of Advocates and the Equality and Human Rights Commission. These responses can be found in Annexe C.
22. At its meeting on 27 September 2016⁸, the Committee heard evidence from Police Scotland and from the Cabinet Secretary for Justice. The Committee's evidence-taking was focussed on matters set out in the LCM, but in order to understand the context in which the Bill would operate, questions were also asked about current operational matters in relation to the interception and retention of data and whether, and how this would be affected by the Bill. The following issues were discussed—
 - Intrusion into privacy
 - Retrospective judicial approval
 - Overlap with other agencies
 - Data retention
 - Technical Advisory Panel
 - Training

Intrusion into privacy

23. The Committee asked Police Scotland what steps it considered when attempting to strike a balance between pursuit of an inquiry and intrusion into privacy. Police Scotland stated that it begins by looking at the least intrusive means of conducting an investigation and considers all available options prior to seeking authorisation for a warrant.

24. The Committee raised with witnesses a concern from the Equality and Human Rights Commission that—

” Intrusion into the privacy of persons who are not suspected of wrongdoing is unlawful unless absolutely necessary and proportionate.

25. Police Scotland explained⁹ that when the application to seek a warrant is submitted to a senior officer for internal authorisation the first test considered by that officer is that of necessity and that there is a legitimate aim of preventing and detecting serious crime. The authorising officer has the responsibility for balancing the proportionality of intrusion into the person’s private life against the prevention and detection of the crime.
26. Police Scotland went on to explain¹⁰ that when an officer begins the application process to obtain a warrant it must also set out what ‘collateral intrusion’ they believe could occur and at what level, for example what information is also likely to be gathered from the family or friends of the individual who is the subject of the warrant based on how frequently the individual is with them. In preparing the case for a warrant, background information is collected by the officer which provides information on the individual and their lifestyle. This information is used, whenever possible, to enable Police Scotland to focus on certain activities and times in an effort to minimise the collateral intrusion into the privacy of those connected to the individual who are not subject to the warrant.
27. The Cabinet Secretary clarified¹¹ that the existing legislation is very clear that the tests of necessity and proportionality have to be met in order to justify any form of interception, because it involves considerable intrusion into someone’s private life. He said it was clear that if the Scottish Government did not think that these tests had been undertaken properly or if the application for a warrant did not show that it met these tests then an authorisation would be refused on that basis.

Handling of collateral intrusion data

28. Police Scotland confirmed¹² that in situations where data on other individuals not subject to the warrant had been gathered, that data would be quickly identified and discarded and would not be recorded. However it acknowledged that it was impossible to ‘unknow what you know’.

Retrospective judicial approval

29. The Committee explored with both Police Scotland and the Cabinet Secretary the circumstances under which it may be considered that urgent action requires to be taken before judicial approval is given for a warrant. The Committee heard¹³ that Police Scotland would consider this to be the case when there was ‘immediate and imminent threat to life’ such as kidnapping or extortion, where timescales often move quickly. In these cases Police Scotland would seek to get the information and intelligence it required to assist it first, with the aim of preserving life and obtaining judicial oversight afterwards.

30. The Bill provides that an application for judicial approval must be made within 3 days. Police Scotland confirmed¹⁴ its intention would be to seek judicial approval as soon as possible within that time period but indicated that the availability of individual judges could determine the speed of the process.
31. The Cabinet Secretary confirmed¹⁵ that in respect of interception warrants, approval would still be required from Scottish Ministers before action could be taken and a process was in place that enables him to be contacted via a senior Scottish Government Official.
32. The Cabinet Secretary also stated¹⁶ that obtaining judicial approval is a new process that will provide additional safeguards and that some practical measures will need to be put in place to ensure that any urgent requests are able to be considered by one of the judicial commissioners in Scotland as quickly as possible.
33. The Committee queried what would happen to any data that had been gathered if a retrospective application for judicial approval was not successful. Police Scotland confirmed¹⁷ that once an application for a warrant is refused then it would seek guidance from the judicial commissioners as to whether or not they required this data to be retained for their inspection or deleted immediately.

UK wide agencies and the security services

34. The Committee heard¹⁸ that in some circumstances it would be possible for the National Crime Agency or the security or intelligence services to lead on investigations in Scotland. Police Scotland liaise with other relevant agencies to ensure there is no duplication of effort. It told the Committee that the application process is designed in such a way so that no two agencies would be looking separately at the same individual at the same time.
35. The Cabinet Secretary stated that there is a clear process for the National Crime Agency's jurisdiction in Scotland and it requires the express consent of the Lord Advocate for work it undertakes in relation to criminal activities in Scotland. The Cabinet Secretary said¹⁹ that whenever the security and intelligence services are engaged in work with Police Scotland in an effort to prevent or detect serious crime, they would require the authorisation of Scottish Ministers in relation to interception activities. Police Scotland confirmed²⁰ it is conceivable that there are operations on-going in Scotland that it could be unaware of.

Data retention periods

36. The Committee heard²¹ that Police Scotland's record retention policy for legally obtained interception data is six years. Police Scotland explained that this did not mean data was automatically deleted after this time because if the data related to a cold case or a case that was unsolved, it would be 'entirely appropriate²²', at that six year point, to undertake a review and decide that the retention of the data was still required.

37. If the data related to a case that has been closed and completely dealt with, it is reviewed at that six year point and if it can be deleted it will be. The Committee heard that for certain specific offences consideration must also be given to the appeals process when determining retention.
38. Police Scotland confirmed²³ that its data retention policies are part of the inspection process carried out by the Interception of Communication Commissioner's Office (IOCCO).

Technical Advisory Panel

39. The Cabinet Secretary spoke to his letter of 26 September which set out the Scottish Government's position on the intention of the UK Government to make amendments to the Bill in order to implement the single recommendation made in David Anderson QC's review of bulk powers that a Technology Advisory Panel (TAP) be set up to advise the Investigatory Powers Commissioner.
40. He explained²⁴ that it was the Scottish Government's view that these new provisions should extend to Scottish Ministers and would therefore require the consent of the Scottish Parliament. This would allow the TAP to provide advice to Scottish Ministers and would provide a further layer of safeguard.
41. The Cabinet Secretary explained that²⁵ in the unlikely case that the amendment was not drafted as has been indicated by the UK Government, or drafted in a way that contradicted the information being currently provided by the UK Government, then the Scottish Government would reject the amendment. Should this happen the Cabinet Secretary has undertaken to provide an update to the Committee and to Parliament.

Training

42. The Committee questioned Police Scotland on its plans for ensuring that all the regulations surrounding the new policy will be properly communicated to the officers who would be required to use them. Police Scotland told²⁶ the Committee that there was a slight problem at present because "we are all planning for something [the enactment of a Bill that is still a work in progress], but we do not know what the final version will look like". However, it also stated that through being represented at a senior level on two of the Bill's UK wide national working groups they are well placed to cascade relevant information and deliver appropriate training to officers to ensure their knowledge is up to date once the Bill is passed.

Recommendations

43. The Committee agrees with the Scottish Government that, if the Investigatory Powers Bill is passed at Westminster, it is appropriate that the UK Parliament legislate in respect of the provisions set out in the LCM. Accordingly, the Committee recommends that the Parliament approves the legislative consent motion on the Investigatory Powers Bill, to be lodged by the Scottish Government.
44. The Committee notes that the Scottish Government is in discussions with the UK Government in respect of the creation of a Technical Advisory Panel under the Bill, and the Scottish Government's view that it should be able to request advice from the TAP. The Committee further notes that the Cabinet Secretary intends to update the Scottish Parliament on this matter before the legislative consent motion is taken.

¹ UK Government Investigatory Powers Bill (HC Bill 143) <http://services.parliament.uk/bills/2015-16/investigatorypowers/documents.html>

² Investigatory Powers Bill Legislative Consent Memorandum. Available at: <http://www.scottish.parliament.uk/LegislativeConsentMemoranda/SPLCM-S05-2-2016.pdf>

³ Letter from the Cabinet Secretary for Justice 21 September 2016. Available at: <http://www.parliament.scot/Inquiries/20160921CSfJtoMM.pdf>

⁴ Letter from the Cabinet Secretary for Justice 26 September 2016. Available at: <http://www.parliament.scot/Inquiries/20160926CSfJtoMM.pdf>

⁵ UK Government Investigatory Powers Bill (HC Bill 143) Explanatory Notes <http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0040/17040en.pdf>

⁶ Paragraph 56, Investigatory Powers Bill Legislative Consent Memorandum.

⁷ Paragraph 53, Investigatory Powers Bill Legislative Consent Memorandum.

⁸ Scottish Parliament Justice Committee *Official Report* 27 September 2016. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10543&mode=pdf>

⁹ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 16

¹⁰ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 7

¹¹ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 24

¹² Scottish Parliament Justice Committee *Official Report* 27 September 2016 cols 7 and 9

¹³ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 11

¹⁴ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 12

¹⁵ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 22

¹⁶ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 23

¹⁷ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 13

¹⁸ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 8

¹⁹ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 19

²⁰ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 8

²¹ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 11

²² Cabinet Secretary for Justice Letter of 26 September 2016

²³ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 15

²⁴ Scottish Parliament Justice Committee *Official Report* 27 September 2016 cols 26 and 29

²⁵ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 26

²⁶ Scottish Parliament Justice Committee *Official Report* 27 September 2016 col 14

Annexe A

Letter from the Minister for Parliamentary Business to the Presiding Officer

22 March 2016

Dear Tricia

I am writing to you to set out how the Scottish Government intends to deal with the potential need for legislative consent in respect of two UK Bills, the Investigatory Powers Bill and the Policing and Crime Bill.

The Investigatory Powers Bill is highly technical and dialogue between the UK and Scottish Governments on the policy intent and practical impact of its provisions is ongoing. Consequently, whilst the Scottish Government has been in discussion with the UK Government, both in relation to the draft Bill, and as introduced, regarding the provisions in the Bill that would require legislative consent, no commitment has been given, at this stage, to promoting an LCM.

Similarly, discussions around the Policing and Crime Bill are continuing with the UK Government around the provisions of the Bill with regard both to legislative consent and the interpretation made around EVEL certification.

Rule 9B.3.1(a) of Chapter 9B stipulates that the Scottish Government shall lodge a legislative consent memorandum "normally no later than 2 weeks after introduction" for "relevant" UK Bills. Given the need to conduct further analysis of Bill provisions and their impact in devolved areas before forming a view on the recommendations that should be made to the Scottish Parliament, combined with the limited time available ahead of dissolution, the Scottish Government's intention is to lodge any necessary legislative consent memoranda once the new Parliament has been constituted after the election.

The position that both the Scottish Government and Scottish Parliament have been put in by the UK Government's approach to the timetabling of these Bills is unsatisfactory and you will be aware that, in order to avoid exactly this sort of scenario emerging, I wrote to the Leader of the House, Chris Grayling MP, in January of this year seeking to ensure that UK Government legislation, or amendments which require the consent of the Parliament, would not be introduced at Westminster after 4 February 2016. It is therefore disappointing that the UK Government appears not to have taken into account the timing constraints faced by the Scottish Government and Scottish Parliament in the lead up to dissolution when timetabling the Bills. I intend to raise this matter with the Secretary of State for Scotland.

On a more positive note, I understand that the timetable for the Bills means Royal Assent is unlikely to be sought before December 2016 and it is my

view that this will provide sufficient time for parliamentary scrutiny of the Bill and for a decision to be taken on any legislative consent requirements in the normal way.

I hope that you will appreciate why the Scottish Government is proposing to lodge any necessary legislative consent memoranda later than it normally would. I am happy to discuss the matter further.

JOE FITZPATRICK

Annexe B

Draft motion – revised 26 September 2016

“That the Parliament supports the principle of modernising the law in the area of investigatory powers, believes protection of civil liberties, transparency and independent oversight must be at the heart of this process; supports law enforcement in having necessary powers to keep Scotland’s communities safe, subject to the most stringent checks and safeguards; agrees that the relevant provisions of the Investigatory Powers Bill, introduced in the House of Commons on 1 March 2016, relating to the interception of communications in places of detention, decisions relating to the issue, renewal, modification, cancellation and approval of interception warrants, targeted examination warrants and functions relating to mutual assistance warrants; the subject matter of Part III of the Police Act 1997 and other equipment interference provisions; the safeguards relating to the use and retention of material obtained by investigative techniques under the Investigatory Powers Bill; oversight arrangements and functions; the functions of, and rights of appeal from, the Investigatory Powers Tribunal; the creation of a Technology Advisory Panel; and amendments to the Regulation of Investigatory Powers (Scotland) Act 2000 in consequence of the Investigatory Powers Bill; so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament; recognises that many of the provisions are necessary to ensure that law enforcement operates within an updated and robust legislative framework; supports powers that are demonstrably operationally necessary to counter terrorism and prevent and detect serious crime; and recognises the concerns that have been raised about potential impingement on civil liberties and the privacy of individuals in relation to internet connection records and bulk data collection, but notes that these issues are reserved to the UK Parliament and are not matters that the Scottish Ministers or Scottish Parliament can determine.”

Annexe C

Written submission from the Equality and Human Rights Commission

1. The Equality and Human Rights Commission is the National Equality Body for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. We are an 'A Status' National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).
2. The Commission welcomes the opportunity to comment on the Legislative Consent Memorandum (LCM) for the Investigatory Powers Bill (the Bill).
3. The Commission engaged in detail during the Bill's passage in the House of Commons. All relevant written evidence and parliamentary briefings are published on the Commission's website.¹

Introduction

4. A number of the rights contained in the European Convention on Human Rights (the Convention rights) are engaged by the Investigatory Powers Bill, including Articles 2 (right to life), 8 (respect for private and family life), 10 (freedom of expression), 14 (non-discrimination in the enjoyment of Convention rights) and Article 1 of Protocol 1 (the right to property), as well as relevant case law.
5. In the Commission's analysis, the proposals in the Bill go some way towards meeting the human rights requirements that there should be clear and detailed rules governing the scope of investigatory powers and robust legal and operational safeguards against arbitrary use and misuse of powers.
6. In scrutinising the Bill, we have had particular regard to the need to protect the right to privacy. The right privacy is not absolute – it can, and must, be balanced against the need to, for example, fight crime and protect the public. However, the powers in the Bill, which are highly intrusive of privacy, must be subject to careful scrutiny to ensure that they are necessary and proportionate.

¹ Equality and Human Rights Commission response to Public Bill Committee call for evidence, 23 March 2016, <https://www.equalityhumanrights.com/en/parliamentary-library/parliamentary-library/investigatory-powers-bill-equality-and-human-rights>; Investigatory Powers Bill: House of Commons, Briefing for Committee Stage, Tuesday 12 April 2016, <https://www.equalityhumanrights.com/en/parliamentary-library/parliamentary-library/investigatory-powers-bill-house-commons-briefing>; Investigatory Powers Bill, House of Commons, Committee Stage 28 April 2016, <https://www.equalityhumanrights.com/en/parliamentary-library/investigatory-powers-bill-house-commons-committee-stage>; The Commission's written evidence to the Draft Investigatory Powers Bill Committee, December 2015, <https://www.equalityhumanrights.com/en/parliamentary-library/parliamentary-library/draft-investigatory-powers-bill>.

Part 1 - General Privacy Provisions

7. The Commission considers that the Bill's provisions must be compatible with the following principles:

- The powers set out in the Bill are intrusive of privacy and therefore the scope and limits to those powers should be construed narrowly.
- The Bill must permit only necessary and proportionate covert capabilities, exercised by authorised individuals and bodies, in compliance with the Human Rights Act 1998 and the rights set out in that Act.
- Intrusion into the privacy of persons who are not suspected of wrong doing is unlawful unless absolutely necessary and proportionate to the intended legitimate purpose.
- A power under this Bill may only be exercised where it is the most limited and least privacy intrusive power available to achieve a specified lawful purpose including in relation to:
 - i. the type of power used
 - ii. the number of people to whom it applies
 - iii. the duration of the authorisation
 - iv. the way in which the power is exercised.
- Information obtained by the exercise of these powers must :
 - i. only be retained for the minimum period necessary for the purpose for which it was acquired.
 - ii. not be shared unless that can be done without breaching the rights guaranteed under the European Convention on Human Rights (Convention rights).
- The exercise of the powers in this Bill, where they are intrusive of privacy, must be independently authorised in accordance with clear, necessary and proportionate laws, providing sufficient safeguards for Convention rights.
- Rigorous oversight arrangements must be exercised to deter, prevent and address misuse of powers in breach of Convention rights.
- The exercise of intrusive powers under this Bill must be kept under continuous democratic, judicial and other forms of independent review, to uphold privacy safeguards and to ensure the security, intelligence, law enforcement and other State agencies are supervised and, when required, held to account when using the powers in this Bill.

8. These principles are derived from human rights law, including rights to privacy and freedom of expression. These rights are not absolute but require that any interference with them must be in accordance with clear and transparent laws, necessary and proportionate.

Part 2 – Lawful interception of communications

Thematic warrants

9. Under the Bill, thematic targeted interception warrants can be sought in relation to a group of people, organisations and premises. The draft Code of Practice makes it clear that "*there is not a limit to the number of locations, persons or organisations that can be provided for by a thematic warrant*" and that "*the warrant does not have to*

*identify the subjects of the warrant any more than is possible at the time of issue of the warrant*². This suggests that thematic warrants may be issued with quite generalised descriptions of their scope, making them more like bulk powers than targeted powers.

10. Both the ISC and the Draft Bill Committee raised concerns about these provisions³. The Draft Bill Committee recommended amending Clause 15 so that thematic warrants concerning a very large number of people cannot be issued. The ISC recommended that thematic warrants should be used sparingly and subject to greater safeguards and as a minimum should be issued for a maximum period of one month to ensure greater scrutiny.

11. The Commission supports these recommendations and would wish to see amendments made to give effect to them. The issue of warrants against generalised thematic targets may breach Article 8 ECHR in two ways. First, on the grounds that they are not sufficiently clear to be "in accordance with law" as required by Article 8(2). Second, because they may be more invasive of privacy than necessary and therefore not proportionate, particularly if they result in significant collateral intrusion into the privacy of individuals against whom there are no grounds of suspicion.

Consistent safeguards for legally privileged communications, journalistic material held in confidence and communications of or to parliamentarians

12. The Commission has endorsed the ISC recommendation that there should be consistent protection for the sensitive professions, such as lawyers and journalists, in relation to all investigatory powers on the face of the Bill.⁴ For further detailed analysis, see pages 3-5 of the [Commission's briefing for Committee stage, dated 12 April 2016](#).

Power to modify warrants

13. As the Bill stands, certain major modifications to warrants, for example by adding a new name, does not require approval through the "double lock" mechanism by a Judicial Commissioner. Clause 32 permits a major modification to be made by a senior official acting on behalf of the Scottish Ministers or in an urgent case by the person to whom the warrant is addressed. The Commission considers this undermines the principles of independent authorisation of surveillance powers. This is a very important factor that the courts look for in a human rights compliant framework.⁵ There is a significant risk that the Clause as currently drafted may not be found to have the necessary element of independent authorisation and may therefore be held to be in breach of human rights. We consider that Clause 32 should be amended to require major modifications of warrants to be authorised by a Judicial Commissioner. Further

² Draft Interception of Communications Code of Practice paragraph 5.12

³ Report of Joint Committee on the Draft Investigatory Powers Bill, recommendation 38 and ISC report recommendation vii at page 11.

⁴ ISC report recommendation B at page 3.

⁵ See [Digital Rights Ireland](#) in the context of access to communications data that "above all, the access by the competent national authorities to the data retained was not made dependent on a prior review carried out by a court or by an independent administrative body". In the ECtHR, see for example the case of *Iordachi v Moldova* (Application no. 25198/02), 10 February 2009, in which the court referred to *Dumitru Popescu v. Romania* in which the Court expressed the view that the body issuing authorisations for interception should be independent and that there must be either judicial control or control by an independent body over the issuing body's activity.

analysis is contained at pages 5 and 6 of the [Commission's briefing for Committee stage, dated 12 April 2016](#).

Retention periods and destruction of data

14. Under the Bill, information gained through interception powers only has to be destroyed when, for example, there are “no longer any relevant grounds for retaining it” (Clause 51(5)) meaning “retention is not necessary or not likely to become necessary” (Clause 51(6)).

15. This means such information can be retained even where there is no current utility, if it is considered it may be of future utility. This is very broad, too vague and unlikely to be compliant with human rights law under Article 8 ECHR and under EU law.

16. The Commission recommends introducing additional safeguards which ensure data retention periods are proportionate in relation to all powers. We also recommend an amendment requiring that data must be destroyed when retention is no longer necessary and proportionate.

Safeguards for sharing information abroad

17. Concerns have been raised by both the Draft Bill Committee and the ISC that the provisions in the Bill governing the sharing with overseas agencies of information obtained using investigatory powers are too broad and need further definition and improved safeguards. The Commission agrees that further safeguards are needed. Compliance with Convention rights requires safeguards concerning the retention, use and disclosure of information. In order to ensure real and effective protection of Convention rights, this protection must extend to decisions about disclosure of information abroad.

Parts 6 and 7: Bulk powers

18. The use of bulk powers inevitably means the private information of many innocent people is obtained and potentially examined, resulting in considerable intrusion into qualified privacy rights. Such mass surveillance powers are different from targeted powers, requiring a much higher standard of justification.

19. The Commission's view is that a sufficiently compelling case has not yet been made out for the present Bill proposals for bulk surveillance powers, both their extent and the safeguards applicable to their exercise. As presently drafted, we consider they are likely to constitute an unjustifiable interference by the State with the individual's right under Article 8 of the Convention to respect for private life. Further analysis is set out at pages 8 and 9 of the [Commission's response to the Public Bill Committee call for evidence, dated 23 March 2016](#).

Part 8 – Oversight arrangements

Power of Judicial Commissioners to refer matters to the Investigatory Powers Tribunal

20. The Commission has called for improvements to the oversight provisions in the Bill, in particular that Judicial Commissioners should have the power to refer any matter the Commissioner considers may involve the unlawful use of investigatory powers to the Investigatory Powers Tribunal (IPT).

21. The Commission believes that giving the Judicial Commissioners power to ensure that issues of concern are brought to the IPT without having to rely on a complaint being brought would increase accountability and transparency in the oversight arrangements. The Judicial Commissioners are much better placed to identify issues of systemic concern and issues of law requiring resolution by the IPT than the subjects of surveillance, who will often be unaware of the measures being taken. A power to allow Judicial Commissioners to make referrals to the IPT on any matter of concern would therefore provide an additional safeguard against unlawful exercise of the powers in the Bill. It would also promote compliance with human rights law, in particular that the exercise of powers should be clear and in accordance with the law. In depth analysis of this issue is contained in pages 2-4 of the [Commission's briefing for Committee stage in the House of Commons, dated 28 April 2016](#).

Power for the IPT to make a declaration of incompatibility

22. The Draft Bill Committee recommended that the IPT should be able to make a declaration of incompatibility under the Human Rights Act.⁶ The Commission endorses this recommendation. The UK Government's response is that this provision is unnecessary because the Court of Appeal has this power on appeal.⁷ The Commission considers that making it necessary for an appeal to be brought in a clear cut case solely for the purpose of securing a declaration of incompatibility is cumbersome and unnecessarily costly and time-consuming. Further analysis is included at pages 6 and 7 of the [Commission's response to the Public Bill Committee call for evidence, dated 23 March 2016](#).

Written submission from the Faculty of Advocates

Joint briefing on legal privilege for House of Lords second reading of the Investigatory Powers Bill

This paper outlines provisions required to ensure legally privileged communications are protected from surveillance by the Investigatory Powers Bill. This paper reflects the positions of the Bar Council of England and Wales, The Faculty of Advocates, the Bar of Northern Ireland, The Law Society of England and Wales, the Law Society of Northern Ireland, the Chartered Institute of Legal Executives, Liberty and JUSTICE.

A. Importance of LPP

Legal Professional Privilege (LPP) is a cornerstone of the constitution and the rule of law in this country.

This privilege belongs to clients not lawyers. It guarantees that individuals can consult a legal representative in confidence which underpins the right to a fair trial and access to justice.

⁶ Report of Joint Committee on the Draft Investigatory Powers Bill, recommendation 75.

⁷ Government response to pre legislative scrutiny at page 73.

Not only is legal privilege central to the protection of the rights of individuals, the ability to access a fair and efficient legal system is the reason why our law and jurisdiction are used throughout the world.

B. The need for much greater protection for LPP

In our view the Investigatory Powers Bill falls far short of the protection required for LPP.¹ We have identified the following seven points that must be addressed:

Bar on use of LLP material

(1) There should be a bar on use of the targeted and bulk powers in the Bill for the purpose of obtaining access to LPP material unless a Judicial Commissioner is satisfied that the relevant communication has lost its privilege because made in furtherance of a criminal purpose (the so-called ‘iniquity exception’ to LPP). The Bill should contain provisions:

- Precluding the targeting of lawyer-client communications in the absence of compelling evidence of iniquity;
- Requiring the destruction of LPP material obtained as an unintended by-product of surveillance.

²⁷**Statutory requirement to avoid capture of LPP material**

(2) The Bill should include clear provisions to ensure that the authorities use their powers in a way that minimises the inadvertent acquisition, examination, retention or use of material subject to LPP.

Persons outside the UK

(3) As presently drafted, there are no protections at all for LPP material where it is captured by bulk powers where an individual is outside the UK communicating with a lawyer in the UK.² This is a serious gap in the Bill and is of particular concern to the UK legal services market.

Modifications to warrants

(4) As presently drafted, the Bill allows some modification of warrants without approval of a Judicial Commissioner even where the modification is likely to lead to the capture of LPP material. That is another serious gap. Any modification which could result in capture of LPP material should require approval from a Judicial Commissioner.

Communications data

(5) The Bill provides no protection at all for LPP in the context of acquiring communications data, under the specific Part 3 powers, or the bulk Part 6 powers, or as secondary data in the exercise of the other powers in the Bill. However, the aggregation of communications data allows a very precise picture to be built up about a person’s dealings with their lawyer, which the courts have recognised can inhibit access to justice. There must be proper protection for data relating to privileged communications.

Recording

(6) Any authorisation involving LPP must be recorded as such by the Judicial Commissioners. The Annual Report of the Investigatory Powers Commissioner should expressly include data on the number of occasions and agencies which have sought to access, retain or use LPP material subject to exceptional and compelling justification.

RIPA powers

(7) RIPA 2000 will continue to cover surveillance and use of covert human intelligence sources. The Bill should amend that Act to ensure it adequately protects LPP along the same lines as the above points.

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¹ The terms of the Bill fail to protect LPP. As presently drafted the Bill:

- Enables the authorities to obtain a warrant targeting LPP communications in “exceptional and compelling circumstances” (which are not defined) (Clause 27(1); Clause 106(1)).
- Imposes a requirement before granting a warrant that is “likely” to lead to capture of LPP material that undefined “specific arrangements” are in place for handling the LPP material (Clause 27(4); Clause 106(4)).

² This is because the Bill would only require an examination warrant to be obtained to examine material obtained by bulk powers where it is referable to a person who is known to be in the British Isles (s.13(3), 134(4)).

